I. INTRODUCTION

In 1996, Congress enacted the Line Item Veto Act. The statute granted the President power to cancel certain discretionary spending provisions in duly passed legislation. Opponents criticized this Act as both being an unconstitutional delegation of power to the President and a violation of the Presentment Clause of the Constitution. In *Clinton v. New York*, the Supreme Court held that the Act’s cancellation procedures violated the Presentment Clause. In reaching this conclusion, the Court expressed no opinion on the broader separation of powers issue.

The Court’s decision to invalidate the procedure on a narrow constitutional ground seems very questionable. The Court should have gone to the more difficult, and constitutionally critical question: Was Congress’s delegation of cancellation authority to the President a violation of inherent separation of powers principles? In avoiding this question, the Court changed the plain meaning of the Presentment Clause without resolving the issue of what is and is not a constitutional delegation of power regarding discretionary spending. More crucially, the Court’s holding may have made a final resolution of the separation of powers issue impossible.

This note criticizes the Court’s analysis in *Clinton v. New York*, as well as the Court’s failure to analyze the separation of powers issue. The note will begin by giving a brief description of the Line Item Veto Act of 1996. It will then discuss the majority opinion in *Clinton v. New York*, as well as the two dissents. The note will then give some relevant background on the constitutional doctrines implicated in the case, followed by a criticism of the opinion. The note will conclude with the author’s opinion of a more appropriate way the Supreme Court could have resolved this issue, and some suggestions on how the potential effect of this opinion can be limited.

II. THE LINE ITEM VETO ACT OF 1996

In April of 1996, Congress enacted the Line Item Veto Act, which went into effect on January 1, 1997. The Act allowed the President power to cancel three types of provisions in appropriations legislation. The President could cancel in whole “(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit.”

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5. *Id*.
Congress did place some limits on the President’s power, including some strict procedures in the exercise of the cancellation power. When identifying items for cancellation the President was required to consider the legislative history, the purposes of the provisions, and any other relevant information regarding the provisions. With respect to each cancellation, the President had to determine that the cancellation would reduce the federal deficit, not impair any essential government function, and not harm the national interest. The President also was required to transmit a “special message” to Congress within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit that was canceled.

A cancellation took effect when Congress received the special message from the President. Congress could respond to the cancellation by introducing a “disapproval bill.” If passed by a majority of both the House of Representatives and the Senate, this disapproval bill would defeat the cancellation. The procedures for introduction and consideration of a disapproval bill were extensive. Congress would have thirty days of review upon receiving the special message by the President, and the disapproval bill had to be introduced within five calendar days after the receipt of the special message. When passed by Congress, the disapproval bill would then be subject to the President’s normal veto power. If the President vetoed the disapproval bill, then Congress could override the President’s veto with a two-thirds vote by both houses.

III. Clinton v. New York

A. The Predecessors to Clinton

Immediately after enactment of the Line Item Veto Act, six members of Congress challenged the Act’s constitutionality. In Byrd v. Raines, the district court for the District of Columbia held the Act unconstitutional. The Supreme Court, however, remanded the case to the district court with instructions to dismiss the Congressmen’s complaint due to lack of standing.
NOTES

Less than two months after that decision, the President used his authority to cancel three provisions: one from the Balanced Budget Act of 1997,17 and two from the Taxpayer Relief Act of 1997.18 The Balanced Budget Act provision provided a waiver of the $955 million that the state of New York would have been required to return to the United States for fifteen of its state taxes that were subject to the new amendments of the Social Security Act.19 The latter two provisions were from section 968 of the Taxpayer Relief Act. Section 968 amended section 1042 of the Internal Revenue Code and allowed owners of qualified refineries and processors to defer the recognition of capital gain if they sold their stock to eligible farmers' cooperatives.

In City of New York v. Clinton,20 two groups of plaintiffs brought suit against the President because of these cancellations. The first group of plaintiffs was the City of New York, two hospital associations, two unions representing health care employees, and a hospital. The second group of plaintiffs was Snake River Potato Growers, Inc., a potato farmers' cooperative of about thirty potato growers in Idaho, and an individual acting on behalf of Snake River. The district court found that all plaintiffs had standing to raise their complaints.21

On the merits, the district court held that the President's cancellations of the provisions did not conform to the constitutionally mandated procedures for the enactment or repeal of laws. The district court cited two reasons for this conclusion. First, what resulted from these cancellations were not the same laws that had passed both Houses of Congress. Second, the court found that the President violated Article I of the Constitution when he made rescissions without majority approval of both the House and Senate.22 The district court also held that this Act "impermissibly disrupt[ed] the balance of powers among the three branches of government."23

B. Clinton v. New York: The Majority

In an opinion by Justice Stevens, the Supreme Court started with the jurisdictional question. It agreed with the district court that all appellees had standing, both by statute and by Article III, to have their case heard by the district court. As to the substantive issue, the Court concluded the President's cancellation of the provisions was both practically and legally an amendment of acts of Congress. While the Court agreed the President has law-making responsibilities arising from both Article I and Article II of the Constitution, neither article authorized the President to enact, to amend, or to repeal statutes. The Court held

22. Id. at 178-79.
23. Id. at 179.
that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7. 24

In discussing the President’s power to “return” (veto) a bill pursuant to Article I, section 7, the Court contrasted it with the President’s cancellation power under the Line Item Veto Act. The Court stated three reasons why the cancellation power was different, and thus violated the Presentment Clause. First, while the “return” of a bill takes place before the bill becomes a law, under the Line Item Veto Act the President could cancel a bill within five days after it has become a law. Second, the “return” of the bill rejects the legislation in its entirety, while the Line Item Veto Act authorized the President to cancel portions of a bill. Finally, the Constitution is silent on “unilateral Presidential action that either repeals or amends parts of duly enacted statutes.” 25

