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Why Did President Bush Repudiate the "Inherent" Line-Item Veto?

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Why Did President Bush Repudiate the “Inherent” Line-Item Veto?

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In 1987, an intriguing legal memorandum arrived over the transom at the White House. Sent by New York City securities lawyer Stephen Glazier, it argued that President Reagan did not need a statute or constitutional amendment to exercise a line-item veto because the Constitution inherently confers such power on the President. Far from embracing this novel theory, lawyers in the Reagan and Bush Administrations attacked it, and in 1992, President Bush publicly renounced it. In previous writings we have examined in detail the legal arguments for and against the existence of an “inherent” line-item veto in the Constitution. In Part I of this Essay, we recount the chronology of the debate over the line-item veto from its beginnings in 1987, to its conclusion in 1992. In Part II, we briefly summarize our prior legal analysis because it is critical to assessing the credibility of the frequent claim, implicitly embraced by the Bush Administration, that the theory of the inherent line-item veto is constitutionally baseless. Similarly, we briefly explain why there might exist a broader presidential power to unbundle, and separately veto, non-germane parts of an omnibus piece of legislation. If, as we have previously argued, the legal theory of the inherent line-item veto cannot be dismissed out of hand, then why, we ask in Part III, did two Republican administrations, ostensibly committed to controlling federal spending, de-

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nounce the theory so vigorously?

I. THE RISE AND FALL OF THE INHERENT LINE-ITEM VETO

After sending his legal memorandum to the White House, Mr. Glazier¹ presented his thesis publicly in an op-ed piece in the *Wall Street Journal*.² Shortly thereafter, L. Gordon Crovitz, legal columnist for the newspaper, began urging President Reagan to create a test case for the inherent line-item veto.³ Far from embracing the Glazier thesis, however, the Reagan Justice Department rejected it. The Reagan and Bush Administrations have not made public the opinions of the Attorney General, or of the Office of Legal Counsel (OLC), concerning the inherent line-item veto. However, after resigning his appointment as Assistant Attorney General in charge of OLC, Charles Cooper wrote an article, based on the analysis contained in the OLC memorandum rejecting the theory of the inherent line-item veto, for a conference on the subject sponsored by the National Legal Center for the Public Interest.⁴ Another conference participant, Dr. Louis Fisher, a specialist on the separation of powers at the Congressional Research Service, also attacked the Glazier thesis on legal and historical grounds.⁵ On the other hand, Professor Forrest McDonald, a well-known historian of America's founding period, argued that history supported the Glazier thesis.⁶

Less than a week after President Bush was inaugurated in January 1989, Senator Robert Dole, no toady of Mr. Bush, urged in the *Wall Street Journal* that he exercise a line-item veto.⁷ And indeed, for a short time, it appeared that President Bush might follow Senator Dole's advice, thus overriding OLC's advice to

¹ See Stephen Glazier, *Reagan Already Has Line-Item Veto*, *Wall St. J.*, Dec. 4, 1987, at A14.

² *Id.* See also Stephen Glazier, *A Plank Bush Should Stand On*, *Wall St. J.*, Feb. 12, 1988, at A14. An extended presentation of the Glazier thesis is contained in Stephen Glazier, *The Line-Item Veto: Provided in the Constitution and Traditionally Applied*, in *Pork Barrels and Principles: The Politics of the Presidential Veto 9-16* (National Legal Center for the Public Interest 1988) [hereinafter *Pork Barrels*].

³ Crovitz's arguments are compiled in L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 *Pepp. L. Rev.* 43 (1990).

⁴ Charles Cooper, *The Line-Item Veto: The Framers' Intentions*, in *Pork Barrels*, supra note 2, at 29-46.

⁵ Louis Fisher, *The Presidential Veto: Constitutional Development*, in *Pork Barrels*, supra note 2, at 17-28.

⁶ Forrest McDonald, *The Framers' Conception of the Veto Power*, in *Pork Barrels*, supra note 2, at 1-8.

⁷ Robert Dole, *Bush Can Draw the Line*, *Wall St. J.*, Jan. 25, 1989, at A21.

President Reagan. When asked by reporters in July 1989 about securing the line-item veto by statute or constitutional amendment, Mr. Bush responded by expressing his interest in the Glazier thesis: "I'm sure you're familiar with the theory that the President has that inherent power, and if I found the proper, narrowly-defined case, I'd like to try that and let the courts decide whether it's there."⁸ In October 1989, during the annual enactment of the thirteen appropriations bills to fund the federal government, the *Wall Street Journal* reported that "White House spokesmen . . . said Mr. Bush is considering simply declaring that the Constitution gives him the power" to assert a line-item veto and thereby "invit[e] a court challenge to decide whether he has the right."⁹

Senator Edward Kennedy, a member of the Senate Judiciary Committee, responded to these executive rumblings by soliciting from Professors Laurence Tribe of Harvard and Philip Kurland of the University of Chicago a legal opinion on the constitutionality of the inherent line-item veto. Their conclusion, which Senator Kennedy inserted into the *Congressional Record* on October 31, 1989, was that "any attempt to exercise such a 'line-item veto' would be clearly unconstitutional."¹⁰ Within two weeks, two distinguished conservative lawyers who served in the Reagan Justice Department, Bruce Fein and William Bradford Reynolds, similarly asserted in print that all arguments in favor of the inherent line-item veto "have been wholly discredited" and that such an assertion of power by the President would be unconstitutional.¹¹ But the prospect of President Bush acting upon the Glazier thesis also elicited an imposing intellectual ally. On November 20, 1989, Representative Thomas J. Campbell of California, a member of the House Judiciary Committee who was formerly a Supreme Court clerk and a law professor at Stanford University, introduced a resolution co-sponsored by five other representatives urging: "That, for the purpose of determining the constitutionality of the line-item veto, the House of Representative encourages the

⁸ Owen Ullmann & Ellen Warren, Interview with President George Bush, at the White House (July 25, 1989) (transcript copy on file with the office of the White House Press Secretary).

