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Separation of Powers and the 1995-1996 Budget Impasse

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SEPARATION OF POWERS AND THE 1995-1996 BUDGET IMPASSE†

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I. INTRODUCTION

With the re-election of a Democratic President and a Republican Congress, the uneasy budgetary consensus which developed after the recent budget battle and impasse will likely continue. The goal of achieving a balanced budget by 2002 still appears to hold though serious negotiations must occur regarding the looming problem of healthcare entitlements. President Clinton's willingness to engage in such negotiations is an acknowledgment that difficult decisions must be made if balance is to be maintained beyond 2002. Those decisions will likely be made jointly by the President and Congress. The 1995-1996 impasse indicated that both the President and Congress were willing to shut down the federal government rather than yield on their budgetary principles. That willingness guarantees that both branches will have integral roles in the structure of future budgets and budgetary policy. Given the desire to avoid annual shutdowns and the likely voter dissatisfaction that would attend such shutdowns, an explicit sharing of budgetary power seems likely. Thus, the United States appears on the verge of entering a new budget regime comprised of a balanced budget imperative with explicitly shared presidential and congressional re-

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† On June 26, 1997, the Supreme Court decided *Raines v. Byrd*, 117 S.Ct. 2312 (1997). While the primary issue in that case was the standing of members of Congress to challenge the Line Item Veto Act, the case may eventually have implications for arguments raised in this article.

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sponsibility over the budget.[1]

The explicit power sharing portended in the new regime may however run afoul of the separation of powers doctrine. In the past, federal budgets have reflected various blends of executive and legislative initiatives and priorities. However, the budgeting process has not thoroughly embraced the blending of executive and legislative power at the micro level.[2] Future budgets will likely require explicit coordination and implementation of presidential and congressional agendas. Possible alterations in the budget conferencing system may cause many of the decisions that were previously made solely by the Congress or the President to be made jointly by them. Such explicit power sharing is a direct outgrowth of the budget impasse and a recognition that the President and Congress are jointly politically responsible for budget failures and government shutdowns.[3] Whatever budgetary solution the branches reach will likely involve legislative control or influence over quasi-executive functions, executive control or influence over quasi-legislative functions, or combined control over all functions. How Congress and the President share the budgetary power, and whether such arrangement is memorialized in law or informally enforced, may determine whether the arrangement will be allowed under the Supreme Court's Constitution-driven separation of powers jurisprudence.

Blended power in the face of the separation of powers doctrine can be problematic. Several ways to interpret the separation of powers exist, and the Constitution does not command any particular vision of the separation of powers.[4] Differing views range from those which focus simply on stopping one branch of government from accumulating too much power to interpretations which perceive each governmental power as being assigned exclusively to a particular branch.[5] Often, various interpretations of separation of powers doctrine stem from distinctive views of the Founders' reasons for separating powers. Mandates flowing from a separation of powers doctrine grounded in limiting governmental power will be very different from mandates flowing from a separation of powers doctrine based largely on the smooth functioning of a

1. For an explanation of what constitutes a budget regime, see *infra* part I.

2. Indeed, *Bowsher v. Synar*, 478 U.S. 714 (1986), arguably suggests that no such blending on the micro level can occur. For a discussion of *Bowsher*, see *infra* part III.B.

3. Although both branches are responsible for budget failures, one side will tend to get more blame. *See* Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 440 (1996) (suggesting that Congress took more blame for the 1995 budget impasse than President Clinton).

4. *See* Hon. Richard S. Arnold, *Money, or the Relations of the Judicial Branch with the Other Two Branches, Legislative and Executive*, 40 ST. LOUIS U. L.J. 19, 23 (1996) (stating that though no separation of powers clause exists in the Constitution, the idea is central to the document).

5. For a discussion of these views, see *infra* part IV.

three-branch government. A rigid separation of powers doctrine may yield a rigid system of power sharing. Conversely, a flexible separation of powers doctrine may allow flexible power sharing arrangements. Different power sharing solutions will be deemed constitutional or unconstitutional based on the separation of powers analysis the Supreme Court chooses to use.

The extent to which the Court's separation of powers jurisprudence will frustrate budgetary power sharing is unclear. *Bowsher v. Synar*[6] is the Court's last direct application of the separation of powers doctrine to budgetary power sharing, and it frustrated a portion of the political solution that Congress and the President reached under the Gramm-Rudman-Hollings Act.[7] Whether the Court's separation of powers jurisprudence will allow future power sharing or power allocating political solutions that the President and Congress may reach remains to be seen.