The Government contested the argument that the cancellations by the President amounted to a “repeal” of the canceled items. The Government reasoned that because of the “lockbox” provisions of the Act, a canceled item retains an effect in that it prevents Congress and the President from spending the savings resulting from the cancellation. The Court acknowledged that the canceled item retained a “real, legal budgetary effect,” but maintained that the canceled item had no legal force or effect as to the appellees. Thus, the Court held that even if a portion of the canceled section had a legal effect, the cancellation could still be the functional equivalent of a partial repeal. 26

24. Id. at 2106.
25. Id. at 2103.
26. Id. at 2104 n.31 provides a good explanation of the “lockbox” provision and its purpose: The lockbox procedure ensures that savings resulting from cancellations are used to reduce the deficit, rather than to offset deficit increases arising from other laws. See 2 U.S.C. §§ 691c(a)-(b); see also H.R. Conf. Rep. No. 104-491, pp. 23-24 (1996). The Office of Management and Budget (OMB) estimates the deficit reduction resulting from each cancellation of new direct spending or limited tax benefit items and presents its estimate as a separate entry in the “pay-as-you-go” report submitted to Congress pursuant to § 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 (or “Gramm-Rudman-Hollings Act”), 2 U.S.C. § 902(d). See § 691c(a)(2)(A) (1994 ed., Supp. II); see also H.R. Conf. Rep. No. 104-491, at 23. The “pay-as-you-go” requirement acts as a self-imposed limitation on Congress’s ability to increase spending and/or reduce revenue: if spending increases are not offset by revenue increases (or if revenue reductions are not offset by spending reductions), then a “sequester” of the excess budgeted funds is required. See 2 U.S.C. §§ 900(b), 901(a)(1), 902(b), 906(f). OMB does not include the estimated savings resulting from a cancellation in the report it must submit under §§ 252(b) and 254 of the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. §§ 902(b), 904. See § 691c(a)(2)(B). By providing in this way that such savings “shall not be included in the pay-as-you-go balances,” Congress ensures that “savings from the cancellation of new direct spending or limited tax benefits are devoted to deficit reduction and are not available to offset a deficit increase in another law.” H.R. Conf. Rep. No. 104-491, at 23. Thus, the “pay-as-you-go” cap does not change upon cancellation because the canceled item is not treated as canceled. Moreover if Congress enacts a disapproval bill, “OMB will not score this legislation as increasing the deficit under pay as you go.” Ibid.
The Government further maintained the cancellation power was not the functional equivalent of a partial repeal by citing *Field v. Clark.* In *Field* the Court upheld the constitutionality of the Tariff Act of 1890. The statute allowed almost 300 articles to be exempt from import duties. Section 3 of the Act contained a special provision that directed the President to suspend the exemption for many of these articles if he determined that any country producing or exporting these products were imposing duties on products of the United States that the President deemed to be "reciprocally unequal and unreasonable." The Court in *Field* concluded that there was no unconstitutional delegation of legislative power to the Executive.

The Court in *Clinton* distinguished the cancellation power of the Line Item Veto Act from the actions in *Field.* First, it said that the power of the President to suspend the exemption of import duties was contingent upon a condition that did not exist at the time of the passage of the Tariff Act. This was not the case with a cancellation under the Line Item Veto Act. The President had to exercise his cancellation power within five days after the enactment of the legislation. Thus, the President could exercise his power of cancellation based on the same conditions that Congress evaluated when it passed the statute. The second distinction was one of discretion. In the Tariff Act, once the President determined there was a "reciprocally unequal and unreasonable" import duty imposed by another country, he would have a duty to suspend the exemption. Though the President did have to follow certain procedures to use his cancellation power, these procedures did not qualify his ability to cancel or not to cancel. The final distinction mentioned by the Court was that under the Tariff Act, when the President suspended exemptions he was acting in pursuance of the policies embodied in the statute. Under the Line Item Veto Act, when the President canceled a provision under the statute, for any of the three acceptable cases, he was not acting upon the policy judgments made by Congress when they passed the bill, but rather was acting based on his own policy judgments. Since the President had to cancel within five days for the cancellation to be effective under the Act, "every exercise of the cancellation power [would] necessarily be based on the same facts and circumstances that Congress considered, and therefore constitute a rejection of the policy choice made by Congress."

The Government also relied on other tariff and import statutes cited in *Field* for further support of its position. The Court contrasted these statutes with the Line Item Veto Act because the cited statutes all related to foreign trade. The Court distinguished *United States v. Curtiss-Wright Export Corp.* because the President
has a higher degree of discretion in foreign affairs than he would have in domestic affairs. The most important distinction for the Court was that in *Field* and the related statutes, Congress made the decision to repeal or to suspend the particular provision, and it made the suspension or repeal subject to a certain event. The only thing left to the discretion of the President was a determination of whether the events that Congress made a prerequisite to suspension or repeal had occurred. In the Line Item Veto Act, Congress authorized the President to make the repeal based on his own judgment, and not on any event dictated by Congress in the provision itself. The Supreme Court concluded that the fact that Congress intended to give the President the power to repeal laws based solely on his own judgment does not authorize the circumvention of the procedures set up by the Presentment Clause.\(^3\)

At the end of the majority opinion, Justice Stevens emphasized that the Court's decision was not decided based on the wisdom of the procedures authorized by the Line Item Veto Act. The Court acknowledged the Executive and Legislative purpose of "ensur[ing] greater fiscal accountability in Washington,"\(^8\) but stated no opinion on the matter. Justice Stevens also emphasized that the Court was not lightly concluding that these actions were unconstitutional.\(^9\) After twice hearing full argument and briefing on the question, the Court determined that its duty was clear.