⁹ Gerald Seib, If Bush Tests Constitutionality of Line-Item Veto, Reverberations Could Transform Government, *Wall St. J.*, Oct. 30, 1989, at A12.

¹⁰ Letter from Laurence H. Tribe and Philip B. Kurland to Senator Edward Kennedy (Oct. 31, 1989), reprinted in 135 Cong. Rec. S14,387 (daily ed. Oct. 31, 1989) [hereinafter Tribe-Kurland Letter]. But see Sidak & Smith, *supra* note *.

¹¹ Bruce Fein & William Bradford Reynolds, Wishful Thinking on a Line-Item Veto, *Legal Times*, Nov. 13, 1989, at 20.

President to execute a line-item veto."¹²

In an article published in the *Northwestern University Law Review* in 1990, we criticized as superficial the conclusory legal analysis provided to Senator Kennedy by Professors Tribe and Kurland.¹³ We argued that, although it is quite possible that the President lacks the implied power under the Constitution to exercise any form of item veto, Professors Tribe and Kurland overstated their case when they declared that the exercise of such a veto "would clearly be unconstitutional." At the same time, we showed that the argument in favor of there being an inherent line-item veto in the Constitution was more subtle than Mr. Glazier's original op-ed piece suggested three years earlier, and that the debate over the Glazier thesis had ignored or obscured a more fundamental question of constitutional interpretation of the veto power: Does the scope of the veto power expand and contract concomitantly with the definition of a bill? When one searches for a constitutional principle that affirmatively permits Congress to attempt to undermine the veto but forbids the President to respond, we argued, one begins to suspect that this project is at least as difficult as defending the inherent line-item veto. This view suggests that, while Congress' constitutional power to define a "bill" is a living, growing thing, the President's authority to interpret the veto power is not. We briefly discuss the substance of our legal analysis in Part II of this Essay.

The prospect that President Bush might exercise an inherent line-item veto was buoyed by his repeated use, beginning methodically and without fanfare in November 1989, of presidential signing statements to excise sections of bills that he believed were unconstitutional on their face because they impeded the executive's duties and prerogatives under article II of the Constitution.¹⁴ As we have previously explained in detail,¹⁵ this practice is an item veto only in a functional sense, and originates in the President's duties to faithfully execute the law¹⁶ and to preserve, protect, and

¹² H.R. Res. 297, 101st Cong., 1st Sess. (Nov. 20, 1989).

¹³ Sidak & Smith, *supra* note *.

¹⁴ See *id.* at 457-60; Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1990 (Nov. 3, 1989), 1989-2 Pub. Papers 1448, 1449.

¹⁵ Sidak & Smith, *supra* note *, at 452-60; J. Gregory Sidak, *The President's Power of the Purse*, 1989 Duke L.J. 1162, 1213-14 (1989); J. Gregory Sidak, *Spending Riders Would Unhorse the Executive*, Wall St. J., Nov. 2, 1989, at A18.

¹⁶ U.S. Const. art. II, § 3, cl. 4.

defend the Constitution¹⁷—both of which are duties found in Article II, not Article I. Although it does not derive from the President's veto power, this power of "constitutional excision," as we call it, is nonetheless an example of the President construing his constitutional role in the law-making process somewhat more expansively in a way that responds to the tendency of legislative bundling to produce harmful laws. Starting in November 1989, President Bush consequently declared dozens of provisions in omnibus bills affecting presidential powers to be "precatory" or "advisory," if not entirely null and void. Speaking on May 10, 1991, at Princeton University, he said that "on many occasions during my Presidency, I've stated that statutory provisions that violate the Constitution have no binding legal force."¹⁸ Mr. Bush made that statement while summarizing his view of the Presidency as follows:

Presidents define themselves through their exercise of Presidential power. They must use their special authority to serve the whole Nation in matters of foreign and domestic policy. They must set a tone for governance, at once leading the people, yet following their desires. They must preserve, protect and defend the Constitution. And they must encourage deliberative behavior on the part of Congress.¹⁹

In the same speech, Mr. Bush said that a line-item veto would give him the power to prevent wasteful federal spending "to study cow belches, or a Lawrence Welk museum," and he noted portentously: "Some believe that I already have that power under the Constitution."²⁰

Presumably responding to this tantalizing passage in President Bush's Princeton speech, Representative Campbell again introduced on May 14, 1991 a resolution urging Mr. Bush to exercise a line-item veto for purposes of creating a test case.²¹ Mr. Campbell said on the House floor that the line-item veto is "a power that I believe the President already has," and he urged President Bush

¹⁷ *Id.*, § 1, cl. 8.