The promise of power sharing in a new budget regime offers a marked improvement over the current regime. A power sharing process that establishes mechanisms which will insure responsible behavior by the President and Congress leading to control over budget deficits is a good one. If the Constitution is a blueprint for the effective use of power and the separation of powers doctrine is a means to that end, the Court may need to alter how it views interbranch political agreements reached in the interest of reducing partisanship and balancing the budget.

Separation of powers doctrine will have implications for any budget regime which contemplates explicit power sharing. This Article examines the possible separation of power pitfalls which threaten to undermine the emergence of a relatively healthy new budget regime and the creative mechanisms necessary to make that regime work. The Constitution does not provide many explicit instructions regarding the federal budgeting process. Thus, whether a particular budget arrangement is a good one requires a largely political analysis.[8] Whether a particular budget arrangement is constitutional must be answered by the Supreme Court. On what basis the Court should make such a decision, the likelihood that the decision will have an impact on future budget arrangements, and whether the Court's vision of the Constitution will unduly influence budget reform manifested as power sharing are the key concerns of this short Article.

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6. 478 U.S. 714 (1986).

7. President Reagan acquiesced to the Gramm-Rudman-Hollings Act by signing it. Nonetheless, the Solicitor General argued against the provision allowing the Comptroller General to control mandatory budget cuts. The Comptroller General's power to require particular budget cuts was the core issue in *Bowsher v. Synar*.

8. This is not to suggest that the question is nonjusticiable, just that the issue is one that is peculiarly relevant to the political arena.

II. BUDGET REGIMES

The 1995-1996 budget impasse forced Congress and the President to identify budget priorities and budgetary principles that will guide the United States in the near future. Agreement on many of those principles has led the United States to the verge of a new budget regime. A regime refers to the governing philosophy of a nation as it exists in the constitution, laws, and norms by which political elites are bound in their actions.[9] The philosophy of the governing regime does not necessarily coincide with the political culture which rules the rest of the public.[10] A regime may be thought to be the philosophy which controls the actions of political elites, whereas political culture refers to the expectations or values held by the majority of the citizenry.[11]

A budget regime entails a confluence of a philosophy of spending and a philosophy of responsibility.[12] The philosophy of spending describes the con-

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9. *See* DALL FORSYTHE, TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION 1781-1833 2-3 (1977) (stating:

> 'Regime' is thus equivalent to the formal rules of political conduct as expressed in written constitutions, charters, or statutes, insofar as those rules in fact serve as practical working guides to acceptable political behavior. 'Regime' also includes informal specifications of the political rules of the game .... Even more generally, 'regime' also specifies other important limits on political activity ... such as the major settlements defining participation in politics, the distribution of political benefits, the types and level of social control available for use by the political elite, the broad institutional relationships inside government, and even the legitimating rhetoric and language of politics.).

10. *Id.* at 4.

11. In a political world where reelection may be more important than governing, one would expect the behavior of the elites to coincide with the political culture.

12. An examination of the conjuncture between the philosophies of spending and responsibility reveals the prevailing budget regime. For instance, the first regime from 1789 until 1921 involved a philosophy of spending which called for balanced budgets and a philosophy of responsibility that was marked by congressional dominance of the budgeting process. A new regime formed when the Budget and Accounting Act of 1921 called for a balanced executive budget and thus gave the President a more prominent role to play in the formulation of the budget. During the United States two hundred plus year history there have been five distinct budget regimes. The first regime lasted from 1789 until 1921. The second regime endured from 1921 to 1933. The third existed from 1933 to 1946. The fourth regime went from 1946 to 1974. And the fifth began in 1974 and perhaps is about to be replaced by the sixth in the coming years.

	PHILOSOPHY OF SPENDING		
PHILOSOPHY OF RESPONSIBILITY	BALANCED BUDGET	KEYNESIAN ECONOMICS	BUDGET CONTROL
CONGRESSIONAL	First Regime		
SHARED	Second Regime Sixth Regime	Third Regime	Fifth Regime
PRESIDENTIAL		Fourth Regime	

sensus of federal politicians regarding the questions of whether, when and why the federal budget should or should not be balanced.[13] In the past, rather than being a creature of partisan political considerations, the consensus philosophy of spending has been justified based on economic and sometimes moral foundations. This reliance on economic justification had led American politicians to follow two predominant philosophies of spending: 1) balanced budget, and 2) Keynesian or full-employment economics. Each of these has a clearly established set of guidelines and beliefs about economic determinants which allow politicians to justify spending decisions. In the current budget regime, however, a third choice which calls merely for control of deficit spending seems to have influenced many politicians. This position by most accounts lacks a firm economic basis and seems to be more a creation of political convenience than economic calculation.