The Court reiterated that the only issue it was addressing was the "finely wrought" procedures commanded by the Constitution.\(^4\) Since the Court concluded that the Line Item Veto Act's cancellation provisions violated the Presentment Clause of the Constitution, it did not consider the alternative holding of the district court that the Line Item Veto Act "impermissibly disrupts the balance of powers among the three branches of government."\(^4^1\)

C. Clinton v. New York: The Dissents

Three Justices dissented in *Clinton*, and they authored two separate dissenting opinions. Justice Scalia wrote the first dissent, joined by Justice O'Connor and Justice Breyer. Justice Scalia dissented to both the jurisdictional and the substantive opinion of the Court.\(^4^2\) Justice Breyer wrote the second dissent, with

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37. Id. at 2107 ("Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.").
39. In footnote 42 of the opinion, Justice Stevens cites his concurring opinion in *Bowsher* v. *Synar*, 478 U.S. 714, 736, 106 S. Ct. 3181, 3193 (1986): "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons."
41. Id. at 2108 (quoting *New York v. Clinton*, 985 F. Supp. 168, 179 (1998)).
42. Justices O'Connor and Breyer did not join Justice Scalia in the portion of his dissent relating
which Justices Scalia and O'Connor joined in part. Justice Breyer agreed with the majority that the Court had jurisdiction to hear the dispute, but did not feel the cancellation procedures of the Line Item Veto Act were unconstitutional.

1. Justice Scalia

Justice Scalia did not feel that the Idaho parties had standing to bring their claim, so his substantive opinion only applied to the remaining New York appellees. Reaching the substantive issue, Justice Scalia did not find that the Line Item Veto Act's cancellation procedures for an item of direct spending violated the Presentment Clause, because the President could cancel the item of direct spending only after the requirements of the Presentment Clause had been met. The bill had already been presented and signed by the President. Thus, as Justice Scalia put it: "the Court's problem with the Act [was] not that it authorize[d] the President to veto parts of a bill and sign others into law, but rather that it authorize[d] him to 'cancel'—prevent from 'having legal force or effect'—certain parts of duly enacted statutes." 44

Justice Scalia pointed out Article I, section 7 (the Presentment Clause) does not prohibit the increase or suspension of congressionally appropriated funds when Congress specifically authorizes such action. Thus, the issue in this case was the constitutionality of a delegation of legislative power to the Executive. Justice Scalia's decision thus turned on "whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch." 45

Justice Scalia revealed that Congress has allowed presidential discretion in the spending of appropriated funds since the founding of the nation. He saw no distinction between that practice and a practice where Congress authorizes the President to cancel an item of direct spending as in the Line Item Veto Act. Justice Scalia added that Presidents throughout our history have thought it within their authority to withhold funds appropriated by Congress, even without statutory authorization. 46 Not until President Nixon stated he had a constitutional right to impound appropriated funds did the Supreme Court, in Train v. City of New York, 47 expressly hold that no such absolute right existed. Justice Scalia mentioned that Train, however, did implicitly confirm that Congress could confer discretion to the Executive to withhold appropriated funds. 48

44. Id. at 2115.
45. Id. at 2116.
48. Clinton, 118 S. Ct. at 2117.
Justice Scalia concluded that had the Line Item Veto Act authorized the President to "decline to spend" certain appropriated funds, the Supreme Court would not have had a problem declaring the Act constitutional. The problem was the Act allowed for something technically different in the form of a cancellation. Justice Scalia believed this technicality had nothing to do with the Presentment Clause but rather with the Delegation Doctrine. Since the Delegation Doctrine is not a technical one, Justice Scalia saw no reason to distinguish the two procedures constitutionally.49

2. Justice Breyer

Justice Breyer only dissented as to the substantive issue. Since the Line Item Veto Act did not violate any express provision of the Constitution or any implicit separation of powers principles, he concluded it was constitutional.

Justice Breyer started by accepting the goal of providing the President with power to limit certain expenditures and revenue-diminishing provisions contained in an omnibus appropriations bill as a proper legislative objective. He explained that in the days of our founders, appropriations bills were so small that the Congress could have easily embodied each provision in a separate bill, thus each bill would be subject to the veto power.50 Now that appropriations bills have grown so large that it is impossible to break them into separate provisions, the Line Item Veto Act could be explained as a "particular novel means to achieve this same, constitutionally legitimate, end."51

Justice Breyer pointed out that this case was focusing on the general structural provisions of the Constitution. Article I's "legislative" power, and Article II's "executive" power are not easily defined concepts; moreover, according to Justice Breyer, both have always been interpreted generously to secure a "workable government."52 Justice Breyer believed that since this cancellation provision does not violate any express provision of the Constitution, the issue should then be

49. Id. at 2118.
50. Justice Breyer quoted the entire operative text of the first general appropriation law. Clinton, 118 S. Ct. at 2118. The Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 provided:

| Be it enacted . . . | that there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on import and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety six thousand dollars for paying the pensions to invalids. |

51. Id., 118 S. Ct. at 2119 (emphasis in original).
decided on implied separation of powers principles, keeping in mind the need for a "workable government."\textsuperscript{53}

Justice Breyer disagreed with the majority that this Act violated any literal commandment of the Constitution. The President was not amending or repealing any law; rather, he was preventing the language of the provision from "having legal force or effect."\textsuperscript{54} This power was expressly delegated to the President by the statute. Therefore, instead of repealing or amending the law, he was actually following it.

Satisfied that the Line Item Veto Act did not violate any literal text of the Constitution, Justice Breyer considered whether the Act violated implicit separation of powers principles. Justice Breyer felt Congress had not conferred upon the President any type of power that could be deemed "non-executory." Throughout its history Congress has delegated authority to spend or not to spend appropriated funds, and the Line Item Veto Act authorized essentially the same thing.

