THE LINE-ITEM VETO:
TINKERING WITH THE SYSTEM

THESIS

Presented to the Graduate Council of
Southwest Texas State University
in Partial Fulfillment of
the Requirements

For the Degree of
MASTER OF ARTS

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San Marcos, Texas

June 5, 1998

To Mom and Dad

...for the times I could not go HOME.

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CHAPTER I

INTRODUCTION

The Republican-controlled Congress of 1996 passed the line-item veto that enabled the president to remove certain budgetary items attached to legislative bills without vetoing the entire proposal. It was considered an important and historic power because of a growing concern with "wasteful spending."[1] Two years later, however, the line-item veto was declared unconstitutional by Judge Thomas Hogan's federal court.[2] Since the court ruling, interest over the powerful tool has not waned and the judicial decision is being debated around the country.

The debate over the line-item veto is between those who adhere to a strict interpretation of the Constitution and those who favor a loose interpretation. As written, the Line-Item Veto Act was designed to help weed out the "pork barrel" projects that are usually attached to unrelated legislation that would not have passed Congress or made it to the president's desk on their own merits. As with any public law, the issue is complicated and the effects of the line-item veto are still uncertain. As a result, the debate raises serious concerns regarding separation of powers between the legislative and executive branches of government. The line-item veto may be too sweeping because it allows the president to override Congress and, consequently, to tamper with the delicate balance of power the framers of the Constitution specifically designed to ensure a stable and free form of government.

The Debate

The current debate revolves around theoretical questions that have their origin in 1787 when the framers of the Constitution were creating the foundation of America's political system. At issue was how to ensure a free and stable form of government for the American people. Memories of life under English rule played an important part in the framers' decision to delegate powers between three distinct branches. Thus, in order to safeguard the American people from an authoritarian government, separation of powers and checks and balances were intended to prevent a concentration of power in one department.

A little over two centuries later, the debate continues over the issue of separation of powers. If the line-item veto is exercised by the executive, what does it do to the system that the framers of the Constitution created? How will it affect the principle of checks and balances? What happens to the system when one branch abdicates some of its authority to another? Why would any branch be willing to hand over power in the first place? Does the system rely on politicians having good intentions and working for the common good, or is the system designed to allow "ambition to counteract ambition"?[3] Does it mean that *The Federalist*, the best commentary on the Constitution, is no longer relevant?

Two schools of thought articulate the political and theoretical arguments surrounding the line-item veto. A survey of the literature suggests that the supporters of the line-item veto think that Congress has been slowly crossing constitutional boundaries for too long, infringing on the powers of the executive.[4] Therefore, the line-item veto will help restore power to the executive. Supporters also argue that the line-item veto will help reduce the "pork" from

the legislative process.[5] They refer to the majority of state executives exercising line-item vetoes and explain that it works well. On the other hand, opponents of the line-item veto believe that the "pork" is a consequence of extensive negotiations between different views, and compromise, the end product of negotiations, is an essential part of the political process.[6] Furthermore, they contend that removing or shifting the element of compromise gives too much power to the executive branch of government. Opponents also argue that the political scope states deal in is minute compared to the national level and thus not an adequate comparison. The political and theoretical debates will be examined in order to understand the context and implications that the line-item veto may have on the political process.

Critical to the analysis is a clear understanding of separation of powers and the reasoning behind the formal process of amending the Constitution. In order to understand the full complexity of the issue, the material has been broken down into sections. Chapter II begins with an evaluation of the line-item veto by tracing the steps it went through before being signed into law in February 1996.[7] Chapter III focuses on the academic arguments, both theoretical and those concerned with its effect on policy, from leading scholars around the country. Chapter IV will present an argument in defense of separation of powers and checks and balances which are clearly at the center of the controversy. A general overview of *The Federalist* will be given because the papers offer a political and philosophical analysis of America's political system and the proceedings that took place at the Constitutional Convention. *Federalist 47 and 51* in particular will be analyzed for their presentation of the argument for a balance of power that must exist in government in order to safeguard against tyranny. The review of *Marbury v. Madison* is intended to support Publius' arguments surrounding separation of powers and checks and balances.

Finally, the informal process over the formal process of amending the Constitution will be evaluated. The discussion of The War Powers Act is intended to show how the Supreme Court has consistently struck down legislation that is designed to delegate power informally from one branch to another. With a little over 200 years of American political history, *Marbury v. Madison* and The War Powers Act delineate the path the Supreme Court has taken regarding separation of powers and suggest the constitutional approach this country is likely to take in the future. The line-item veto might help expedite passing legislation, but it offsets the important and delicate balance that needs to exist in order to forestall a tyrannical form of government by preventing the concentration of power in any one branch of government.

CHAPTER II

CHRONOLOGY OF EVENTS LEADING TO THE LINE-ITEM VETO ACT

The Constitution describes the formal, written process by which constitutional change may be formulated in the United States. Article V of the Constitution states:

> *The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislature of two thirds of several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.*

A discussion of this process is critical to the analysis of the line-item veto. Any attempt to bypass the formal process described in the Constitution is questionable. The Line-Item Veto Act of 1996 is at the center of the dispute over whether an act may legitimately change the physical structure of the way government conducts its business and whether it is an insidious attempt to tilt the balance of power in favor of one branch over another.

The Line-Item Veto Act

The Line-item Veto Act, granted to the president in 1996, is Congress's response to its inability to discipline itself within the legislative process. The Act gives the president the power to veto sections of a bill from January 1, 1997, and "shall have no force or effect on or after January 1, 2005."[8] The line-item veto grants the president the power to sign or cancel in whole any "dollar amount of discretionary budget authority; any item of new direct spending; or any limited tax benefit if the president determines that such cancellation will reduce the federal budget deficit; not impair any essential Government function; and not harm the national interest."[9] The president must send a special message to Congress within five days, however, delineating the cancelled items. Conversely, the Act provides a check on this power of the president by giving Congress the authority to override the president's actions by passing a "disapproval bill," a motion that requires a majority vote in both chambers. However, the president may veto it again. This time, however, Congress could still prevail by voting to override that veto by a 2/3 vote in both the House of Representatives and the Senate—a far more difficult task than passing a bill by a simple majority vote. The power given to the executive is part of an attempt by Congress to curve the nation's debt. However, the Act may informally change the constitutional process by which legislation is formulated and enacted into law.

Historical View

The controversy over the line-item veto is not a new issue; it dates back to the Constitutional Convention of 1787.[10] The legislative process was a

critical issue at the Convention because it would be the means by which power, resources, and liberty would be allocated. The emphasis at the Convention was on process, and the events of August 15, 1787, illustrate the difficulty in reaching consensus regarding the nature of bills. James Madison, Mr. Strong Col. Mason, Mr. Governor Morris, Mr. Williamson, Mr. Rutlidge, and Mr. Mercer,Mr. Pickney, Mr. Gerry, Mr. Dickenson, Mr. Sherman, debated the definition and procedure for bills at the Constitutional Convention.[11] On that particular day, Madison had proposed for the legislature to submit the bill to both the executive and judicial branches; however, Mr. Pinkney opposed noting that the process would "involve them [the Judiciary] in parties, and give a previous tincture to their opinion."[12] The Judiciary was eventually excluded. As the debate over bills continued in subsequent days, the concern seemed to be over the language regarding what constituted a bill. The debate regarding the line-item veto seems to center around Madison's concern. His concern was that "if the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolution, votes &c."[13] Thus, the formal procedure by which bills would be formulated and enacted was written in the Constitution.[14] The framers were careful to make sure that in the language, powers remained separated but interconnected and the balance of power maintained. Article 1, Section 7, Clauses 2 and 3 state:

> *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 Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of*

> *the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.*
>
> *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.*

Since 1789, Article 1, Section 7 of the Constitution has been scrutinized by political and academic circles. Does this section of the Constitution imply a line-item veto? Presidents have long debated the power of the line-item veto and even though executives admit that the power would benefit them, many have had reservations regarding its constitutionality because of the power it gives to one branch in the legislative process.[15]

Former President William Howard Taft had a concern regarding the imbalance that might occur from a line-item proposal. He stated: "While for some purposes, it would be useful for the executive to have the power of partial veto, if we could be sure of its wise and conscientious exercise, I am not entirely sure it would be a safe provision. It would greatly enlarge the influence of the President, already large enough from patronage and party loyalty and other causes."[16] Even the first executive of the United States, George Washington, was under the impression that the president had to approve or disapprove the entire bill and not just portions of it.[17] Paul R.Q. Wolfson in "Is a Presidential Item Veto Constitutional?" expresses similar sentiments: "Quite simply, bill means any singular, entire piece of legislation in the form in which it was approved by the two Houses [of Congress]."[18] Richard A.