¹⁸ Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University in Princeton, New Jersey (May 10, 1991), in 1991-1 Pub. Papers 496, 499 [hereinafter Princeton Speech].

¹⁹ *Id.*

²⁰ *Id.*

²¹ H.R. Res. 152, 102d Cong., 1st Sess. (May 15, 1991).

“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.”²²

Within six months, however, the likelihood that President Bush would ever create a test case for the inherent line-item veto had collapsed. In the early fall of 1991, Attorney General Richard Thornburgh resigned to run for the United States Senate seat made vacant by the sudden death of Senator John Heinz of Pennsylvania. President Bush nominated as Mr. Thornburgh's successor Deputy Attorney General William P. Barr, who previously had been Assistant Attorney General in charge of OLC, where he had ordered a reexamination of the constitutionality of the inherent line-item veto. On November 13, 1991, during his confirmation hearings to be Attorney General, Mr. Barr repudiated the theory of the inherent line-item veto when responding to a question from Senator Joseph Biden, Chairman of the Senate Judiciary Committee, concerning the President's use of legal arguments to expand executive power:

You know that there was a lot of writing in the literature among scholars that there is an inherent line-item veto. That would have shifted a tremendous amount of power just by interpretation to the Executive. It is one, as a matter of policy, I think the Executive should have, personally. I think that the President should have a line-item veto. But I looked at that issue and I looked at it hard and spent a lot of time having people research it. In fact, we went back to ancient English and Scottish constitutions and precedents and so forth. I found no basis for an inherent line-item veto in the Constitution.²³

This concession by Mr. Barr, who was unanimously confirmed by the Senate,²⁴ is curious for two reasons. First, Chairman Biden did not explicitly ask Mr. Barr about the inherent line-item veto: Mr. Barr volunteered this answer. Second, Mr. Barr's concession was tantamount to a major policy pronouncement of the Bush Administration, one which someone possessing the political discre-

²² 137 Cong. Rec. H3029 (daily ed. May 14, 1991).

²³ Confirmation Hearings on Federal Appointments—William P. Barr: Hearings Before the Sen. Comm. on the Judiciary (pt. 2), 102d Cong., 1st Sess. 144 (1991).

²⁴ 137 Cong. Rec. S17,228-32 (daily ed. Nov. 20, 1991).

tion necessary to be nominated to be Attorney General presumably would not make spontaneously, without the President's knowledge and consent.

The debate over the inherent line-item veto thus ended with a whimper. In his State of the Union Address on January 28, 1992, President Bush challenged Congress to enact his legislative program, including his plan to "freeze all domestic discretionary budget authority."²⁵ With rhetorical allusion to the ultimatum presented to Saddam Hussein before the United States unleashed Operation Desert Storm, Mr. Bush warned that "the battle is joined" if by March 20, 1992 Congress had not passed his legislative program.²⁶ "And you know," he added, "when principle is at stake I relish a good, fair fight."²⁷ Mr. Bush did not say what he intended to do if Congress flouted his ultimatum, but speculation arose that he might create a test case by vetoing some carefully chosen line item of pork-barrel spending, such as the funding to construct a Lawrence Welk Museum, which had appeared in the prior year's appropriations bill for the Department of Agriculture.²⁸

The days leading up to the expiration of the March 20 deadline provide perhaps the strongest indication that the President's exercise of an inherent line-item veto would have appreciably altered the allocation of political power on matters of federal spending. On March 17, 1992, Senator Robert Byrd of West Virginia, Chairman of the Senate Appropriations Committee, presented on the Senate floor an elaborate denunciation of the line-item veto and of the Glazier thesis in particular, which subsequently ran ten printed pages in length in the *Congressional Record*.²⁹ "Some of our colleagues here in the Senate," Mr. Byrd warned, "are urging the President to go ahead and exercise line-item veto authority, . . . thus precipitating a court case."³⁰ After making detailed arguments about the meaning of the text of Article I, Section 7, Clauses 2 and

²⁵ Address Before a Joint Session of the Congress on the State of the Union, 28 Weekly Comp. Pres. Doc. 170, 175 (Jan. 28, 1992).

²⁶ *Id.* at 174.

²⁷ *Id.*

²⁸ See 138 Cong. Rec. E602 (daily ed. Mar. 10, 1992) (remarks of Rep. Gerald B.H. Solomon); George F. Will, *Lawrence Welk and Line Items*, Wash. Post, Feb. 23, 1992, at C7.

²⁹ 138 Cong. Rec. S3737; S3738-50 (daily ed. Mar. 17, 1992).

³⁰ *Id.* at S3738.

3,³¹ and after calling the Glazier thesis “pure fantasy” and “the wildest flight of the imagination,”³² Senator Byrd quoted the passage that we have quoted above from the confirmation testimony of Attorney General Barr³³ and then warned: “I believe that President Bush—any President—would be ill-advised to attempt a court case in a vain search for line-item veto authority in the words and phrases of Article I, Section 7, of the Constitution.”³⁴ Although Senator Byrd concluded that “[n]o amount of digging will unearth that which is not there,”³⁵ it is telling that, five years after being dropped over the transom at the White House, the Glazier thesis would still deserve to have heaped upon it so much scorn in the *Congressional Record* by the Chairman of the Senate Appropriations Committee, the single most powerful person in the process of allocating federal largess.