Justice Breyer argued the fact that this power can be exercised by both the legislative and executive branches of government is irrelevant. He cited several authorities for the proposition that powers can fall within the domain of more than one branch of government.\textsuperscript{55} According to Justice Breyer, many of the cases in which delegations were found constitutionally permissible were conceptually more difficult to attribute to an executive power than the case at hand.\textsuperscript{56} The cases that have found unconstitutional delegations of power have been "conceptually irreconcilable" with the traditional functions of the other branch.\textsuperscript{57}

Justice Breyer also stated that Congress's delegation of powers to the President did not place in jeopardy the fundamental function of separation of powers, namely to maintain the tri-partite structure of the federal government. The fact that this Act preserved the power in Congress to attach a provision, by a mere majority, into any future appropriations bill stating that the Act will not apply, distinguished it from the cases where the Court had found unconstitutional encroachment into congressional power.\textsuperscript{58} The disapproval power of Congress to reinstate any presidential cancellations also was a distinguishing factor. The President's cancellation power was shaped by Congress. He could only exercise the power when Congress enacted an appropriations statute. Thus, Congress "define[d] the outer limits of the President's cancellation authority."\textsuperscript{59}

\textsuperscript{53.} Clinton, 118 S. Ct. at 2119-20.

\textsuperscript{54.} Id. at 2120 (quoting 2 U.S.C. § 691e(4)(B) (Supp. II 1996)).


\textsuperscript{56.} Justice Breyer cited American Trucking, where the Court upheld a congressional delegation of adjudicatory and rulemaking power to federal agencies was a constitutional delegation. 344 U.S. at 310-13, 73 S. Ct. at 314-16.


\textsuperscript{58.} See 2 U.S.C. § 691f(b) and (c) (Supp. II 1996).

\textsuperscript{59.} Clinton, 118 S. Ct. at 2124.
In addition to finding no encroachment into the congressional sphere, Justice Breyer did not find that presidential power had been unduly expanded. The power the President had been given (the discretion to spend or not to spend specifically appropriated funds, or to permit or not to permit certain limited tax exemptions) had not strengthened the presidency any more than other constitutional delegations that the Court had previously upheld. 60

Justice Breyer explained that, to be constitutional, a delegation of power to another branch must be inherently necessary for a workable government and limited by specific procedures. 61 Justice Breyer felt the Line Item Veto Act met these requirements. The Act allowed the President to cancel only certain types of appropriations, and required consideration of all the things listed in Section 691b. These considerations included, as previously mentioned: legislative history, construction, and purposes of the law. Additionally, the President had to determine this cancellation would "reduce the federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest." 62 In addition to these requirements, the purposes behind the Act were, as Justice Breyer summarized it, "to promote 'greater fiscal accountability' and to 'eliminate wasteful federal spending and . . . special tax breaks.'" 63 Thus, Congress was saying this purpose could only be satisfied by a joint effort between the executive and legislative branches.

Although Justice Breyer recognized that the standards set forth by Congress were broad, they were not as broad as standards the Court had previously held constitutional. Justice Breyer cited for example, National Broadcasting Co. v. United States, 64 where the Court upheld a congressional delegation to the Federal Communications Commission to regulate all broadcast licensing as "public interest, convenience, or necessity" require. He also cited FPC v. Hope Natural Gas Co., where the Court held constitutional a delegation to the Federal Power Commission to determine "just and reasonable" rates. 65

Since the Line Item Veto Act violated no express provision in the Constitution or any separation of powers principles, Justice Breyer would have upheld it. Justice Breyer saw this Act not as allowing a "line item veto," but rather "an


64. 319 U.S. 190, 225-26, 63 S. Ct. 997, 1013-14 (1943).

IV. SEPARATION OF POWERS, CHECKS AND BALANCES, AND THE DELEGATION
DOCTRINE

The Constitution's founders understood that if they gave too much power to
a single entity, without a check on its exercise of that power, the entity would
adulterate the entire system. To resolve this dilemma, the founders contemplated
a doctrine of separation of powers. This was not a new idea. In the mid-eighteenth
century, Montesquieu was the first to write about a tri-partite structure of
government. He argued that when executive, legislative and judicial powers were
vested in one person or department, tyranny was sure to ensue. The founders were
well aware of Montesquieu's works, and his name was the most frequently cited
name during the Constitutional Convention regarding separation of powers
discussions.

Our government would have three branches. These branches would receive
a certain amount of power to run the federal government. The framers distributed
these powers so that one branch would not be able to use its power to nullify
another branch. This concept, of course, is not consistent with the concept of pure
separation of powers. If one branch can prevent another branch from exercising
its power then no absolute separation exists. In this way, the framers deviated from
the writings of Montesquieu and created a system of "checks and balances." Each
branch would act in its own self-interest, without any clear division of power. The
founders concluded that this arrangement would promote political independence
in each branch and, more importantly, each branch acting in its own self-interest
would prevent the other branches from accumulating too much power.

With respect to legislation, the Constitution gave primary authority to
Congress, but it assigned the President an important "check" over this congressio-
nal power. Clauses 2 and 3 of Article I, section 7 say that every bill, order,
resolution, or vote that requires the concurrence of both Houses must be presented
to the President for approval. If the President does not approve of the legislation

66. Clinton, 118 S. Ct. at 2131.
67. Matthew P. Bergman, Montesquieu's Theory of Government and the Framing of the
68. Id. at 24.
69. Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and
70. The full text of clauses 2 and 3 provide:
[2] 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; 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 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
(whether it be a bill, order, resolution, or vote), he must return it to Congress. If the President returns the legislation, Congress must amend the legislation and seek the President’s approval again, or get a two-thirds majority vote in each House. We know this presidential authority as the veto power.  