Watson's "Presidential Vetoes and Public Policy," notes that it was not until Ulysses S. Grant became president that the request for the line-item veto became more frequent.[19] Subsequently, Rutherford B. Hayes, Chester A. Arthur, and Grover Cleveland, called for this authority. Moreover, since Franklin D. Roosevelt, only Jimmy Carter has not advocated the adoption of the line-item veto.

The Constitution describes the formal process for formulating and enacting legislation in order to take care of the needs of the country, yield to the wishes of the American people, and ensure a stable and democratic form of government, all at the same time. On Tuesday August 14, 1787, Mr. Mercer shared a concern regarding the political system they were in the process of designing. He was under the impression that it was huge mistake to think that words on a piece of paper would control people. After all, "It is The men whom it [the proposed constitution] will bring into the Govern[ment] and interest in maintaining it that is to govern them. The paper will only mark out the mode & the form. Men are the substance and must do the business.[20] Thus, the framers, in creating a political system in which a balance of power would ensure liberty and a stable form of government, stimulated the creation of factions.[21] Publius specifically addressed the concern of domestic dangers by arguing that liberty would create interest groups that would pose the greatest threat to this country. Factions would be comprised of people with similar interest who would try to influence the decision-making process. Consequently, in order to move a piece of legislation through the formal legislative process, the political system the framers created would force factions to negotiate and reach a compromise. Through the course of 209 years of compromising, however, supporters of the line-item veto believe the political system has failed as bills have now proliferated to include many unrelated items.

In the legislative process, no piece of legislation is more controversial, more heated, than the federal budget, for the legislative process determines which programs will be created, which ones will be expanded, and which ones will be eliminated. Just as with any other bill, it requires both houses of Congress to compromise before it is sent to the president. It is a slow and highly politicized process that has begun to raise some concern among Americans. As the national debt approaches $6 trillion, the demand from the American public to have both the House and the Senate work together to trim the budget has become vociferous.[22]

The decisions Congress and the president make on the federal budget directly and indirectly affect the American people. Year after year, heated debates on the budget echo from Washington D.C. over how federal monies should be spent, and interest groups make sure to be at every step of the legislative process. Social programs such as Social Security, Medicaid, student loans, environmental policy, and fiscal policy are extremely political, and for this reason special interest groups try to influence Congress in the formulation of policy. Supporters of the line-item veto are beginning to think that special interest groups are driving the policy process, and some even believe that interest groups, unable to gather enough support for their bill, persuade legislators to tag ingermane items to more popular pieces of legislation. Consequently, supporters look at the line-item veto as tool to counter the influence of interest groups.

In addition to interest group politics, the financial problems of the 1980s and 1990s in the United States led to the drastic change in the legislative process. As a result of the sky-rocketing national debt, the president was given a new tool to help curb unnecessary spending and weed out pet projects that many people think are tagged on to major bills by special interest groups.

Byrd v. Rains

The court battle over the line-item veto that ensued shortly after its enactment reveals the heated and controversial nature of the authority. Before President Bill Clinton was able to exercise this new authority on the 1997 budget bill, five congressional Democrats and a former Republican senator filed suit challenging the Line-Item Veto Act.[23] In a strongly worded opinion, U.S. District Judge Thomas P. Jackson declared the line-item veto unconstitutional.[24] Jackson's opinion stated that Congress was trying to circumvent the formal process of budget decisions, a power clearly delegated by the Constitution to Congress, specifically to the House. According to Jackson, "Congress has turned the constitutional division of responsibilities on its head" because additional legislation could easily expand president's authority to mold other legislation than just the budget.[25] To justify his decision, Jackson referred to Article I, Section 7, Clause 3 of the Constitution: "The Constitution's presentment clause requires that upon considering a bill, [the president] must reach a final judgment: either approve it or not. Where the president signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority."[26] The legal battle, however, was far from over as supporters appealed to the Supreme Court.

The willingness of the Supreme Court to hear the appeal of *Byrd v. Raines* raised some concern among supporters favoring the principles of separation of powers and checks and balances.[27] In a decision that shocked opponents of the line-item veto, the Supreme Court overruled the lower federal court's decision on procedural errors; the members of Congress who filed the law suit

did not established that their injury was personal since the president had never executed his new power.[28] The Court said in its closing remarks that their decision "neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach), nor forecloses the Act from constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act)."[29] In effect, the Court left the question open by not deciding on the constitutionality of the *Byrd* case.

Even though the Court dismissed the *Byrd* case on a procedural technicality, the Supreme Court tried to imply what their decision would have been if not for the procedural error. The Court expressed its consistency in striking down any measure where there is a delegation of powers between the branches.[30] Justice Stevens, however, did express interest in another argument advanced by members of Congress that even if the line-item veto is not exercised, it severely cripples Congress from effective negotiations by increasing the power of the executive in budget matters. The Court, nevertheless, made it quite clear that it does not have the constitutional authority to violate Article III of the Constitution: "If courts were to recognize standing in such cases, they would effectively enable losing legislators to replay political battles against their colleagues in the federal courts, which is precisely what the separation of powers concerns at the core of the Article III standing requirement are meant to interdict."[31]

The Court cleared the way for President Bill Clinton to exercise the line-item veto. In 1997, he used the newly granted power to veto 82 items, totalling $1 billion, from the 1997 federal budget.[32] A couple of items he vetoed affected people in New York and Idaho who faced financial losses as a result of the line-item veto. Unlike the first suit brought by several members of Congress in 1997, these plaintiffs had been injured. As a result, the case had

standing and was reviewed on purely constitutional grounds. Federal Judge Thomas Hogan ruled in February 1998 that the line-item veto was unconstitutional because it gives the "president, who heads the executive branch, legislative powers by letting him decide which parts [of a bill] are valid."[33]

For now, the a federal court has overruled the Line-Item Veto Act. The issue, no doubt, raises political and theoretical questions that the Supreme Court is expected to hear during the summer of 1998. Will the Supreme Court maintain its consistency in striking down legislation that delegates power from one branch to another or will it allow acts and statutes to obscure the separation of powers? The issue has brought about heated discussions regarding the principles of separation of power and checks and balances. Are those issues still relevant in a modern and highly political environment, or perhaps even more so? As the country moves forward, these questions will become even more important.

CHAPTER III

THE DEBATE: LITERATURE REVIEW

The political and theoretical controversy surrounding the Line-Item Veto Act of 1996 stems from Article I Section 7, known as the Presentment Clause because it describes the nature and process of a bill before the executive has the constitutional duty to sign or veto it. Special attention is given here to scholars from around the country who are debating the political and theoretical consequences of the line-item veto. The language in Article 1, Section 7 will be reviewed in order to understand the argument over words. The question over how effective the line-item veto will be in eliminating "pork-barrel" projects from legislation also will be reviewed. Finally, the issue of tinkering with the Constitution will be addressed, specifically the literature regarding the constitutional question regarding separation of powers and checks and balances.

The Language Debate

At the core of the debate is the language regarding Article 1, Section 7, Clauses 2 and 3. In defining the nature of a bill, opponents of the line-item veto point to Clause 2 while supporters focus their argument around Clause 3. In the argument over words, each side attempts to legitimize their position by providing information on what the framers may have meant.

Supporters of the line-item veto believe that the wording offered by

James Madison at the Constitutional Convention gives the line-item veto its constitutionality. During the Constitutional Convention, the framers were concerned that Congress would find ways to circumvent the power of the executive. Madison wrote, "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."[34] The word "&c" was Madison's way of preventing future Congresses from creating new words to describe a process to circumvent the president.

Supporters consider the line-item veto constitutional as a means to check Congress. "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," states L. Gordon Crovitz, assistant editor of the editorial page of *The Wall Street Journal*.[35] Article 1, Section 7, Clause 2 simply meant that every bill is to be referred to the executive, while Clause 3, "every Order, Resolution or Vote," in the same article and section left the door open for the executive to unbundle bills if necessary.[36]

The debate over a line-item veto was accelerated in 1987, when Stephen Glazier argued that the president already has the authority in Art. 1, Sect. 7, Clause 2. His paper, which became known as "The Glazier Thesis," was published in the *Wall Street Journal* on December 4, 1987. According to Crovitz, Glazier makes reference to an inherent line-item veto in clause 2 to counter the framers' fear that Congress would try to lump bills into one and go against the "natural scheme of statutory drafting."[37] Thus, the executive has the inherent power, according to Stephen Glazier, to veto sections of it in order to preserve separation of powers.[38]

The "Glazier Thesis" regarding an inherent line-item veto authority was very controversial in the last year of Reagan's second term and even more so throughout George Bush's term. Prompted by the Galzier paper, scholars from

around the country debated the idea that former President Ronald Reagan had the authority to wield a line-item veto. Shortly after its publication, however, attorneys of the president from the U.S. Department of Justice rejected it. A majority of scholars agreed with the opinion handed down by the Department of Justice: among them former Assistant Attorney General Charles Cooper of the Office of Legal Council, Dr. Louis Fisher, specialist on the separation of powers at the Congressional Research Service, professor Laurence Tribe of Harvard, and Philip Kurland of the University of Chicago. Each of these scholars rejected the constitutionality of the inherent line-item veto on legal and historical grounds.[39] Even Bruce Fein and William Bradford Reynold, who served in the Justice Department during Reagan's administration and had been in support of the inherent veto, discredited the Glazier proposal.