When the March 20 deadline arrived and Congress had neither passed President Bush’s legislative program nor frozen domestic discretionary spending, Mr. Bush did not respond by creating a test case for the Glazier thesis. Instead, he followed Senator Byrd’s advice and publicly repudiated the theory that the Constitution confers on the President an inherent line-item veto. On March 20, the very day of the deadline he had announced in such ominous tones, President Bush announced:

Some argue that the President already has that authority, the line-item veto authority, but our able Attorney General, in whom I have full confidence, and my trusted White House Counsel, backed up by legal scholars, feel that I do not have that line-item veto authority. And this opinion was shared by the Attorney General in the previous administration.³⁶

Consequently, he argued, “the American people” should “demand that a President be given line-item veto authority legislatively or, if necessary, by changing the Constitution.”³⁷ Remarkably, in the same paragraph in which he buried the possi-

³¹ Id. at S3739-42.

³² Id. at S3740, S3742.

³³ Id. at S3742.

³⁴ Id.

³⁵ Id.

³⁶ Address to the Republican Members of Congress and Presidential Appointees, 28 Weekly Comp. Pres. Doc. 510, 512 (Mar. 20, 1992).

³⁷ Id.

bility that a test case might establish that the Constitution has already given the President the line-item veto, Mr. Bush nonetheless called that power "essential" and concluded: "I need it now."³⁸

II. THE PRESIDENT'S POWER TO UNBUNDLE LEGISLATION

"Veto"—the Latin word for "I forbid"—is not in the Constitution. The President's veto powers do not even appear in Article II, which creates the executive and defines his duties and prerogatives, but rather in Clauses 2 and 3 of Article I, Section 7. In relevant part, Clause 2 provides:

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 the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.³⁹

This provision is commonly called the Presentment Clause. Clause 3 is an analogous provision requiring the presentment to the President of "Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and House of Representatives may be necessary. . . ." ⁴⁰

Throughout the Constitutional Convention, the framers called the veto either the President's "negative," or the "revisionary check" or "revisionary power."⁴¹ On August 15, 1787, one month before the Convention completed its work and adjourned, the framers approved the Presentment Clause,⁴² which was then phrased in terms of every bill being presented "to the President of the United States for his revision."⁴³ It was the Convention's Committee on Style who changed the wording of the Presentment Clause after the Convention's approval of it, thus deleting its sev-

³⁸ *Id.*

³⁹ U.S. Const. art. I, § 7, cl. 2.

⁴⁰ *Id.*, cl. 3.

⁴¹ James Madison, *Notes of Debates in the Federal Convention of 1787*, 66, 628-29 (Ohio U. Press 1966) (1840).

⁴² *Id.* at 465.

⁴³ *Id.* at 388-89 (Aug. 6, 1787 draft constitution).

eral intriguing references to the President's "revision" of a bill presented to him.⁴⁴

Thus, one serious interpretative issue over which even the most devout originalists can reasonably disagree is the meaning and scope of "revision" in the minds of the framers. If revision meant only "review," it would be harder to construct a textual argument supporting an inherent item veto (of any form, not simply of the line-item variety) than if revision meant, as Blackstone used the word in 1768, "critical or careful examination or perusal with a view to correcting or improving."⁴⁵

We know from the writings of Madison and Hamilton that the framers intended the veto to serve two functions: to protect the Presidency from the encroachment of the legislative branch and to prevent the enactment of harmful laws.⁴⁶ The line-item veto, by which the President would be empowered to veto individual lines of spending in appropriations bills, is one method by which the President might achieve the second of these objectives. A more general method is the subject veto, which would empower the President to unbundle non-germane provisions presented to him in a single "bill" and veto or ratify each one separately. The subject veto would apply to more than merely appropriations bills.

To what extent may the President, without further constitutional or statutory authorization, unbundle legislation presented to him by Congress? This is the larger and more enduring question raised by the five-year debate—now evidently concluded by politicians, if not by legal and historical interpreters of the Constitution—over whether that document implicitly confers on the President a line-item veto. Whether the President has the power to unbundle legislation in some manner turns on esoteric questions of textual and historical interpretation, and of structural inference, to which we can only advert briefly here, but which we have addressed in detail previously.⁴⁷ Among these questions are: What is a "bill"? What did the framers mean by the "revisionary

⁴⁴ See *United States v. Weil*, 29 Ct. Cl. 523, 545 (1894).

⁴⁵ 13 *Oxford English Dictionary* 833 (2d ed. 1989). The issue is even more complicated than this and requires one to parse the New York Constitution of 1777 and the Massachusetts Constitution of 1780. Although such analysis is beyond the scope of this Essay, see the discussion in Sidak & Smith, *supra* note *, at 443-45 and the references cited there.

⁴⁶ Madison, *supra* note 41, at 629 (remarks of James Madison); *The Federalist* No. 73, at 492, 495 (Alexander Hamilton) (Jacob Cooke ed., 1961).

⁴⁷ See Sidak & Smith, *supra* note *.

power," which was their name for the veto? Did the framers comprehend omnibus appropriations bills of the sort that are commonplace today? Was the practice of impoundment, outlawed by Congress in 1974, essentially a line-item veto under a different name? Is the power of severability limited to the judiciary, or may the President exercise it also, and, if so, in what manner and subject to what constraints? Viewed on this plane, the line-item veto is considerably less interesting than the subject veto.