The founders thought these statements in Article I would be sufficient to maintain a balance between the Congress and the President regarding the law-making function. Eventually, however, Congress found a way to tip the balance in its appropriations bills. Congress understood that if they grouped enough spending proposals into a single document then they would force the President to choose between two equally unpleasant alternatives. The President could veto the bill en toto, and, for all practical purposes shut down the federal government, or he could succumb to Congress’s desires, and pass spending proposals he otherwise would have vetoed. This congressional practice has been criticized by many legal scholars as being a means to destroy the effectiveness of the presidential veto as a check on Congress.  

Part and parcel to our system of separation of powers is the Delegation Doctrine. Although no express provision in the Constitution expressly forbids the Congress to delegate legislative power to the Executive, the Supreme Court has implied a limit to congressional transfers of legislative power to the President based on an interpretation of Article I. Article I, section 1, places “[a]ll legislative Powers herein granted . . . in a Congress of the United States.” This section, it was argued, implicitly forbade any delegation of legislative power to another branch. Despite this argument, the Supreme Court has repeatedly allowed some delegations of legislative authority. In fact, not since 1935 has the Supreme Court disallowed a delegation to the Executive. This state of events provoked Justice Thurgood Marshall, in his dissent in *Federal Power Commission v. New England Power*.  

Law. But in all such Cases and 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. 

[3] 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. 

Power Company, to state that the non-delegation doctrine "has been virtually abandoned by the Court for all practical purposes." 75

V. IMPOUNDMENT AND THE VETO POWER

By "bundling" legislation into omnibus appropriations bills, Congress found an apparently constitutional means to control the details of the federal purse without an executive check. Because of this practice, Presidents have made several attempts to re-impose limits on congressional spending.

A. Impoundment

Impoundment is defined as "[a]ction, or inaction, by [the] President . . . that precludes the obligation or expenditure of budget authority by Congress." 76 This action is far more intrusive on Congress's power than the veto. The veto is overrideable, and thus is a limited veto. The power to impound appropriations is functionally equivalent to an absolute veto—a veto that can not be overridden by Congress. If the President had this unrestricted power without limitation, it would clearly undermine the framers' intent to create a system of separated powers. During the Constitutional Convention, James Madison said that "[t]o give such a prerogative [to the President] would certainly be obnoxious to the temper of the country . . . ." 77

Nevertheless, from the very beginning of United States history, Congress and the Court have allowed a certain measure of presidential impoundment. In 1803, Thomas Jefferson declined to spend fifty thousand dollars appropriated by Congress to maintain gun-boats to guard the western bank of the Mississippi River. The Louisiana Purchase ended the need for these gun-boats, and thus Congress did not contest Jefferson's decision not to spend the funds. 78 In addition, the first appropriations bills passed by Congress expressly allowed the President to decline to spend appropriated funds. 79 These bills allowed the President to spend "sum[s] not exceeding" specified amounts determined by Congress. 80

Supporters of an inherent executive power of impoundment use Article II, section 3 of the Constitution for authority to withhold funds when appropriations threaten the expenditure-restricting purposes of previously passed statutes. 81 Article II, section 3 states that the President "shall take Care that the Laws be faithfully executed . . . ." When Congress passes an appropriation that threatens the goals of a previously enacted statute, then to resolve the conflict between the

79. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104.
80. Id.
81. 1 Rotunda & Nowak, supra note 69, § 7.4.
two statutes, the President must have the power to impound the necessary funds. This statutory authority to impound has originated primarily from four statutes: (1) the Anti-deficiency Act of 1950; (2) the Employment Act of 1946; (3) the Economic Stabilization Act of 1970; and (4) the public debt ceiling.

The courts traditionally have been reluctant to decide impoundment issues. The first Supreme Court case to decide issues of impoundment was *Kendall v. United States*. The case involved a private act passed by Congress ordering the Postmaster General to pay Kendall for services rendered. The Postmaster General, an executive officer, refused to follow the order. The Court found for Kendall, holding that when Congress expressly directs that funds be spent, the President has a duty to spend them. This holding has been limited to cases where the executive expressly refuses to spend funds that Congress has explicitly ordered to be spent.

Besides *Kendall*, the courts have generally avoided the constitutional issues raised with impoundment. The cases are usually dismissed as non-justiciable or decided on grounds of statutory interpretation. The one case that, arguably, implicitly interpreted the Constitution is *Train v. New York*. President Nixon declined to spend six billion dollars appropriated by Congress under the Water Pollution Control Act. President Nixon had previously stated that his right as President to impound funds was a constitutional one. The Supreme Court disagreed with the President. Although the Supreme Court did not expressly address the constitutional issue, many constitutional scholars believe the Court implicitly rejected "a constitutional authority to impound in the face of a Congressional mandate to the contrary and in the context of a program where the President could not reasonably claim special powers as the Commander-in-Chief or an inherent power limited to foreign affairs."

In light of the judicial reluctance to address the constitutional issue, Congress passed the Congressional Budget and Impoundment Control Act in 1974. President Nixon signed it into law in July of the same year. The Act increased Congress's control over the federal purse strings. The President cannot decline to spend appropriated funds of Congress without its permission or subsequent ratification. This Act was a compromise with the Executive in that it required Congress to pass at least thirteen appropriations bills per year. This requirement limits Congress's ability to force upon the President one or two omnibus appropriations bills to sign or veto. The Line Item Veto Act of 1996 is an amendment to this Act.

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86. 37 U.S. (12 Pet.) 524 (1838).
87. 1 Rotunda & Nowak, supra note 69, § 7.4.
88. Id.
90. Kramer, supra note 78, at 165 (citing J. Nowak et al., Constitutional Law 233 (2d ed. 1983)).
B. The Veto Power

Clauses 2 and 3 of Article I, section 7 of the Constitution demonstrate the importance of the veto power of the President. The founders were not satisfied in just stating "Every Bill which shall have passed . . ." since this would have left the term "bill" open to interpretation. Congress could easily have passed legislation, under any name but "bill," and avoided the President's veto check. Thus, the founders found it necessary to add Clause 3: "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 . . ." This reiteration by the founders shows that they found the veto power of the President to be a crucial part of the law-making equation.