However, professor Forest McDonald, a well known historian of American founding argued that history supported the inherent line-item veto. Congressman Thomas J. Campbell of California, who had been a member of the House Judiciary Committee and a former Supreme Court Clerk and law professor at Stanford University, argued that there really is no concrete notion that proves or disproves the inherent line-item veto.[40] He urged the Bush Administration to come up with a test case to determine once and for all the constitutionality of the inherent line-item veto. So strong was his opinion that he introduced a resolution in the House to develop a test case for former President Bush. Campbell said on the House floor that the inherent veto power is "a power that I believe the President already has," and he urged President Bush "to exercise his inherent authority to use a bit of discretion and single out those parts of a bill on which money really ought not be spent and at the same time let the other parts of the bill become law."[41] Like former presidents of the United States, George Bush, despite the pressure, also stepped back from

accepting the notion of an implicit line-item veto. After all, it was discredited from all sides of the political spectrum as well as academic circles. The argument, however, continued with the passage of the Line-Item Veto Act of 1996.

The Boondoggle Debate

As the national debt approaches $6 trillion, supporters believe the line-item veto will help weed out pork-barrel projects and serve as the only way to check Congressional overspending. Opponents, however, believe the line-item veto will not have the same effect at the national level as it does at the state level. At the center of the debate is whether the president will be in a much better position in the legislative process to weed the "pork" from budget bills if he is given the line-item veto.

Bruce Fein is a supporter who argues that the line-item veto is constitutional because the Act concurs with Art. 1, Sect. 7, Clause 2 of the Constitution and *The Federalist*.[42] Fein shares the concerns that most supporters have in regard to the unbelievable proliferation of omnibus spending. "The aim," Fein states, "is to avoid adopting policies that could not command majority support in isolation but might prevail by piggy-backing on more attractive proposals."[43] According to Fein, "the legislative process is skewed in favor of excessive federal spending by making presidential vetoes politically costly. Who would have the boldness to veto a bill if that meant holding up Social Security checks and veterans pensions."[44] Fein believes the Line-Item Veto Act would force Congress to itemize expenditures. In regards to *Federalist* writings, the line-item veto is in line in one other respect—"the surfeit of lawmaking."[45] According to Bruce Fein, Alexander Hamilton applauded "every institution calculated to restrain the excess of lawmaking because the injury which

may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[46] Fein concludes by stating that Congress can always rescind the line-item veto by a majority of votes in both chambers.

John J. Spitzer also writes that supporters of the line-item veto believe the power granted to the executive is warranted on account of the numerous boondoggles and pork included in bills.[47] Even Donald Regan, former secretary of the Treasury, stated once before the Senate Committee on the Judiciary that the framers would "undoubtedly pass 'separate appropriations bills for discrete programs or activities, rather than omnibus bills encompassing a variety of related and unrelated matters."[48] The political system must change to reflect the changing times.

Louis Fisher, a scholar at Congressional Research Service who specializes in executive-legislative relations, disagrees with the supporters of the line-item veto regarding omnibus bills. After all, the first appropriation bill passed in 1789 was an omnibus bill containing funds for military and civilian measures.[49] Furthermore, many members in that first Congress were also framers who had been at the Constitutional Convention in Philadelphia; they knew exactly the realm of politics involved over the nature of bills. The historical evidence clearly undermines Donald Regan and the proponents' arguments for the line-item veto. Paul R.Q. Wolfson stated in the latter 1980s that the framers were familiar with detailed and complex appropriations bills, including ones with riders.[50] After all, "riders" were a political issue in the British parliament long before American independence, a practice known as "tacking."[51]

The proponents' strongest argument for the line-item veto comes from its successful implementation in various states, where governors sign itemized appropriations bills. Gerald F. Seib, staff reporter for *The Wall Street Journal*,

states that conservatives note that 43 state governors have this authority when dealing with their budgets.[52] The fear of being vetoed is enough to force legislators not to add too many spending projects. The item veto has worked well in states and they reason it should work at the national level.

Louis Fisher, however, challenges Gerald F. Seib's argument stating that there is an egregious misconception regarding the line-item veto because the political realm state executives operate in is quite different from the national arena.[53] Fisher points out that there is an inherent problem in the way bills are written at the state level. First of all, bills are itemized at the state level. Each line stipulates what is to be done, how its going to be done, and the exact money appropriated. At the national level, however, the budget is one large dollar figure. Appropriations bills at the federal level are not itemized in the same manner as states. For example, an $864.5 million Energy and Water Development Appropriations Bill for fiscal year 1985 contained a specific amount and stated that the amount was to be used for river and harbor, flood control, shore protection and related projects authorized by law.[54] While the bill earmarked some funds for a project in New Jersey, another one in Kentucky, and a few others, the total amount of earmarked funds was only $32.8 million out of $864.5 million. The manner in which funds were to be spent was stipulated in a separate House Report (98-866): "$25,000 for Kake Harbor in Alaska; $200,000 for Lytel and Warm Creeks in California; $25,000 for Jonesport Harbor in Maine; and so forth."[55] Reagan could not have eliminated any of them using the line-item veto. Consequently, Louis Fisher believes the line-item veto would not have the same effect at the national level as it does at the state level.

Some believe that the current political climate must clearly outweigh the 209 year old written document in determining the constitutionality of the line-

item veto. Michael Higgins cites experts who believe the line-item veto is not as radical as many believe. When is comes to budgetary items, Congress usually "authorizes the president to spend money, without mandating that it be spent."[56] Higgins is implying that the president has the impoundment power, the process by which the president signs the bill and then proceeds to rescind part of it by not enforcing sections of it, yielding results quite similar to the line-item veto. The line-item veto is merely an extension of that power. Others agree. John Harrison, a professor at the University of Virginia Law School, states that Congress has the constitutional right to delegate its power as long as it stipulates 'intelligible principles.'[57] Elizabeth Garrett, a law professor at the University of Chicago, agrees that the power to veto sections from a major piece of legislation maintains the separation of powers.[58] Garrett implies that the Court should take into consideration the political context Congress has evolved into and maintains that the law has merit as long as it is used for spending. Other conservative legal theorists, similar to Stephen Glazier, believe presidents have always had the power to veto sections from a bill because it is a power delegated to Congress by the Constitution in Art. 1, Sec. 7, Clause 3— "Every order, resolution, or vote".[59]

The Tinkering Debate

The Constitution of the United States defines the policy process by giving each branch of government certain basic functions: Congress makes the laws, the executive enforces the laws, and the Supreme Court interprets the laws. The line-item veto grants the president the power to decide which items of a bill to sign and which ones to veto. Is that making law? Congress may have obscured the basic functions as well as clouded the accountability of

government. The delegated function may be tinkering with the balance of power that the framers established between the branches.

Nelson W. Polsby shares the concerns of those scholars who have raised issues concerning the constitutional and political impact of the line-item veto.[60] Polsby argues that the line-item veto would be a direct attack on the very important and sacred principle of separation of powers; it would violate the realm of politics in which diverse interest groups operate.[61] Congress was designed to be the place where factions would pervade and would be forced to iron out their differences in order to move their piece of legislation through the political process. The end result would be compromise, an essential part of the political and democratic process. The line-item veto would take politics out of the legislative process and shift it toward the executive. The line-item veto would clearly shift the leverage that Congress constitutionally has over the president in negotiating a compromise. According to Polsby, "The item veto would greatly trivialize the work product of Congress by requiring the president's acquiescence on each detail of legislation."[62] Congress would loose its ability to craft legislation and would dwindle to a branch that would merely overturn vetoes. Polsby concludes that the line-item veto is a bad idea and almost certainly unconstitutional.

Neal E. Devins, on the other hand, argues that the excitement and controversy over the line-item veto has been exaggerated. In a political climate where interest groups pervade the halls of Washington, the power is not likely to tinker with the balance of power between the branches. The interest-group politics that permeate the legislative process in Congress are the same politics that will not allow the president to veto pork from major bills.[63] The only pork that will be eliminated are the extreme silly pet projects that lack a large number of constituent support.