The term "line-item" refers to the level of detail found in appropriations bills, which corresponds to the different "lines" of spending proposed in the federal budget and subject to congressional approval under the appropriations clause.⁴⁸ Line items are what one state supreme court has called "separable fiscal units."⁴⁹ The line-item veto would function as the veto power does currently in that the President could veto an individual line item of spending in an appropriations bill for the same reasons that he could veto anything else—because the spending in that line item would disserve his agenda, waste taxpayers' money, or, in Hamilton's words, expose "the community [to] the effects of faction, precipitancy, or . . . any impulse unfriendly to the public good, which may happen to influence a majority" of Congress.⁵⁰

Skeptics of the inherent line-item veto frequently ask: Why, if such power is embedded in the Constitution, was it never unearthed before Mr. Glazier wrote to President Reagan two hundred years after the Convention of 1787? Why, for example, did the drafters of the Confederate Constitution in 1861, who hewed closely to the United States Constitution except on matters of executive power, add an explicit line-item veto for their President if the Convention of 1787 had already provided for this power?⁵¹ The standard response has become that the line-item veto has indeed been exercised, only under the name of impoundment, the practice by which Presidents selectively refuse to spend appropriated funds. Proponents of the implicit line-item veto cite the custom of presidential impoundment, which ended when Congress enacted the Impoundment Control Act of 1974 over President

⁴⁸ U.S. Const. art. I, § 9, cl. 7. See generally Sidak, *The President's Power of the Purse*, supra note 15.

⁴⁹ *In re Opinion of the Justices*, 2 N.E.2d 789, 790 (Mass. 1936).

⁵⁰ Hamilton, supra note 46, at 492, 495.

⁵¹ Confederate Const. art. I, § 7, cl. 2 (1861), reprinted in 1 *The Messages and Papers of Jefferson Davis and the Confederacy* 37-54 (1966) (John Richardson ed. 1905). Senator Byrd, for example, asks this question. 138 Cong. Rec. S3740 (daily ed. Mar. 17, 1992) (statement of Sen. Byrd).

Nixon's veto,⁵² as evidence rebutting the historical assertion that no President has ever asserted the right to exercise a line-item veto. Representative Campbell goes a step further and maintains that it is Congress' enactment of the Impoundment Control Act, and not the President's exercise of an inherent line-item veto, which rests on shaky constitutional ground.⁵³

Impoundment and the line-item veto differ crucially, however, in that impoundment permits the President to convert his veto of a line item from a discrete variable (limited solely to the choice between ratification and veto) to a continuous variable, whose magnitude in dollars the President can adjust at his discretion. The pure line-item veto, by contrast, simply permits the President to exercise, on a disaggregated basis, a discrete choice between ratification and veto: Either all or none of the funds appropriated in a given line item will be spent. Furthermore, Congress could override a line-item veto, whereas once funds were impounded, Congress would be powerless to cause them to be spent. In this respect, the impoundment power appears greater than the line-item veto, though this appearance, of course, does not in itself imply that the President necessarily has the lesser line-item veto authority. It does, however, mitigate the alarming claims of Senator Byrd and others⁵⁴ that the line-item veto would constitute a radical and unprecedented shift in power from the legislative to executive branch of the federal government. Even this difference between impoundment and the line-item veto might be eliminated if a President claimed that he had the power to veto *portions* of lines in appropriations bills, a power that may seem extraordinary, but which on its face may not be far outside the revisionary power that the framers envisioned.

It is at this point that the debate on the line item-veto reduces to a stalemate. It is useful, therefore, to consider the question of presidential unbundling of legislation at a level of greater generality. In his Princeton speech, President Bush said that "when Congress bundles up a series of unrelated measures and calls it a single bill, it frustrates the President's constitutional role in resisting the influ-

⁵² Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified at 2 U.S.C. §§ 681-88 (1988)).

⁵³ 137 Cong. Rec. H3030 (daily ed. May 14, 1991) (statement of Rep. Campbell) ("President Nixon was at his weakest, and the Congress took back his [impoundment] power which I believe the Constitution gave him. So I believe the Congress took that power back erroneously.").

ence of special interests."⁵⁴ This perceived problem is not limited to appropriations bills, nor would it necessarily be remedied by resort to a line-item veto. "It is often impractical to veto a tremendous bill, a major bill, especially an appropriations bill," Mr. Bush said, "because of unrelated riders that would never stand a chance on their own."⁵⁵ To the extent that it requires countervailing action, this condition calls for a subject veto, which would permit the President to enforce a germaneness requirement for legislation by unbundling omnibus legislation into components addressing single subjects. It might be that President Bush was signaling in his Princeton speech his belief, at least as of May 1991, that the Constitution gave him an inherent veto over non-germane provisions in a single bill.

The subject veto is more easily defended as an implied presidential power than is the line-item veto because the former can be said merely to respond to the tactic of bundling legislation. Viewed in these terms, a subject veto arguably does no more than restore the veto power to the scope originally intended by the framers. But the subject veto does introduce an intriguing question worthy of serious constitutional analysis: What is a "bill"?