VI. CRITICISM OF CLINTON

The Supreme Court held that the Line Item Veto Act's cancellation procedures violated the Presentment Clause because the procedures, in effect, allowed the President to repeal, amend, or cancel portions of enacted statutes without following the procedures set forth in Article I, section 7, clause 2. Does this Act really violate an accurate reading of the Presentment Clause? The language of Clause 2 appears clear and unambiguous: "Every Bill which shall have passed . . . [both Houses] . . . shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it . . ." The only logical reading of this clause is that a bill becomes a law after the President signs it; at this point, the Presentment Clause is satisfied and no further procedural requirements apply. While it is true that in exercising his power under the Line Item Veto Act the President is altering a law, it is altered only after signature by the President, which is all the Presentment Clause requires. The Presentment Clause, by its very language, is applicable only to legislation not yet a law. Not only is the basis of the Court's decision regarding the Presentment Clause confusing, it leaves us with disturbing results. If the cancellation procedures of the Line Item Veto Act are unconstitutional, it is not due to the mandate of the Presentment Clause, but due to the separation of powers doctrine. But the Supreme Court expressly avoided the separation of powers issue in deciding Clinton.

One might argue the Court is implicitly reading the Presentment Clause requirements as referring not to a specific point in time, but to a range of time which does not end with the President's signature on the bill. Such a change in interpretation of the Presentment Clause creates two major questions, neither of

93. U.S. Const. art. I, § 7, cl. 3 (emphasis added).
95. Clinton, 118 S. Ct. at 2108.
which were addressed by the Court. The first question comes from the text of the
Constitution. The text seems to imply that the presentment procedures require
specific actions. Once the President signs the bill, it becomes a law. A signature
does not imply a broad span of time but rather a specific instant in time. The Court
does not explain its apparent deviation from the text of the Presentment Clause.
Another question is how long this span of time will exist. Are we forced to read
the Presentment Clause as imposing the clause’s procedures on any actions by the
President, whether they occur before or after signing of the bill? We can obviously
infer that Presentment lasts at least five days after the signing of the bill from the
Line Item Veto Act’s requirement that the cancellation be transmitted within that
time, but how much longer? Is it feasible for Congress ever to pass legislation that
would give presidential discretion after the procedures of presentment have been
satisfied?

Given the holding in Clinton, the Court’s distinction of certain cases is
confusing. As stated earlier, the Court distinguished Clinton from the 1892 case,
Field v. Clark, in three ways. First, where the Tariff Act in Field authorized the
President to decline to spend certain funds, contingent upon the occurrence of an
event that did not exist at the time the Act was passed, the Line Item Veto Act
required the President to exercise his authority within five days of signing the bill
into law. This provision, the Court reasoned, allowed the President—while
considering the same circumstances as Congress—to make law opposite to that
which Congress desired. Second, the Tariff Act imposed a duty on the President
to suspend the exemption of tariffs when the President determined the future
contingency had arisen. The Line Item Veto Act imposed no duty on the President
to act when certain events arise.96 Third, under the Tariff Act the President was
abiding by the policies embodied in the statute, but in the Line Item Veto Act, the
President is going against a policy decision of Congress when he cancels a
spending provision or limited tax benefit.97

These factors distinguish Field from Clinton, but in what respect? The Court
used these factors to show how the power to cancel portions of a statute contained
in the Line Item Veto Act is different from the power to suspend the exemption of
import duties as in the Tariff Act of 1890. It is unclear what relation these
distinctions have to the Presentment Clause procedures. With regard to the
Presentment Clause, these two acts are identical. They both allow the President
to impound a certain amount of appropriated funds after the President had signed a
bill into law. Both acts granted specific authority to the President to do so. Why
then does the Court draw this distinction? The Court confused its arguments here.
The distinction does not support the Court’s conclusion vis-à-vis the Presentment
Clause, but rather only helps to determine whether one of the acts grants an
unconstitutional delegation of legislative authority. All of the Court’s reasoning

96. Section 691(a)(A) does require the President to determine that the cancellation will (1) reduce
the Federal budget deficit; (2) not impair any essential Government functions; and (3) not harm the
national interest. These are requirements that authorize the President to cancel appropriated funds.
There are no requirements that mandate the President to exercise his cancellation power.
97. Clinton, 118 S. Ct. at 2105-06.
for why the Line Item Veto Act procedures are a violation of presentment, in reality, has little to do with presentment, and more to do with the separation of powers and the Delegation Doctrine. The Court does not explain how the Presentment Clause applies to bills already signed and enacted into law by the President.

The Court in *Clinton* found itself in a difficult situation. The present Court agrees, at least implicitly, that a “line item veto” is unconstitutional. The Line Item Veto Act cancellation procedure is technically different from what is generally known as a “line item veto,” but is substantively similar in light of its end result—the cancellation of certain provisions in duly passed statutes, leaving the rest as binding law. What the Line Item Veto Act does is allow impoundment by the President at essentially the same time, and considering the same factors, as Congress did when it appropriated the funds, but *after* the President has signed the bill into law. If the Line Item Veto Act authorized the President to cancel certain provisions before signing the rest of the bill into law, then we would have a “line item veto,” and the Presentment Clause would be violated. In that situation, the President could pass a new law without following the procedures of presentment. The result of this veto would be a law that neither house of Congress approved. But, contrast this veto to the case where the President signs into law a bill passed by Congress, and then cancels portions of it. In this case, the Presentment Clause has been satisfied before the changes take place. The changes, while possibly unconstitutional on other grounds, are not in violation of the Presentment Clause. These changes are actually a form of impoundment.