A philosophy of responsibility references the person or persons who set spending priorities and levels and, thus, are accountable for upholding the prevailing philosophy of spending. This aspect of a budget regime addresses the roles played by the President and Congress in formulating the federal budget. It encompasses how much control the President can legally and/or rhetorically exert in setting budget priorities and what committees and interests within Congress are served by its budget procedures. The philosophy of responsibility concerns the constitutional and procedural regulations which govern political elites engaged in the budget process. Whereas the philosophy of spending remains in the realm of ideas, the philosophy of responsibility is set in the context of the separation of powers. As will be seen later in this Article, responsibility for budget problems has been avoided by both branches, in part because the prevailing philosophy of spending allowed them to do so. The strongest attempt made to establish some sort of responsibility was partly negated by the *Bowsher* Court. Unfortunately, the Court may show similar disregard for carefully negotiated political agreements which probe the boundaries of the separation of powers.

III. THE CURRENT BUDGET REGIME

In order to understand the current budget regime and how the country has reached it, one must look to the fourth budget regime which began in 1946, and ended in 1974 with the passage of the Congressional Budget and Im-

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See, Dennis E. Logue, Jr., The Odyssey of the Budget: An Examination of the Political and Economic Forces Which Have Shaped U.S. Federal Budget Regimes, (May, 1996) (on file with *Saint Louis University Public Law Review*).

13. The philosophy of spending emphasizes how much money the government spends, how much debt it accumulates and for what economic or political purpose it does so. In general, conflicts with regard to where federal funds will be allocated must be decided within the boundaries of the reigning philosophy of spending.

poundment Control Act of 1974 (CBICA).[14] The fourth regime had a Keynesian philosophy of spending and a presidential-centered philosophy of responsibility. In the 1950s, both major parties accepted the primacy of Keynesian economics and the central role of the President in setting budget priorities. During the 1950s, politicians generally agreed on the spending cuts required under the prevailing budget theory. The cuts were largely made in the defense budget because, at the time, it accounted for over fifty percent of the federal budget. In the 1960s, this consensus regarding what areas of the budget to cut began to disappear as the ideological make-up of the two parties changed. The Goldwater-influenced Republicans saw a limited role for government fiscal policy in managing the economy. Consequently, they did not favor much spending on social programs directed at individuals. The Democrats were split between a Southern, conservative faction whose views regarding spending mirrored the Republicans and a Northern, more liberal faction that desired an increase in government spending on social services. Until 1963, the Republican/Southern Democrat coalition held the balance of power in Congress. After President Kennedy's death and Lyndon Johnson's 1964 landslide presidential election, the liberal faction gained control of Congress, as a group of younger and more liberal politicians who wanted to enact more social programs became committee chairmen and congressional leaders.

In the next few years, Congress passed many of President Johnson's Great Society programs, e.g., Medicare and Medicaid, which were designed to help the poor and the elderly. The continuing growth of federal revenues which were expected from the continued growth of the economy at a rate of 4.4% per year seemed to make the expansion of the welfare state possible without a cutback in defense spending. The Johnson administration and the liberal Democrats who controlled most of the congressional committees concluded that national consensus paralleled their efforts to expand the social safety net. Even at the outset of the Vietnam War, many believed that the growing economy would provide the government with enough revenue to support both the war in Vietnam and the "War on Poverty."[15]

One need only look at the change in the allocation of funds in the federal budget from 1959 to 1974 to appreciate how profound the changes in the attitudes toward government spending which occurred during the 1960s were. In 1959, the percentage of the federal budget spent on defense was nearly double that spent on social programs (53.2% to 27.0%).[16] By 1974, the difference had

14. Pub. L. No. 93-344, 88 Stat. 297 (1976) (codified as amended at 2 U.S.C. §§ 601-88 (1988 & Supp. IV 1992)).

15. *See* ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 24-25 (1980).