Professors Laurence Tribe and Philip Kurland believe a bill to be whatever Congress calls a bill.⁵⁶ Evidently, they believe that there are no constitutional limits on the degree to which Congress may diminish the effectiveness of the President's veto power by wrapping bills together in large packages. We consider it more plausible that the Constitution envisions some limit to the size and scope of a bill. Otherwise, as Congress bundled more and more proposed laws into a single so-called "bill," it could diminish the President's ability to exercise the veto power to a degree that would seem inconsistent with the constitutional order contemplated by the framers. In the extreme case, Congress could take an entire session's work and package it into a single piece of omnibus legislation, which Congress very nearly did in the fall of 1987, when it combined all thirteen annual appropriations bills into an omnibus continuing resolution to fund the federal government for fiscal year 1988.⁵⁷

⁵⁴ Princeton Speech, *supra* note 18, at 499.

⁵⁵ *Id.*

⁵⁶ Tribe-Kurland Letter, *supra* note 10.

⁵⁷ Continuing Appropriations, Fiscal Year 1988: Joint Resolution Making Further Continuing

The Tribe-Kurland view assumes away the underlying constitutional question of whether Congress has really presented the President with a single "bill" when it presents omnibus legislation. Indeed, one intriguing possibility, particularly in the case of excessively bundled legislation, is that the President could refuse Congress' tender of what it called a bill. The President could refrain from returning this legislative product to the house in which it originated and simply issue a public statement asserting that the product was not a bill, order, resolution, or vote that had started the presentment process under Article I, Section 7. The irony of this presidential strategy is that by refraining from claiming the existence of an inherent line-item or subject veto under the Constitution, and by instead relying on a theory of defective tender, the President, if successful, could magnify the veto power as it is currently understood, causing its effect to resemble more closely the "absolute negative" of the British Crown, which the framers disfavored.⁵⁸

Put somewhat differently, the Tribe-Kurland view of legislative bundling fails to discuss whether the scope of the veto power may expand and contract concomitantly with the definition of a bill. The limited discussion of legislative bundling during the Constitutional Convention in 1787 revealed a fear that the House might abuse its power to originate money bills so as to force unpalatable legislation on the Senate.⁵⁹ If the framers were concerned that legislative bundling might compromise bicameralism and permit the House to coerce the Senate, it follows *a fortiori* that they would oppose the kind of legislative bundling that we observe today, a bundling whose evident purpose is to eviscerate the presentment process and thus permit the legislature to subjugate the executive. Surely the independence and equality of the legislative, executive, and judicial branches of government were at least as fundamental to the framers' vision of the structure and logic of the Constitution as was the bicameral composition of the federal legislature. It seems possible that the framers thought that the executive branch, sharing as it does in the legislative power through its veto and recommendation functions, would respond in

Appropriations for the Fiscal Year 1988, and for Other Purposes, Pub. L. No. 100-202, 101 Stat. 1329 (1987).

⁵⁸ Hamilton, *supra* note 46, at 492, 498.

⁵⁹ Madison, *supra* note 41, at 443-44.

kind to such legislative self-aggrandizement, exercising its power to interpret what the Constitution means by a "bill" and exercising the veto appropriately. Perhaps this is what President Bush had in mind during his Princeton speech in May 1991, when he stated that bills larded with "unrelated riders that would never stand a chance on their own . . . pose as much of a threat to Congress as to the President."⁶⁰

It is frequently argued that the President can possess no inherent constitutional power to unbundle and separately veto portions of bundled legislation because the practice of legislative bundling was common in colonial legislatures before the American Revolution and consequently was a matter with which the framers of the Constitution were familiar.⁶¹ Since they were familiar with the practice, the argument goes, the framers must have approved of it as necessary to check executive power. But that is not the end of the story. The question is not whether the framers thought that Congress has, as an inherent part of the legislative power, the authority to bundle legislation. There is evidence that they did. The question, instead, is whether the framers also thought that the exercise of an item veto, in some form, was a constitutionally appropriate response to such bundling. Congress' putative ability to bundle legislation does not obviously exclude the President's putative ability to unbundle it. The alleged fact that the framers understood that a given legislative prerogative—legislative bundling—was subject to abuse hardly implies that they thought the executive branch was obliged to stand back and do nothing while it was abused. The text of the Constitution is silent on the scope of both legislative bundling and the veto power. If the framers thought that bundling was permissible, it might have been because they thought that the abuse of this power, in the end, would provoke a concomitant exercise of the presidential veto power, since the framers were clear in their debates and in *The Federalist* that the first function of the veto was to protect the President from legislative encroachments. The same constitutional

⁶⁰ Princeton Speech, *supra* note 18, at 499.

⁶¹ E.g., Paul R. Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 842-44 (1987).

silence that sanctions the bundling of bill may also sanction their veto on something other than an all-or-nothing basis.⁶²

III. THE POLITICS OF UNACCOUNTABILITY

If, as we believe, the foregoing legal analysis, even in the abbreviated form presented here, enables the theory of the inherent line-item veto to pass the laugh test, why did the Bush Administration not set up a test case? Even if Mr. Bush's lawyers concluded that an inherent line-item veto probably would not be sustained in court, why, as a political matter, did President Bush not continue to use the threat of setting up a test case as political leverage on Congress to cut spending? Why did he unilaterally sacrifice the bargaining power that he might derive from the possibility that the inherent line-item veto, like the Israeli nuclear arsenal, might exist and might be unleashed in dire circumstances? Finally, how will Bill Clinton, the next Democrat to occupy the White House, likely view the inherent line-item veto debate?