Arguably, the very reason Congress allowed the President to sign the bill into law and then to cancel appropriate provisions was to avoid the line item veto problem. Thus, the Court’s issue was not one of a line item veto—and thus Presentment—but rather a delegation of authority to the President not to spend certain appropriated funds approved by Congress.

The Court could have attacked this statute as an unconstitutional delegation of authority to the President, but in doing so it would have had to render a decision on the impoundment debate. The Court has historically been reluctant to make such a decision. The Court instead fashioned its holding under the Presentment Clause and avoided the issues that would arise with impoundment.

From this opinion, the Court’s views of delegation are clear. However, the Court did not fashion its *holding* on the Delegation Doctrine. It only *reasoned* its opinion on delegation and framed it under presentment. So the holding leaves us with an important question: Has the Court effectively buried the delegation issue? If the Presentment Clause is now considered as covering a range in time rather than a moment in time, it gives the Court free reign in determining when this time frame ends. The Court can decide which impoundments by the President are “constitutional” simply by using presentment rather than the separation of powers doctrine, effectively avoiding the tougher issue of constitutional delegation regarding discretionary spending.
By resting its decision on presentment, the Supreme Court avoided a crucial constitutional issue presented before it: Does the Line Item Veto Act delegate so much authority to the President that it violates inherent separation of powers principles? Contrary to the title of the Act, the issue is not the constitutionality of the line item veto. As Justice Scalia mentioned, this title might explain the reason the Court got involved in the presentment issue. The President was not “vetoing” portions of a bill. The President was signing the bill into law, then canceling certain spending and limited tax benefit provisions.

As mentioned earlier, the opinion does suggest a majority of the Court saw the Line Item Veto Act as an unconstitutional delegation of legislative power, although the Court did not say as much in its holding.98 This section will argue, however, that what the Line Item Veto Act authorized the President to do, while it was a delegation of legislative authority, was not a threat to our tri-partite structure of government.

The major cases of the Supreme Court interpreting separation of powers have acknowledged two primary principles: (1) the different branches of the government must maintain a degree of separation, and (2) interdependence between the branches must be allowed to facilitate a workable government.99 The result the Court has reached in the different cases involving this issue has often turned on what view the Court took in analyzing separation of powers. The two competing views have been described as the formal and functional approaches. If the view the Court takes in a particular case can be determined, then the outcome of its analysis can be predicted.

The formalist view of separation of powers is based on the premise that each branch has unfettered powers that can not be disrupted by another branch. This view leans more toward the approach Montesquieu suggested in his writings on separation of powers.100 Such a formalistic approach was taken in INS v. Chadha.101 The Court found unconstitutional the “legislative veto” provisions in the Immigration and Nationality Act.102 Under this Act, Congress delegated agency authority to the Attorney General to suspend certain alien deportations. Congress retained the power to veto any decision of the Attorney General and either house could exercise this veto (in the form of a resolution). The Court held this action violated both the Presentment Clause and the bicameral requirements under Article

98. See Justice Kennedy’s concurrence in the decision, which was primarily a response to Justice Breyer’s dissent, but does seem to expressly find a violation of separation of powers doctrine. 118 S. Ct. at 2108.
100. See discussion of Montesquieu, supra notes 67 and 68 and accompanying text.
I, sections 1 and 7 since either chamber's veto was not subject to a presidential veto and the resolution was not passed by both Houses of Congress.

The functionalists take a different view of separation of powers. As long as no express provision of the Constitution is violated, the functional approach will permit a delegation from the legislative to another branch as long as the delegation does not infringe on the basic tenets of separation of powers. This functional view was advocated in Mistretta v. United States. The case involved the creation of a United States Sentencing Commission that was required to have at least three federal judges. The purpose of the Commission—set up by Congress—was to implement mandatory sentencing requirements that federal judges would have to follow. When looked at formally, appointing judges to the sentencing commission amounts to permitting federal judges to determine policy—an inherently legislative act. Nevertheless, the Court found this action did not violate the separation of powers doctrine. The Court cited little authority for its decision, but simply stated that such delegation did not threaten the "fundamental structural protections of the Constitution."

One could argue that the crucial distinction is where Congress is delegating the authority. When Congress delegates legislative authority to the judiciary, the Court seems more likely to determine that such a delegation is constitutional. While this "judicial ego" argument might be the reality of the situation, it does not seem to have constitutional support. If the Supreme Court were declaring all delegations of legislative authority to the judiciary as constitutional, then one would see very obvious deviations from the separation of powers doctrine. This author would therefore argue that the "judicial ego" argument should not be lightly accepted. An alternative argument is that the Court is tolerant of delegation so long as Congress is not augmenting its own powers. This argument would clearly support the Line Item Veto Act since Congress was reducing rather than increasing its power.

When the "cancellation" procedures of the Line Item Veto Act are compared to the cases where the Court has decided between either a functional or formal review, it is clear that the functional review should apply to cancellation. No express provision of the Constitution has been violated by the Act. As discussed in Part VI, the Presentment Clause has not been violated by these procedures when one interprets the Presentment Clause in line with the text of the Constitution. The cancellations would take place after the bill had been signed into law. By majority approval of both houses of Congress, Congress delegated discretionary authority to the President in certain matters of appropriations, to be exercised after the President duly signed the bill into law. All future appropriations would have been passed by both houses, and signed by the President before any cancellations. Thus, no violations of presentment or the bicameral structure of the legislature (as were discussed in INS v. Chadha) occurred.

Since no express provision of the Constitution has been violated, the next question should be: did this cancellation procedure disrupt the fundamental tenets
of separation of powers? Separation of powers principles allow some mixing of the powers among the branches, so the issue is how much mixing is permissible before it amounts to the usurping of power from another branch (or, reciprocally, to the transferring of too much power to another branch).