J. Gregory Sidak, Resident Scholar at the American Enterprise Institute for Public Policy Research, and Thomas A. Smith, University of San Diego School of Law, raise a concern regarding the consequences the line-item veto will have on the political system. The line-item veto would shift the responsibility to the executive and Congress may avoid the responsibility and accountability that goes along with hard budgetary decisions.[64] Congressmen can satisfy their constituency and blame the executive when their measure is vetoed from the bill. When the basic constitutional functions are obscured, accountability and responsibility are harder to detect by the American people, especially when one party controls both branches of government.

Publius had concerns regarding the concentration of budgetary decisions in the hands of one branch. So strong was the concern that in 1787 Publius noted, "This power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance and for carrying into effect just and salutary measures."[65] The power of the purse placed in Congress and not in the executive clearly demonstrates the most important check on the executive. For those who argue that the line-item veto will merely restore power to the executive, Devins states that the line-item veto will not restore executive power but only expand the president's power of the purse.[66] The separation of power does not exclude the executive from the budgetary process, for the president can propose to Congress what the office of the executive may desire and then proceed to sign it into law if Congress heeds the executive's advice.

The Budget and Accounting Act of 1921 gave the executive an additional role in the budgetary process, the result of the astronomical debt the country incurred in World War I. Unlike the Line-Item Veto Act, Devins notes

that the formal role given to the president by the Budget and Accounting Act is clearly a subordinate role, the president can merely submit a proposal; Congress maintains the constitutional function of preparing the budget and the president still maintains his constitutional function in the budgetary process of signing it into law or vetoing the legislation. "The power to recommend, and especially the power to veto, enable the President to communicate vigorously his views to Congress and to participate actively in the process."[67] The formal role given to the executive allows for both branches to communicate their ideas sooner, while maintaining their basic functions separated yet interdependent.

Alan Morrison of Public Citizen, a Washington-based public interest litigation group, has objected to the state comparisons offered by supporters of the line-item veto. Supporters continue to make reference to how successfully it has worked in states without realizing that there is a significant difference in the design of the powerful item pen as it applies to the states and the national government. First of all, those states that have the line-item veto have the power written in their state constitutions, unlike the power that was given to the executive by way of statute.[68] Second, even if each chamber in Congress passed a statute that would set a rule for each chamber to itemize their versions of a bill before being sent to the president, there is no inherent safeguard that would permit a new Congress from revoking the rule; a simple majority would nullify the line-item veto statute. "In considering the 'rules' item veto, it will show that, although Congress may have the power to enact such a mechanism, it must fail as a legal means of binding Congress because either house could renounce the 'rules' item veto at any time without the consent of the other house or of the President."[69] It is important to note that the law would be temporary at best and would undermine the important element of stability espoused in *Federalist 47* and *51*, not to mention the unconstitutionality of

vetoing partial items from a bill.

Budget bills are extremely heated and controversial because bills are the means by which people scramble for a piece of the federal pie. A power struggle no doubt ensues each year between members of Congress and the executive over how, to whom, and how much should be allocated. Anthony R. Petrilla makes it quite clear that the delicate balance between the branches must remain intact, but he also points out that a line-item veto, crafted just right, might help balance the leverage that Congress has over the executive regarding what is included in budget bills. Statistics show that from Franklin D. Roosevelt to Ronald Reagan, the executive was overridden 35 percent of the time as compared to 7.2 percent for non-budget bills.[70] The Constitutional power of the executive to veto is relatively weak compared to other pieces of legislation. The leverage that Congress possesses over budget bills, however, can be leveled. In designing a line-item veto, according to Petrilla, careful consideration should be given to maintaining the delicate balance of power.

With a Republican-controlled Congress and a Democratic president in 1995, the political struggle going into budget negotiations was clear from the beginning. One only has to look at the government shutdown of 1996 as an example of what can happen when both sides refuse to compromise. Prior to 1997, presidential and Congressional budgets embraced different initiatives and concerns. Each branch was forced to compromise some points in order to move the legislation through the formal process. However, with the Line-Item Veto Act of 1996, never had a budget process, like the budget of 1997, embraced a blend of executive and legislative powers.[71] On one hand, the executive maintained the power to sign and veto legislation. On the other hand, the executive garnered quasi-congressional powers by determining which sections to veto and which ones to sign into law. The 1997 budget bill was an example

of how Congress and the president informally blended the formal roles delegated to each by the Constitution and placed them in the executive. Henry L. Chambers, Jr., and Dennis E. Logue, Jr., argue that when an executive decides on the substantive measures in a bill, the executive is exercising quasi-legislative powers. Thus, the greatest concern, according Chambers and Logue, is over the meaning of separation of powers. Does one argument simply mean that the power given to each branch by the Constitution must be adhered to verbatim and be read at face value, or does the argument stem from a deeper understanding over the issue of separation of powers and checks and balances as espoused in *Federalist 47* and *51*? Chambers and Logue believe that the understanding stems from a lack of substantive information regarding the context behind separation of powers. The framers' intent was to make sure that powers remained separated and interconnected in order to avoid evolving into a tyrannical government.[72] Conflict between the branches is merely democracy at work. Petrilla also comments on the principle of balance of power. He states, "if the balance of power functions properly, the branches of government would settle policy disputes by pitting these checks against each other until fighting became counterproductive and compromise emerged. The balance of power is askew when one branch's check is less of a threat to another branch, and, thus, the branches lack incentive to compromise."[73]

Opponents to the line-item veto also believe that compromise and the power of persuasion are essential parts of the democratic process. Leaders have been judged ultimately on their ability to gather support. Members of Congress as well as the executive are caught in a constitutional process that requires constant communication, negotiation, and compromise. If the shift in power is made toward the executive, which the line item veto will certainly do, the president could mislead Congress. Sharon Rush, a law professor at the

University of Florida, points out that "I may want 'A' so badly that I'm willing to go along with 'B' and 'C' – and then all of a sudden 'A' isn't in there anymore."[74] Congress can try to override his line-item vetoes; however, the process becomes more difficult. Giving the president the line-item veto would weaken the essential part of the democratic process that Congress has with the president in maintaining a balance of power. Petrilla admits that without compromise in the form of projects often included in bills, "the power of the purse is of limited use."[75] After all, riders are a very important part of the political process; they are the result of extensive negotiations and Congress can't delegate the means by which the balance of power is maintained. The interest of the American public is at stake. Riders are people's wishes manifesting themselves in the political process.

The veto, in its constitutional form, is ultimately a cry to the American people to wake up and pay attention to what Congress may be trying to legislate on rather quickly or unthoughtfully, not to mention the immediate purpose to protect the executive from the legislative branch. Alexis de Tocqueville, a French philosopher who travelled and analyzed the political and social institutions of the United States, had similar sentiments regarding the appeal that vetoes have with the American people. In *Democracy of America*, he states, "The veto power... is a sort of appeal to the people. The executive power, which without this security might have been secretly oppressed, adopts this means of pleading its causes and stating its motives."[76] In the short run, the line-item veto could prove to be an effective weapon. However, the cumulative effect in the long run could be disastrous. The frequent use of the line-item veto could quench the nice appeal that it has when rarely used and could very well be lost in the shuffle of regular vetoes. The frequent use of the line-item veto would bring routine and add complacency.[77] Furthermore, obscuring the

basic functions of government would make it more difficult to pinpoint responsibility and accountability.

The line-item veto has brought many issues to the forefront for discussion. How much of the traditional approach the framers provided should remain intact? Should our society look at the framers writing for guidance but not hinge on their every word? Has *The Federalist* lost its meaning in a modern world? Quite the contrary; *The Federalist* continues to provide a solid backbone to an ever changing political context. Society must look at the political observations behind Publius' words in *Federalist 51* before it decides to tinker with the political system.

> In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[78]
>
> --- Publius

Has this observation proven false, or, perhaps, is it no longer true? If it still has meaning then the principle of separation of powers remains a necessary auxiliary precaution.

CHAPTER IV

IN DEFENSE OF SEPARATION OF POWERS

> Miserable indeed would be the case, were the same man, or the same body to exercise those three powers ... of enacting laws ... of executing the public resolutions, and ... judging the crimes of or differences of individuals."[79]
>
> --- Montesquieu

Publius' concern with limiting the power of government reveals how carefully the framers thought through the framing of a free and stable government. *The Federalist* offers a sustained, coherent explication of the Constitution and its animating features. This collection of essays are instrumental in providing background information regarding the political context of the framing of the Constitution. According to their explication, the Articles of Confederation were not working and the need for a new political system was paramount. The American people, however, feared centralizing power; consequently, the essays attempt to provide support for the new government by explaining to the public why the new government would not become despotic. The important principles of separation of powers and checks and balances must clearly outweigh the rather reactionary impulses of a generation. Stability through compromise is what has made America's political system work for two-hundred and nine years.