16. OFFICE OF MGMT. & BUDGET, BUDGET OF THE UNITED STATES: HISTORICAL TABLES FISCAL YEAR 1995 38 (1995) [hereinafter OMB Historical Tables].

swung almost completely in the opposite direction. Defense spending amounted to 29.5% of the budget while spending for social programs had risen to 50.4%.[17] The explanation for the radical change in percentages is that while spending for defense remained relatively constant at $80 billion since 1969, domestic spending doubled from $66 to $135 billion.[18] In spite of the dramatic growth in social spending which occurred, the overall size of the budget relative to the Gross Domestic Product (GDP) remained consistently between 19% and 20% from 1969 to 1974.[19] Yet because tax revenues were consistently one to two points less than expenditures (except in the anomalous year of 1969) the deficit remained and the national debt grew.[20]

In the early 1970s, the national economy which had grown at a fairly steady rate during the 1960s, slowed. The persistence of recessionary conditions appeared to require Keynesian fiscal stimulus under the old consensus regime. In keeping with the prevailing philosophy of spending, President Nixon accepted budget deficits declaring that he was an economic Keynesian. However, he added a subtle twist to the old economic stability formula, announcing that in the future, the goal of the government was to achieve balanced budgets during times of full-employment rather than surpluses. This was the genesis of the budget control philosophy. The reformulation of the spending philosophy meant that under most economic situations, the government would be operating at a deficit.

While this acceptance of deficits was tacitly acknowledged by all the parties in government, it was not a position which many volunteered to share with a general public that believed the government would try to balance the budget.[21] Deficits were acceptable as long as both sides were willing to blame their existence on Keynesian economics and not use the deficits as political weapons. Thus, when President Nixon decided to run against the spendthrift Congress in his 1972 re-election campaign, he broke the unspoken pact which had existed throughout his first four years (when much of the growth in social spending occurred). In making federal deficits a campaign issue, Nixon indicated that the deficits were not as related to the nation's economic condition so much as they were the result of Congress' failure to enact spending controls. Nixon's claims crystallized the differences between the two parties with regard to the proper role of government in the economy and the allocation of government resources.

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17. *Id.* at 39.

18. *Id.* Even the baseline of $66 billion was a doubling of the figure from 1964. *See id.* at 38.

19. *Id.* at 39.

20. *Id.* at 17, 39.

21. *See* RUDOLPH PENNER & ALAN ABRAMSON, BROKEN PURSE STRINGS: CONGRESSIONAL BUDGETING, 1974-88 29 (1988).

In his first term, President Nixon did very little to change the budget priorities which he inherited from the Johnson administration. Nixon's first truly controversial action, with regard to the budget system, was to request permission from Congress to change the name and nature of the Bureau of the Budget. He wanted to create an Office of Management and the Budget (OMB) which would evaluate government programs.[22] This new organization would be teamed with a Domestic Council of the President as part of an executive action to bring the bureaucracy under control.[23] Congress approved the plan in July 1970.

The creation of the OMB strained presidential relations with Congress. President Nixon's politicization of the new office was the biggest problem. Prior to the change, Congress had viewed the Bureau as a somewhat reliable and unbiased source of information as to the costs of programs and economic predictions. After the switch to the OMB, Congress grew increasingly wary of the Office's policy evaluations.[24] This wariness eventually led Congress to make the position of OMB director and assistant director subject to Senate approval in 1973.

During the 1972 campaign, Nixon continuously declaimed the spendthrift Congress and warned Americans that a congressional tax-hike after the election was a possibility. Nixon also challenged Congress to place a $250 billion spending limit on the budget for fiscal year 1973. He intimated that if Congress failed to act, he would take action on his own to insure that the spending limit was met. After the election, Nixon remained true to his word. When Congress was unable to establish a spending limit agreement, Nixon authorized the impoundment of over $17 billion of appropriated funds from numerous domestic programs.[25] This action created a swarm of controversy around the country and on Capitol Hill. Particularly galling to most legislators was the fact that almost all of the impoundments were enacted against programs supported by congressional Democrats.[26] It was clear that the intent of the Nixon administration was to eliminate executively social programs which it could not eliminate legislatively. Among the programs affected by the impoundments were water-pollution programs, housing programs and several rural assistance programs. Most notable of the programs left untouched by impoundments was the $30 billion General Revenue Sharing Act sponsored by the Nixon administration which had not been passed into law.[27]

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22. *See* LOUIS FISHER, PRESIDENTIAL SPENDING POWER 47 (1975).

23. *Id.* at 47-48.

24. *See id.* at 56.

25. *Id.* at 173.

26. *See* CONGRESSIONAL QUARTERLY INC., BUDGETING FOR AMERICA: THE POLITICS AND PROCESS OF FEDERAL SPENDING 54 (1982).

27. The justification for the withholding of some of the program funds was predicated on

The Nixon administration defended impoundment as the routine exercise of executive authority and pointed to examples of its previous use by other presidents. However, the Nixon impoundments were not routine.[28] Rather, the impoundments were clearly an example of policy-making and priority-setting by the Administration. Although the administration argued that the impoundments were legitimate based on readings of the Employment Act of 1946 and the Anti-Deficiency Act of 1950,[29] these and all the other Administration arguments were rejected.