Obviously, had the cancellation procedures authorized the President to cancel any appropriation without any check by Congress, the separation of powers doctrine would have rendered the procedures unconstitutional. Such a procedure would be the equivalent of Congress delegating a substantial portion of its appropriations power to the President. No matter what Congress appropriated, the President could impound, and Congress could do nothing to stop unrestricted presidential impoundment. Congress did not, however, grant unfettered discretion to the President to “cancel” funds. He was required to follow strict guidelines and to make specific determinations. Furthermore, Congress had the ability to pass a disapproval bill of any “cancellation” by the President. Congress could pass such a bill with a simple majority. In addition, in regard to limited tax benefits, Section 691f of the Act provided that Congress could include a simple statement in any legislation declaring that the Line Item Veto Act would not apply to that particular bill. When one considers all these factors, it is hard to see the Line Item Veto Act as an unconstitutional delegation of authority by Congress which would threaten the tri-partite structure of government.

VIII. WAYS TO LIMIT THE POTENTIAL EFFECTS OF CLINTON V. NEW YORK

When one considers the potential effects this decision could have on future impoundment and delegation, it seems necessary to find as narrow a construction as feasible for its future application. If the Presentment Clause is interpreted in all cases as it has been in Clinton, then it will drastically change the relationship between Congress and the President and result in an expansive increase in congressional power.

The ideal solution would be for the Court to overrule the holding of this decision. Regardless of which way the Court might resolve the delegation issue, it is far more important to erase this interpretation of the presentment procedures. If this reading of the Presentment Clause is not changed then it seems highly unlikely that the Court will ever again reach the constitutionality of delegation in the appropriations process. Before the delegation issue can be decided, all cases will be summarily decided on presentment grounds. In addition to this being a deviation from what the text of the Constitution contemplates, this holding will likely result in expanded congressional power vis-à-vis the President. Congress will be able to pass appropriations bills and present them to the President without ever having to worry about presidential check besides the qualified veto. This veto, as discussed earlier, already has proven to be a relatively minor check on the Congress with regard to spending legislation.

One might limit this holding in two ways: by confirming the vitality of an inherent presidential ability to impound, and by appropriations legislation that expressly allows for presidential reduction.

The Supreme Court has suggested in its decisions that the President does have an inherent constitutional ability to impound when it comes under his "Commander-in-Chief" power. In this situation, there is no delegation of law-making power to the Executive. The President already has the power under the Constitution so there are no presentment procedures required.

The Court in *Youngstown Sheet & Tube Co. v. Sawyer* held the President did not have the power to seize control of the steel mills. Justice Black, in the majority opinion, implied that action pursuant to his "Commander-in-Chief" power might be justified without congressional approval. The Court recognized the President's ability to set policy with regard to the "theater of war." It must be recognized that "Commander-in-Chief" power would be limited in scope. The power would only be effective regarding military appropriations. It would be very difficult to expand this power into the domestic forum.

A more expansive limitation of the holding could be achieved through appropriations bills that expressly allow for reductions by the President. These type of statutes would not violate the Presentment Clause since the President would never be altering the bill (or law, depending on whether he made the alteration before or after signing the legislation). The President would be following the law to the letter when he reduces amounts allocated by Congress.

There are two ways that Congress could frame a bill with this purpose. One way would be for Congress to enact appropriations statutes with language requiring the President to "allocate between X dollars and Y dollars for the purpose of Z." Since there would be no exact figure in the legislation, the President would be free to maneuver between the boundaries set by Congress. This type of appropriations legislation was common in the first years of our nation. Congress could also satisfy this purpose by expressly allowing a certain percentage reduction in an appropriations bill if the President finds certain prerequisites required by Congress.

It is important to reiterate that each of these reduction provisions would have to be in each particular bill the Congress passes and the President signs. Otherwise, the President would run into the Presentment Clause problem as defined by the Court in *Clinton*. But, this delegation of fund-reducing power to the President would again present to the Court the delegation issue. Since this type of legislation would avoid the presentment hurdle, the Court would be left only to decide if the delegation is in violation of inherent separation of powers principles.

The other legislative avenue would be for Congress to authorize non-contemporaneous impoundment. The Court has acquiesced in such impoundment in the past so this will likely remain a viable option to Congress. What might

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108. Id. 343 U.S. at 587, 72 S. Ct. at 867.
109. Id.
110. See Impoundment under Section A of Part V.
interfere is the absence of guidelines governing the length of time considered as presentment. It is not clear whether Congress can delegate appropriations discretion to the President ten days after the bill has been signed, or thirty days afterwards.

IX. CONCLUSION

Clinton v. New York was an opportunity for the Supreme Court to put some meaning behind the separation of powers doctrine and delegation between the federal branches regarding spending. Instead, the Court based its holding on presentment procedures and has potentially worsened the situation between the branches. The Line Item Veto Act was passed to combat the problem of excess spending by Congress which lacked an adequate presidential check.

The Court, in an effort to avoid the controversial constitutional issues of impoundment, framed its holding on a reading of the Presentment Clause that appears to deviate from a fair reading of its text. The result leaves us to reconsider what presentment truly means, and also to define its boundaries. The Court should reconsider this interpretation of the Presentment Clause and address issues such as these in their proper context, constitutional delegation. Hopefully, the Court will reconsider, and find that statutes such as the Line Item Veto Act do not violate separation of powers principles, but rather are constitutional means by which the President and the Congress work toward the goal of increased fiscal responsibility.

If Congress does avoid the new presentment hurdle by implementing any of the previously mentioned alternatives, the Court should hold these delegations within the boundaries of separation of powers principles. This procedure would be the last potentially constitutional way the President and Congress could work together to prevent wasteful government spending. To hold any of these subsequent efforts as unconstitutional delegations would eliminate any chance at branch interdependence regarding appropriations, and would grant to the Congress a power that would go substantially unchecked. Such a result would clearly go against the ideas of our founders.

Thomas Charles Woodworth