An Overview:
TheFederalist and the Constitutional Convention

The *Federalist* offers modern constitutional scholars a wealth of information concerning the ideas, philosophies, and intentions of various framers and supporters of the Constitution. The issue of sovereignty and how that power would be checked were at the center of heated discussions. Would power be centralized at one level of government, or would power remain in the hands of each respective state? If power were to be granted to a national government, were there safeguards against evolving into a tyrannical government. In designing a government, four primary concerns were espoused at the Constitutional Convention. According to Publius, the first two primary concerns focused on how government must possess power and on how "the means [power] ought to be proportioned to the end," the delegated power of the national government must be enforced.[80] The latter concerns are based on the observation that all governments become tyrannical, including governments based on majority rule. The *Federalist* reveals much of the concerns of the Constitutional Convention.

The experiences that the Articles provided led the framers at the Convention to combine "requisite stability and energy in government" while also paying attention to liberty and republican form.[81] The political and economic conditions were in such a torpid state that the framers believed that energy in government was essential for government to accomplish its goals and to provide security against external and internal dangers. The Articles provided a framework that initially satisfied the people in the thirteen colonies. It provided local control while the national government was composed a unicameral legislature whose members were chosen by state legislatures. The Congress,

under the Articles, would elect the president of Congress and the various members of the judicial committee. In order to pass a law, three-fourths of the states had to agree and unanimity was required in order to amend the Articles. The ineffectiveness of the Articles was partly due to the inability of gathering consensus among participating states.[82] In addition, the inability of the national government to tax and to force states to abide by national law in order to achieve national goals led to further problems. Thus, the framers sought to have a government that would be able to control its people and respond in an efficient and proper manner. Stability was a major principle discussed at the Convention as being essential to national character and to the confidence of the people in their government, and energy in government was essential in providing stability and security against abuses as much as reasonably possible.

The other two concerns at the Constitutional Convention were that all governments become tyrannical, including governments based on majority rule. *Federalist 10* specifically addressed the concern of tyrannical dangers by arguing that liberty would create factions and would pose the greatest threat to this country.[83] Factions, groups of people with similar interests who would try to influence government, would, no doubt form under a free government causing great difficulty. Conversely, to eliminate the causes of factions, Publius believed, one must remove liberty, an impossible option by any means. Since no cure for faction was feasible, one could only try to control its effects. Publius argued that only through a representative system that encompassed a wide land area could man's self interest and its tendency to form factions be guarded against. Publius attempts to explain the purpose of the proposed Constitution by revealing the difficulties the Convention must have experienced in the formation of a proper plan. Republicanism and separation of powers, espoused in *Federalist 47* and *51*, would ensure stability and liberty by keeping those who

hold power dependent on the people.

In the midst of all of this, Publius notes that members of the Convention were breaking new ground because of the lack of precedent for forming a republican form of government.[84] However, what the framers lacked in precedent, they made up for it in experience. Recent memories of England's precarious laws clearly defined the goals for the framers at the Convention. Stability and a form of government that would ensure liberty were their motivating objectives.

Federalist 47 and 51

Federalist 47 and *51* are some of the most interesting papers for several reasons: they deal with the essence of human nature, the problem in maintaining a free government, and they provided the principles of separation of powers and checks and balances for maintaining a delicate balance of power. Publius studied how the first principle of separation of powers had operated under the Articles of Confederation and each state's constitution. In the analysis, Publius noted that the separation of powers under the Articles and various state constitutions were not really separated as people thought or as Montesquieu would have envisioned.[85] As a result, people could very well have been in danger of the emergence of a tyrannical government. *Federalist 47* and *51* offer a political and philosophical analysis of the rationales behind the issues of separation of powers and checks and balance that are needed in order to safeguard against a tyrannical government.

In *Federalist 47*, Publius doubted very seriously that separation of powers could exist whenever the executive was chosen from members of the same rank, as was found in Congress and each state legislature under the Ar-

ticles.[86] What they had, James Madison argued, was a system where power was not completely separated. Even though some states had excellent principles within their framework of government, Publius argued that power was not completely separated as Montesquieu had envisioned. Publius went even further and implied that the practice of separation of powers, as it existed under the Articles and each state's constitution, had been misconstrued. The principle did not mean having offices with designated and independent powers or having members serve in more than one office at the same time, but preventing people from influencing those holding other offices as much as possible, for that was truly separation of power. The purpose of having separation of powers structured into the proposed constitution was to reduce the likelihood of people sharing power in order to prevent an authoritarian government and to preserve a democratic system of government. Publius stated that each branch must be separated in terms of no member being able to serve in more than one office at a given time. Publius notes in *Federalist 47*, "The accumulation of all powers legislative, executive and judiciary in the same hands, whether on one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[87] Separation of powers, however, must not be completely separated, for each independent branch could become in itself tyrannical and impose its authority on its people or on the other branches. The message here is checks and balances.

Publius noted that the three branches should be separated but interconnected.[88] A balance of power should exist between the three in order to combat the extremes; otherwise, each branch could itself become tyrannical. The power of the legislature should have superiority because it is closer to the people. The executive and judicial branches should be limited in scope and simple in nature, while the legislative branch should have the ability to expand

its powers without exact limits; however, "after discriminating therefore in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next most difficult task, is to provide some practical security for each against the invasion of the others."[89] After all, in Virginia, Publius implied, power is separated too much, and in Pennsylvania, the legislative branch has too much power. All power cannot be placed in one area. In this selection, Publius was addressing people's worst fear that the proposed government would become despotic. To counteract that fear, Publius mentioned how the legislature would periodically ask for the consent of the people through elections. He even suggested allowing the legislative branch to formally alter and expand the proposed constitution to meet the needs of its people, since it was the best representation of the people and would protect their rights.[90] He discussed how each branch would have to ultimately get approval, whether directly or indirectly, from its respective constituency.

The new governmental structure was designed to allow "ambition to counteract ambition."[91] *Federalist 51* expands on the principle of checks and balances and addresses the rationale behind the importance of separation of powers. According to Publius, separation of powers does not mean three branches working independently; it means power is divided among three branches that are interrelated and limited in terms of what government will be able to legislate.[92] At the center of separation of powers is the manner in which ambition is going to be restrained, and the only way to restrain ambition is to allow self interest to moderate self interest. The rationale behind the political system is based on "man" exerting as much power as has been bestowed on each office. The American political system is not based on benevolence and surely not on branches delegating some of their power to other branches.

In order for a branch to function, it has to work with the other branches;

this is especially true of Congress and the executive. The separation of powers acts as a filter through which political demands flow before they are translated into public policy. Separation of powers plus checks and balances equals compromise. Through compromise, unpopular laws are filtered out, leaving legislation that has been moderated. Publius clearly saw separation of powers and the principle of checks and balances as a process designed to safeguard against arbitrary and excessive government action.

Thus, the Constitution provides the principles of separation of powers and checks and balances. Each branch is dependent on the others because all three must work in concert to make the political system function. Congress has the constitutional power to make laws, the executive has the power to enforce laws, and the Supreme Court has the power to interpret laws. The president cannot make laws, but he can either veto a bill or sign a it into law. Congress in the only branch with the inherent power to decide what legislation will go to the president. If the president vetoes a bill, Congress can then override the president's veto by a 2/3rds margin in each chamber. Neither branch has an absolute negative on the other. The 2/3rds margin needed to override a veto is not easily achieved; thereby, the executive whose veto is overridden must be going against popular will and so must be checked.[93]

The system of separation of powers and checks and balances is clearly what holds the political structure of the United States together. The U.S. Supreme Court can declare a law unconstitutional.[94] Congress can check the Supreme Court, however, by changing jurisdiction, altering the number of judges, or in conjunction with 3/4 of the states, add an amendment to the Constitution. The Court is further checked by the way Supreme Court judges are chosen to the bench. The president has the appointment power, but the Senate must confirm presidential appointments. If the Senate, representing all

50 states equally, decides not to grant the president his choice, the president must compromise and choose another individual that is acceptable to the Senate. Judges, once appointed and confirmed by the Senate, serve life terms in order to insulate them from factional politics. However, the Supreme Court is not immune from the principles of checks and balances and separation of powers; their power is also checked because they can be removed not by the president but by Congress through impeachment proceedings, similar to the process by which the president can be removed. The principles of separation of powers and checks and balances are critical in maintaining a stable and functioning system based on a balance between the three branches. *Federalist 47* "declares that the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive powers, or either of them."[95] In sum, the framers laid the rationale in a political framework that would operate symbiotically.

> Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[96]

Marbury v. Madison

The basic arguments surrounding the Line-Item Veto Act include elimi-

nating boondoggles, the possible augmentation of power to one branch, and, more importantly, the constitutional principles of separation of powers and checks and balances. George W. Carey of Georgetown University, believes there are many scholars who have the wrong understanding of the Madisonian model.[97] They just don't understand the rationale behind America's political system. The main concern of James Madison was the prevention of tyranny at any price. Interestingly, in all the literature reviewed about the Line-Item Veto Act, no one made reference to one of the most important Court decisions in American history—*Marbury v. Madison.*

In 1801, incoming President Thomas Jefferson was fuming over what he felt was outgoing President John Adams' attempt to appoint a series of midnight judges from his Federalist political party. When President Thomas Jefferson was sworn in, he ordered his secretary of state, James Madison, not to deliver the commission. William Marbury, one of the midnight appointees, asked the Supreme Court to intervene, and in a court case that continues to have great importance today, the Supreme Court not only firmly reaffirmed judicial review but also prevented a delegation of power. The Supreme Court struck down a law that Congress passed giving the Supreme Court the power to enforce any congressional or executive appointment. In the opinion of John Marshall, Congress had no right to give the Supreme Court any power that was not already delegated to them in the Constitution.[98] The principles of separation of powers and checks and balances must be maintained.

> The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States...The principles, therefore, so established, are deemed fundamental: and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent....The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that

> limitation committed to writing, intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act... Between these alternatives, there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not a law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature, illimitable.[99]

There seems to be a egregious misconception regarding *Marbury v. Madison*. It is a widely held belief that the case provided the opportunity for the Supreme Court to give itself the power of judicial review. However, in reality, the Court exercised self-restraint based on the written words found under Article III of the Constitution. In its decision, the Supreme Court adhered to the rule of law. Orrin G. Hatch, University of Cincinnati, maintains that "Marshall did not lay claim to any special power to enforce the Constitution or to police the other agencies of government. The Chief Justice merely reasoned that the Supreme Court must resolve disputes over which it has jurisdiction according to the law."[100] Separation of powers and checks and balances have been this country's greatest source of security. The framers thought that "the 'case or controversy' requirement would limit the Supreme Court to 'cases of judiciary nature' as opposed to cases susceptible to political resolution or cases without concrete injuries to specific parties."[101]

Since *Marbury v. Madison*, the Supreme Court has been consistent in striking down statutes and laws that violate the principle of separation of powers and undermine the principle of checks and balances.[102] The most notable ones are *Kendall v. United States ex rel. Stokes*, 37 U.S. (12Pct.) 524 (1938),

which invalidated the impoundment procedure by which the executive would refuse to enforce segments of legislations, and *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579 (1952), which invalidated the inherent power the executive thought he had to order the Secretary of Commerce to seize the nation's steel industry during the Korean undeclared war. The court stated that "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[103] Time and time again, the Supreme Court has maintained that the rule of law helps maintain stability and to deter the remote possibility of centralizing basic functions. No matter how far the United States advances, "ambition must...counteract ambition."[104]

CHAPTER V

CONCLUSIONS: TO TINKER OR NOT TO TINKER

Marbury v. Madison serves as a vital link between what the framers may have meant in their writings at the Constitutional Convention and current interpretations of the Constitution coming out of academic circles. Keep in mind that the framers were serving in government in the early stages of the American republic, and for this reason, the case of *Marbury v. Madison* is extremely important; it provides a firm political and theoretical foundation and springboard concerning what the framers actually meant. Formal process was an important theme espoused at the Constitutional Convention of 1787. The rule of law was critical to maintaining stability and delineating the formal ways of conducting the operations of government. Thus, *Marbury v. Madison* serves as a vital link in communicating the principles and ideas from constitutional writing to governing.

Assessment Regarding the Informal Over the Formal Process

William Gangi, professor of political science at the University of Wisconsin at Madison, makes a key point supporting separation of powers and the checks and balances. He notes that all governments tend to be tyrannical, even majoritarian forms.[105] Gangi notes that even the Supreme Court, which at times

is often criticized as being the least democratic, does operate under the system of checks and balances. It may deviate from time to time from its constitutional role, but the principles of separation of power and checks and balances will pull it back in line with the other two branches.[106] It may take several months or years, but a balance of power will be maintained. Gangi notes that there is a formal process by which government is conducted and "as long as majorities act within the powers granted their actions are constitutional ones," regardless of whether the issue is morally and ethically wrong or right.[107] Burning the American flag, for example, is a heated topic that in many eyes is wrong; however, it is legal (*Texas v. Johnson* 517 LW 4770, 1989) because it is constitutional. Constitutional validity does not make an issue right or wrong, it just makes it legal within the confines set by the Constitution.

The Constitution sets the formal process by which amendments can change the written words of the Constitution itself. Since 1789, thousands of amendments have been proposed; however, only 34 have been sent to the states for ratification, with only 27 actually garnering the required three-fourths of the states to adopt the amendment and change the written words of the Constitution.[108] The framers did allow for change when they wrote the Constitution, and as early as 1791 and as recently as 1992, this process has been employed.[109] The formal process is especially critical if it involves changes to the political structure. The debate centers around the stability of America's political system because obscuring the formal process could lead to a concentration of power.

A very important distinction must be made between the external structure that the Constitution created and the structure that allows the changes to occur in the first place. Madison was concerned about the possibility of consolidating power by changing the constitutional structure. So great was the fear of this possibility that Madison issued another declaration in 1796: "The

American government ought to avoid all imitations of a well-known model in which certain parts possess 'independent and hereditary prerogatives,' and the whole system depends for its energy on its members having 'a personal interest in the public stations' which they hold."[110] While most of the changes to the Constitution have involved internal changes that do not affect the system, some have included changes to the structure and are at the center of debate. While change is inevitable and often welcomed, certain changes to the Constitution are questionable. Two particular amendments stand out and could be said to have started the tinkering game.

The 17th and 22nd Amendments

The 17th and 22nd Amendments changed the manner in which the political system operated. The 17th Amendment changed the manner by which senators were chosen. Before the 17th Amendment was passed, each state legislature would choose two state senators. By having state legislatures decide on the two senators, Publius tried to ensure that characteristics such as experience and virtue would prevail.[111] State legislatures were designed to act as a filter, filtering out the "passion" of people and factions and adding security and stability to the system. That is why, according to the *The Federalist*, U.S. Senators serve staggered terms and serve for six years, with a third of the seats up for reelection every two years. In the House of Representatives, every single representative goes up for reelection every two years; the president every four years; and supreme court judges serve based on good behavior.

The 22nd Amendment further changed the system that the framers created. *The Federalist* stated that the desire for reelection would keep the leader from abusing the powers of the executive because he or she would again have

to secure the people's approval.[112] The important notion here is that people must be made responsible and be included in the governmental process.

While the 17th and 22nd Amendments could be considered tinkering with the system, they were formally added. The problem with the line-item veto is that not only does it circumvent the formal process by which the Constitution can be amended, it drastically changes the formal process by way of statute. J. Gregory Sidak states; "a statute and a constitutional amendment differ vastly in their likely efficacy in protecting future generations."[113] The law is ephermeal. The War Powers Act of 1973 serves as an analogy of how an act or statute can easily cloud the principles of separation of powers and checks and balances.

The War Powers Act

Dating back to the Constitutional Convention, the president's war power has also been controversial. Does the president have the sole authority to conduct and make war or is Congress included in the decision making. In 1973, Congress passed The War Powers Act, a statutory law intended to restrict the executive from arbitrary action in foreign affairs.[114] The Act reinforces congressional power through the legislative veto that Congress is granted by the Act. In general, The War Powers Act forces the executive to consult with Congress before involving troops in military action abroad for more than 90 days. The Act is relevant to the discussion because the legislative veto raises issues concerning separation of powers and checks and balances.

The 1973 Congress thought that the War Powers Act of 1973 merely reinstated what was already granted to them by the Constitution: "the residual authority over the entire domain of foreign policy--not just the war power."[115]

Several questions, however, emerged: Is the legislation constitutional? Does the law infringe on the powers of the executive? The answers to these questions may shed light on the constitutionality of the line-item veto.

At face value, the president could argue that the Constitution gives his office latitude when it comes to foreign affairs. However, constitutional history states otherwise, as well as the experience of presidents. In foreign matters, every situation the executive faces must be addressed together with Congress, formally or informally. After all, Congress has the power of the purse. The executive does not have total latitude in foreign affairs because treaties must be approved by the Senate. The president does have executive agreements he can resort to; however, executive agreements don't carry as much clout as treaties because executive agreements are transitory, changing with every incoming administration. Treaties, however, are binding on every administration and in effect until formally changed.