The unpopularity in both Congress and the White House of the item veto in any form appears to require some explanation. Unbundling legislation, by any means, is unpopular in Congress because the exercise of any such power would represent a significant shift in the current balance of power between Congress and the Presidency. Although both Governor Clinton and President Bush publicly supported legislation or a constitutional amendment granting the President a line-item veto, Speaker of the House Thomas Foley said on August 25, 1992 that he "will oppose it no matter who is president."⁶³ If the behavior of the various branches of government, however, were to be explained simply as a function of the maximization of political power, one would have expected the White House to pursue an item veto in some form.

That this has not been the case suggests that the maximization of power is too simple an explanatory model. Consider instead an alternative hypothesis. Political actors, considered stylistically, seek not to maximize power *per se* but to maximize the difference

⁶² See Sidak & Smith, *supra* note *, at 469-76.

⁶³ David S. Broder, *Foley Calls Spendthrift Charge Against Congress a 'Big Lie.'* Wash. Post, Aug. 26, 1992, at A2.

between power and accountability. Crudely put, the king will prefer the regime in which he can go to war at will, to the regime in which he can go to war at will, but if he fails in the trial of arms, he will lose his head. He might well prefer to the latter a regime in which he does not have such unilateral power at all. Political actors do not necessarily seek to maximize power if by doing so they also increase their level of accountability to the electorate. Put differently, political actors seek to maximize their unreviewable or unaccountable power.

The item veto in any form would radically increase the level of the President's accountability for the contents of legislation more than it will increase the President's power over the contents of legislation. Every portion of an omnibus "bill" that the President did not veto would be legislation for which he would have to take personal and political responsibility. Members of Congress rather disingenuously attribute such responsibility to the President now when blaming him for the current large federal budget deficit. However, anyone with any understanding of the legislative process knows that the President cannot veto every legislative package that contains spending of which he disapproves, unless he wishes to degrade government from its current partially disabled state to one of total paralysis. Under the current regime of extensive bundling, the President is, to a significant extent, coerced into signing legislation that contains bills that he would veto, or at least may claim that he would veto, if presented separately. Under an item-veto regime, the President would have no such excuses. The President would have, if he chose to exercise it, significantly more power to shape the final output of the legislative process with an item veto; but, conversely, he would not be able to blame Congress for serious problems with that output.

Under a model in which political actors seek to maximize unaccountable power, one would not expect the President to push very hard for an item veto. Rather, one would expect it to be used merely as a bluff, as President Bush apparently used it to no perceptible effect. The call for a congressionally enacted line-item veto or a constitutional amendment to provide for such a power, a plea publicly repeated in Mr. Bush's speech accepting the Republican nomination for President in August 1992,⁶⁴ appears, like

⁶⁴ Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston,

the call for a balanced-budget amendment, to be an entreaty that the President made in the full confidence that it will not be granted. This recalls St. Augustine's famous prayer as a young man: "Oh Lord, grant me chastity—but not yet."

One would expect a campaign for a presidential line-item veto to founder, not only because the President's desire for such a power may be qualified, but also because of the absence of any effective interest group or rent-seeking organization that would strongly support an item veto. To expand somewhat on the metaphor of logrolling, the current regime may be analogized to two loggers who must cooperate with each other in order to fell and remove the trees in a forest that they do not own. Each logger will have to cooperate and make deals with the other: "You help me cut down this tree, which I will keep, and I will help you cut down that tree, which you will keep." But this system of checks and balances between loggers, which is aimed at making possible, and then dividing, the fruits of joint production, does nothing to protect the interests of the owners of the forest.⁶⁵ The owners, who are the public at large, the dispersed body of taxpayers and voters, face very high transactions costs in attempting to monitor and correct the behavior of their agents. Even if the loggers are hired under a two-year, four-year, or six-year renewable contract, analogous to those under which federal elective officials are employed, there will be ample opportunity for the loggers to sell logs to their friends or keep them for themselves if the group to which they are accountable is extremely diffuse and unable to monitor these activities at a reasonable cost. Neither logger would want a system under which one could be held personally accountable for every log that was chopped down. In any event, the group that would push for such a change is notoriously unable to press its claims, as compared to smaller, more focused, and better organized groups with a special interest in this or that tree.

The general nature of this problem of unaccountability belies the suspicion that proponents of the item veto are merely partisans

28 Weekly Comp. Pres. Doc. 1462, 1465 (Aug. 20, 1992). For earlier calls by President Bush for a line-item veto, see Remarks at the Annual Republican Congressional Fundraising Dinner (June 13, 1991), 1991-1 Pub. Papers 654, 656; Remarks Announcing Federal Budget Reform Proposals (Apr. 25, 1990), 1990-1 Pub. Papers 561, 561; Address on Administration Goals Before a Joint Session of Congress (Feb. 9, 1989), 1989-1 Pub. Papers 74, 75.