Ten years later, in a case that may have severely crippled The War Powers Act, the Supreme Court ruled in the case of *Immigration and Naturalization Service v. Chadha* (103 S. Ct. 2764) that the basic functions of government must not be infringed upon.[116] The *Chadha* case involved a deportation issue in which Congress vetoed an action from the executive. Chadha was an East Indian who was legally admitted into the United States in 1966. When his visa expired in 1972, deportation proceedings took place. An immigration judge ordered that Chadha's deportation be suspended because he met all of the character requirements. When the Attorney General of the United States conveyed the information to Congress, Congress had the power under section 244(c)(2) of the Act, 8 U.S.C. 1254(c)(2), to veto the Attorney General's request that Chadha not be deported. The House Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law, on December

12 1975, denied permanent residence to Chadha and five other aliens in a resolution that was voted on before time had been allowed for the resolution to be read by other members of the House. The motion was even carried out without ever going through the Senate. Chadha appealed and Chief Justice Burger issued the court's opinion that Congress's veto was unconstitutional.

In the *Chadha* case, the court maintained that the legislative veto had violated the sacred principle of separation of powers, specifically the presentment clause of Article 1, section 7, clause 3.[117] Congress did not have the power to tinker with the presentment clause by allowing a one-house or two-house veto. The framers were very specific in delegating legislative powers to each branch; each branch was responsible for certain functions and Congress was not delegated the power to veto. Chief Justice Burger states, "the President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident Laws."[118] The president's veto power is limited as well in that Congress can override the veto by a two-thirds vote in each chamber, thereby preventing the executive from exercising arbitrary power. In the case of Chadha, not only did Congress exercise executive powers, but it went further by exercising judicial powers as well. Justice Powell concurred: "When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country, it has assumed a judicial function."[119]

Justice White dissented with a very strong opinion of his own. In his opinion, the majority opinion should have been defined along "narrower grounds of separation of powers."[120] Justice White couldn't believe the broad interpretation handed down, for it gave the legislative veto a severe blow. It may weaken hundreds of provisions in which the legislative veto has been used. Hadley Arkes believes that the *Chadha* case clearly weakens if not nullifies the

War Powers Act.[121] The ruling clearly undermines measures found under the War Powers Act and agency rulemaking, some of which affect the independent regulatory agencies. Justice White states, "From the summer of 1787 to the present the government of the United States has become an endeavor far beyond the contemplation of the Framers. Only within the last half century has the complexity and size of the Federal Government's responsibility grown so greatly that the Congress must rely on the legislative veto as the most effective if not the only means to insure their role as the nation's lawmakers."[122]

The War Powers Act continues to have supporters who argue that the Act is constitutional. Supporters argue that the wording in the Constitution in Article One of the Constitution of "declaring war" can be implied by the president to mean make war. Congress also believes that the War Powers Act of 1973 is constitutional.[123] The question regarding the encroachment of powers remains in the area of making war; however, that same question on encroachment is now entering into the domestic budgetary sphere with the potential for expansion. Giving the line-item veto to the executive could very well be the last straw that will break the political backbone of this country.

Concluding Remarks

The power struggle between Congress and the president has long been noted over the nature of bills. A bill must be submitted to the executive and the executive must sign or veto the bill in its entirety, as specified in Art. 1, Sect. 7, Clause 2. Clause 3 was designed to prevent Congress from substituting another name for a piece of legislation that could possibly circumvent the president. After all, the same "&c" that was used in reference to bills in the

language debate was used for other matters relating to domestic and foreign commerce, as well toward export/import duties.[124] At the center of the line-item debate is not the language but the context behind the language found in Art. 1, Sect. 7, Clause 2 and 3. Clearly, the framers understood the legislative process quite well. *The Federalist* is a testimony of those realities associated with the power struggle over legislation.

The line-item veto upsets the delicate balance of power that the framers of the Constitution originally established. What is actually taking place is that Congress is increasing the power of the executive branch because the process of overriding vetoed bills is extremely difficult. From 1789 to 1998, the executive branch has exercised about 1,419 non-pocket vetoes,[125] with about 7.2 percent of the total overridden.[126]

The line-item veto could lead to a cataclysmic chain of events. Even though the Act is temporary, it can serve as a precedent for additional acts and statutes that could further conflate the basic functions of government. It could transform the Constitution from an enduring document that has provided stability for the last 209 years to one equal to a statutory law that can be easily rescinded. The debate on its effects on the political system will surely continue. The American people no doubt will continue to clamor for an end to torpid government, failing to realize that it is the result of the principles established through the Constitution to secure liberty.

If Americans continue to clamor for a line-item veto to prevent Congress from overspending, people could very well begin the chain of events toward concentration of power. If Americans demand efficiency, they would do well to remember that dictatorship and unitary systems provide efficiency but at the price of liberty. To use the Constitution to support the line-item veto is unfounded. The only way to support the line-item veto is to formally amend the

Constitution, to change the written words. However, while written words will no doubt continue to change the Constitution, the rationale and historical context behind the founding must not be lost. From *Marbury v. Madison* (1803) to the most recent decision in the second opinion of *Byrd v. Raines* (1996), the Supreme Court has maintained that in the future, "the more momentous and difficult the case, the more likely the Court is to turn to simple and basic truths."[127]

NOTES

[1] Michael Higgins, "Hold That Pen Mr. President," *The American Bar Association Journal.* 83 June 1997, p.24.

[2] *City of New York v. Clinton et al. v. Clinton et al./Snake River Potato Growers Inc. et al. v. Rubin et al., No. 97-1374.* _____, "High Court Makes Room For Line-Item Veto Appeal: City of New York v. Clinton," *Andrews Government Contract Litigation Reporter.* 1 April 1998, p. 10.

[3] Hamilton, Alexander; Madison, James; John Jay. *The Federalist Papers* (New York: Banton Books, 1982) [herein cited as Federalist]. Publius elsewhere.

[4] Some supporter include Professor Forest McDonald, a well known historian of the American founding; former Congressman and law professor at Stanford University, Thomas I. Campbell of California; Gerald F. Seif, staff reporter for the *Wall Street Journal*; Elizabeth Garrett, law professor at the University of Chicago; John Harrison, University of Virginia Law School. Additional scholars will be discussed in Chapter 3.

[5] *Ibid.*

[6] Some opponents include former Assistant Attorney General, Charles Cooper; Dr. Louis Fisher, specialist on separation of power at the Congressional Research Service; professor Laurence Tribe of Harvard; Philip Kurland, University of Chicago. Additional scholars will be discussed in Chapter 3.

[7] _____ "Clinton Signs Line-Item Veto," *West's Legal News Staff,* 11 April 1996, p. 2078. (Abstract from the *Wall Street Journal*, "Line-Item Veto is Signed into Law by the President," 10 April 1996).

[8] Line-Item Veto Act, PL 104-130 (S 4) 9 April 1996. 110 STAT 1200.

[9] *Ibid.*

[10] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton & Company, Inc., 1966), pp. 460-465.

[11] *Ibid*, pp. 460-465.

[12] *Ibid.*

[13] *Ibid*, p. 465.

[14] See Article 1, Section 7, Clause 2 and 3 on page 7.

[15] Richard A. Watson, *Presidential Vetoes and Public Policy* (Kansas: University Press of Kansas, 1993) p. 154.

[16] William H.Taft, *Our Magistrate and His Powers* (New York: Columbia University Press, 1916) pp. 27-28.

[17] Watson, p. 154.

[18] Robert J. Spitzer, "Presidential Prerogative Power: The Case of the Bush Administration and Legislative Powers," *PS: Political Science and Politics*, 24 March 1991, p. 40.

[19] Watson, p. 154.

[20] Madison, pp. 460-465.

[21] *Federalist.*

[22] Bruce Fein, "The Line-Item Veto: Both Parties Want it, but is it Unconstitutional?" *The American Bar Association Journal,* 81 June 1995, p. 47.

[23] Higgins, p. 24.

[24] *Byrd v. Raines,* No. 97-0001 (D.D.C. Apr. 10, 1997). Higgins, p. 24.

[25] *Ibid.*

[26] *Ibid.*

[27] *Raines v. Byrd,* no. 96-167 1 (S. Ct. Apr. 23, 1997).

[28] The Court retreated to the case-or-controversy requirement by which personal injury must occur first. Warren Gorham and Lamont, "Line-Item Veto Crossed The Line, Court Says," *Journal of Taxation*, Vol. 87, No. 1 July 1997, p. 3.

[29] *Ibid.*

[30] _____, "Supreme Court Hears Line-Item Veto and White House Attorney-Client Privilege Cases," *Administrative and Regulatory Law News.* 22 Summer 1997, p. 1.

[31] William Funk, "Supreme Court News," *Administrative and Regulatory News,* 23 Fall 1997, p. 227.

[32] Tony Mauro, "Supreme Court Next Stop After Federal Judge Rules," *The USA Today.* 13-15, February 1998, p. A1.

[33] *City of New York v. Clinton et al. v. Clinton et al./Snake River Potato Growers Inc. et al. v. Rubin et al., No. 97-1374.* _____, "High Court Makes Room For Line-Item Veto Appeal: City of New York v. Clinton," *Andrews Government Contract Litigation Reporter.* 1 April 1998, p. 10.