⁶⁵ See J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. Rev. (forthcoming 1993); J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 Duke L.J. 325, 325-27 (1991).

of a Presidency that for three consecutive terms has been occupied by Republicans. Mechanisms of accountability are indeed probably more important if the same party controls both the White House and Congress. Under such circumstances, it would be even more difficult to discern who should be held accountable for particular bills. Under a divided government, one can apply certain rules of thumb, such as "qui bono," to determine which party at least should be held accountable for a bill that redistributes public wealth to some special interest. For example, a bill that further insulates unionized workers from competition in the labor market might be attributed, with rough justice, to the Democrats, even if a Republican President signed it as part of a large legislative package. A bill that extends the funding of a military project of dubious utility might be attributed, with rough justice, to the Republican party, unless the spending is to occur in the district of a powerful Democratic member of Congress. The facts are always more complex than these simple examples would suggest, but those bills that are not simply direct subsidies to some favored group, such as beekeepers, dairy farmers, truck owner-operators, Chicago real estate developers, etc., will usually have some ideological flavor that indicates which coalition of rent-seekers, the Republicans or the Democrats, they are intended to favor. In divided government, one can attempt, if only with limited success, to hold officers of the relevant branch responsible for whatever set of bills one considers the most egregious violations of the public trust by rewarding or penalizing officials on the basis of party affiliation. When both political branches are controlled by the same party, however, the legislative process will become more cooperative and less adversarial, further diffusing blame for bad outcomes. Devices of accountability are that much more desirable, therefore, when the same party controls both political branches of government.

An item veto would be especially perspicacious in the event a modern liberal occupies the White House. Some contemporary politicians believe that carefully targeted federal expenditures, euphemized in an election year as "public investment" rather than "government spending," can significantly benefit the national economy. By directing subsidies to high technology industries, socially disadvantaged groups, and others, these politicians and their supporters apparently hope to unlock economic potential that the

capital market has allegedly neglected.⁶⁶ There are many reasons to doubt the effectiveness of such industrial and social policies, but one of the best has always been that federal spending tends to be allocated not on the basis of any technocratically sophisticated plan, but rather according to the existing allocation of political power. Concretely put, money that is supposed to go to repair some vital piece of infrastructure will probably merely build another superhighway going nowhere in West Virginia. For a President to have any appreciable effect on the economy by targeting federal spending subject to real budget constraints, he will need an item veto or some close substitute, such as the power of impoundment. This power will probably be necessary if federal spending is to have any of its hoped-for effects.

There is some reason to think that the President is somewhat less subject to the influence of rent-seekers than are members of Congress. The President serves subject to an eight-year term limitation. He cannot appropriate funds, except perhaps in extraordinary circumstances.⁶⁷ Legal changes to create economic rents for interest groups must originate in Congress or a regulatory body, neither of which (including those agencies internal to the executive branch, such as the Environmental Protection Agency or the Food and Drug Administration) is subject to very effective presidential control. "Lobbyists" seeking to influence executive branch decision makers, and the decision makers themselves, are subject to a daunting array of congressionally erected barriers to entry into the rent-seeking industry, from which, not astonishingly, Congress is immune.⁶⁸ While far from completely effective, these strictures give the President and his officers a relative degree of freedom to attempt to use public money to buy public goods, rather than simply award it to political supporters and other rent-seekers. This is not intended as an endorsement of such government spending or industrial policy. Rather, we merely observe that in the realm of the second-best, it is probably better that industrial and similar policies be merely misguided, rather than both misguided and corrupt.

⁶⁶ See, e.g., Rudiger Dornbush, *Why America Needs Clinton's Economics*, *Wall St. J.*, Aug. 27, 1992, at A11.

⁶⁷ See Sidak, *The President's Power of the Purse*, *supra* note 15, at 1183-94.

⁶⁸ See J. Gregory Sidak, *The Recommendation Clause*, 77 *Geo. L.J.* 2079, 2107-10 (1989).

IV. CONCLUSION

One hypothesis for why President Bush publicly repudiated the theory of the inherent line-item veto is that the theory lacks any respectable legal basis. Although this position has been advanced by the Justice Departments of Presidents Reagan and Bush, it is a caricature that cannot withstand serious scrutiny. The President's power to unbundle legislation is an issue that raises legitimate and subtle questions of constitutional interpretation. It is no more frivolous for the President to create a careful test case to determine whether a line-item veto or subject veto implicitly exists in the Constitution than it is for him to permit the Solicitor General to file a brief in any case implicating the separation of powers. If President Bush, claiming the power to exercise an inherent line-item veto, had eliminated federal funding for a Lawrence Welk Museum and stopped at that, he would have precipitated a test case immediately affecting only a microscopic fraction of one year's federal spending. It would have been a controversy, but not a crisis, over constitutional interpretation.

Given the improbability of Congress ever allowing the President to acquire a line-item veto, either by statute or constitutional amendment, President Bush's repudiation of the inherent line-item veto on March 20, 1992 suggests that he did not consider acquiring a line-item veto, and using it to cut federal spending, to be significant political priorities of his presidency. A line-item veto probably would have subjected Mr. Bush and future Presidents to greater accountability than this additional increment of presidential power would be worth in terms of its political benefits to any of them. For President Bush, a politician who emphasized that "when principle is at stake" he "relish[ed] a good, fair fight,"⁶⁹ the greater risk associated with pursuing a test case on the inherent line-item veto was not that he might lose, but that he might win.

⁶⁹ See *supra* note 27.