[34] Madison, p. 465.

[35] L. Gordon Crovitz, "The Line-Item Veto: The Best Response When Congress Passes One Spending 'Bill' A Year," *Pepperdine Law Review,* 18 December 1990, p. 45.

[36] *Ibid.*

[37] *Ibid.*

[38] Stephen Glazier, "Reagan Already Has Line-Item Veto," *Wall Street Journal,* 4 December 1994, p. A14.

[39] J. Gregory Sidak and Thomas A. Smith, "Why Did Bush Repudiate the 'Inherent' Line-Item Veto," *Journal of Law and Politics,* 9 Summer 1994, pp. 40-41

[40] *Ibid,* pp. 43-44.

[41] *Ibid.*

[42] Fein, p. 47.

[43] *Ibid.*

[44] *Ibid.*

[45] *Ibid.*

[46] *Ibid.*

[47] Spitzer, p. 39.

[48] Louis Fisher, "The Line-Item Veto--a Misconception," *Washington Post,* 23 February 1987, p. A21.

[49] Ibid.

[50] Paul R.Q. Wolfson, "Is a Presidential Item Veto Constitutional?" *The Yale Law Journal.* 96 March, 1987, pp. 839-842.

[51] Spitzer, p. 40.

[52] Gerald F. Seib, "If Bush Tests Constitutionality of Line-Item Veto, Reverberations Could Transform Government," *The Wall Street Journal,* 30 October 1989, p. A12.

[53] Spitzer, p. 39.

[54] Fisher, p. 21.

[55] *Ibid.*

[56] Higgins, p. 24.

[57] *Ibid.*

[58] *Ibid.*

[59] Seib, p. A12.

[60] Nelson W. Polsby, "Congress-Bashing For Beginners," *American Government: Reading and Cases,* 12th Edition by Peter Woll. (Harper Collins College Publisher, 1996), p. 405.

[61] *Ibid.*

[62] *Ibid.*

[63] Neal E. Devins, "In Search of the Last Chord: Reflections on the 1996 Item Veto Act," *Case Western Reserve Law Review,* 47 1996, p. 1605.

[64] Sidak and Smith, pp. 54-57.

[65] *Federalist 58,* pp. 294-299.

[66] Devins, p. 1608.

[67] *Ibid.*

[68] Alan Morrison, "The Line-Item Veto: Both Political Parties Want it, but is it Unconstitutional?" *The American Bar Association Journal*, 81 June 1995, p. 46.

[69] Wolfson, p. 839.

[70] The percentage 7.2 includes all not-pocket vetoes from 1789-1988, including budget bills. Thus, the percentage for non-budget bills that have been overridden is approximately 5%. Anthony Petrilla, "The Role of the Line-Item Veto in the Federal Balance of Power," *Harvard Journal on Legislation*, 31 Summer 1994, p. 479.

[71] Henry L. Chambers, Jr. and Dennis E. Logue, Jr., "Separation of Powers and the 1995-1996 Budget Impasse," *Saint Louis University Public Law Review*, 16 1996, p. 52.

[72] *Ibid.*

[73] Petrilla, p. 475.

[74] Higgins, p. 24.

[75] Petrilla, p. 475.

[76] Alexis de Tocqueville, *Democracy in America.* Translated by George Lawrence and edited by J.P. Mayer (United States: Harper and Row, 1966).

[77] *Ibid.*

[78] *Federalist 51,* pp. 261-265.

[79] Robert L. Utley, *Principles of the Constitutional Order,* edited by Robert L. Utley, Jr. (Lanham, Maryland: University Press of America, 1989), p. 96.

[80] William Gangi, *Liberty Under Law*, Chapter 5, edited by Kenneth L. Grasso, and Cecilia Rodriguez Castillo, (University Press of America, 1997), pp. 52-55.

[81] *Federalist 37,* pp. 175-182.

[82] *Ibid.*

[83] *Federalist 10,* pp. 43-48.

[84] *Federalist 38*, pp. 182-189.

[85] *Federalist 47,* pp. 243-250.

[86] *Federalist.*

[87] *Federalist 47.*

[88] *Ibid.*

[89] *Ibid.* p. 250.

[90] Article 5 of the Constitution sets the formal process by which the Constitution can be formally amended.

[91] *Federalist 51.*

[92] *Federalist*

[93] *Federalist 69,* p. 349.

[94] The law must be challenged by a citizen who has suffered injury due to the piece of legislation. The Court can't declare it unconstitutional unless is has affected someone first. Mauro, p.A1.

[95] *Federalist 47,* p. 247.

[96] *Federalist 51.*

[97] George W. Carey, "Separation of Powers and the Madisonian Model: A Reply to the Critics," *The American Political Science Review,* 72 March 1978, p. 151.

[98] The decision correlates with the caveat regarding sharing of powers as mentioned in *Federalist 47*, p. 247.

[99] On February 24, 1803, Chief Justice Marshall delivered the opinion of the Supreme Court in *Marbury v. Madison.* 1 Cranch 137 (1803) Unanimous. Rotunda, Ronald D., and John E. Nowak. *Treaties on Constitutional Law: Substance and Procedure*. Second Edition (West Publishing Co., 1986) Chapter 1. The Court decision on pages 36 and 37 of this paper is from Feeley, Malcolm and Samuel Krislov, *Constitutional Law*, Second Edition. (Illinois: Scott, Foresman and Company, 1990), p. 30.

[100] Orrin G. Hatch, "Modern Marbury Myths," *University of Cincinnati Law Review,* 57-1989, p. 894.

[101] *Ibid.*

[102] Malcolm Feeley and Samuel Krislov note other cases such as *McCulloch v. Maryland*, *McGrain v. Daugherty*, *Watkins v. U.S.*, *Gravel v. U.S.*, *Myers v. U.S.*, *U.S. v. Nixon*, *Missouri v. Holland*, and *Korematsu v. U.S.* Feeley and Krislov, pp. 83-127

[103] Feeley and Krislov, p. 102.

[104] *Federalist 51.*

[105] Gangi, p. 52.

[106] The process is evaluated in detail in the following pages.

[107] Gangi, pp. 64-66.

[108] Over five thousand amendments have been proposed. William McClenaghan, *Magruder's American Government*, (Englewood Cliffs, New Jersey: Prentice Hall, 1995).

[109] The first 10 amendments to the Constitution were added in 1791, and the last one, the 27th, in 1992. Subsequent amendments include: the 11th Amendment in 1795; 12th in 1804; 13th in 1865; 14th in 1868; 15th in 1870; 16th and 17th in 1913; 18th repealed; 19th in 1920; 20th & 21st in 1933; 22nd in 1951; 23rd in 1961; 24th in 1964; 25th in 1967; 26th in 1971. Ibid., pp. 736-742.

[110] Robert J. Morgan, *James Madison on the Constitution and the Bill of Rights,* (Westport, Connecticut: Greenwood Press, 1988), p. 108

[111] *Federalist.*

[112] *Ibid.*

[113] J. Gregory Sidak, "The Line-Item Veto Amendment," *Cornell Law Review*, 80 July 1995, p. 1498.

[114] Peter Woll, *American Government Readings and Cases*, 12th Edition. (New York, New York: Harpers Collins, 1996), p. 305.

[115] Robert Scigliano, "The New Understanding of the President's War Power.," *Liberty Under Law.: American Constitutionalism Yesterday, Today and Tomorrow.* Edited by Kenneth L. Grasso and Cecilia Rodriguez-Castillo. (Lanham, Maryland: University Press of America, Inc., 1997), p. 122.

[116] *Immigration and Naturalization Service v. Chadha.* 103 S.Ct. 2764 (1983). Clokey, Jane F. "INS v. CHADHA and The Impoundment Control Act of 1974: A Shift in the Balance of Power," *University of Pittsburg Law Review.* 45 Spring 1984, p. 673-675.

[117] *Ibid.* p. 679-681.

[118] *Ibid.*

[119] *Ibid.*

[120] Feeley and Krislov, p.125.

[121] Hadley Arkes, "The Reasoning Spirit of It: The President, the Separation of Powers, and the laws of Reason," *Principles of the Constitutional Order,* Edited by Robert L. Utley, Jr. (Lanham, Maryland: University Press of America, 1989), pp. 95-97.

[122] Feeley and Krislov, p. 125.

[123] Scigliano, p. 122.

[124] Madison, pp. 465-485.

[125] A non-pocket veto is a veto in which Congress has adjourned and the president does not sign it nor vetoes it; the reasoning is that it vetoes itself because Congress is not is session to try to override the veto had the president vetoed it in the first place.

[126] About 103 vetoes. Petrilla, p. 477.

[127] Feeley and Krislov, p. 83.

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____, *Constitution of the United States*, 1787