In response to the initial Nixon impoundments in 1973, Congress formed the Joint Study Committee whose task was to design a method for Congress to match the president's expertise in budget matters and devise a way to control congressional spending.[30] The result was the CBICA, which changed the budget system in a multitude of ways. It created a Congressional Budget Office (CBO) to provide Congress with its own agency to analyze the possible budgetary consequences of all proposed legislation.[31] Part of the CBO's mission was to perform five-year economic analyses of all bills presented in Congress.[32] Congress empowered the CBO to act as a counterweight to the presidential controlled OMB and to serve as a tool to help Congress design its own fiscal policy.[33] CBICA also established budget committees in each house of Congress.[34] The purpose of the committees was to produce budget resolutions prior to and just after the various authorization and appropriation committees finished their allocation process.[35] Under the Act, funds could not be appro-

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the Administration's belief that they would be replaced by monies from the revenue-sharing plan. *See* FISHER, *supra* note 22, at 172.

28. *See* SCHICK, *supra* note 15, at 48. Four different kinds of impoundments have been used by Presidents to control government spending. They are:

> (1) routine actions taken for purposes of efficient management; (2) withholdings that have statutory support; (3) withholdings that depend on constitutional arguments, particularly the Commander-in Chief clause, and; (4) the impoundment of domestic funds as part of policy-making and priority-setting by the Administration.

FISHER, *supra* note 22, at 148-65. For examples of the successful use of impoundments by Presidents, *see id.*

29. *See* FISHER, *supra* note 22, at 154.

30. Pete V. Domenici, *The Gramm-Rudman-Hollings Act: An Exercise in Legislative Futility?*, 25 HARV. J. ON LEGIS. 537, 542-43 (1988).

31. § 201, 88 Stat. at 302.

32. § 202, 88 Stat. at 304; § 603, 88 Stat. at 324.

33. *See* PENNER & ABRAMSON, *supra* note 21, at 19, 45; James Thurber, *The Consequences of Budget Reform for Congressional-Presidential Relations*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (September 1988).

34. §§101-102, 88 Stat. at 299-300.

35. In a related action, the Act also delayed the beginning of the fiscal year from June until October in order to give Congress time to use the additional budgeting procedures it had established. § 501, 88 Stat. at 321.

priated before the first budget resolution or after the second one.[36] Any spending that exceeded the budget resolutions was addressed in the reconciliation process which forced appropriations committees to review their allocations and make the necessary cuts to comport with the budget resolution.[37] The Act also established time deadlines for each stage of the budgeting process.[38] Presumably, the new process would add to congressional credibility as a responsible budgeter and would allow Congress to formulate its own spending priorities apart from the executive budget.[39]

Most importantly, the CBICA created new guidelines for executive use of impoundments. Under the Act, impoundments were divided into two categories: rescissions and deferrals.[40] Deferrals entail the delay of spending of funds for appropriated purposes. A President requesting a deferral acknowledges that the funds will eventually be spent, but not immediately. Congressional approval is not necessary for a deferral to be effective. However, if both houses vote to disapprove the deferral,[41] the President must immediately release the funds for expenditure.[42] Rescissions resemble Nixon's use of impoundments as domestic policy tools.[43] In such cases, the President asks the Congress to rescind some or all of its appropriation decision.[44] A rescission must be approved by both houses of Congress within forty-five days to become permanent.[45] The Act also included a notification procedure which called for full disclosure of all presidential impoundments and empowered the Comptroller General of the General Accounting Office (GAO) to serve as a watchdog for executive efforts to skirt the law.[46]

The Nixon impoundments and Congress's response shattered any lingering beliefs that consensus existed regarding the role of the federal government in

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36. § 303, 88 Stat. at 309; § 311, 88 Stat. at 316.

37. § 310, 88 Stat. at 315.

38. The second resolution and reconciliation requirements were eviscerated when Gramm-Rudman-Hollings was created. §§ 301-11, 88 Stat. 306-16.

39. *See* Louis Fisher, *Federal Budget Doldrums: The Vacuum in Presidential Leadership*, 50 PUB. ADMIN. REV. 693, 695 (1990).

40. Thurber, *supra* note 33, at 106.

41. Originally, the 1974 Act called for a one house veto of deferrals, but after the Supreme Court ruled that kind of legislative veto out of order in *INS v. Chadha*, 462 U.S. 919, 959 (1983), the two house system was adopted. For the text of the original statute, *see* § 1013(b), 88 Stat. at 335. *See also* Thurber, *supra* note 33, at 106.

42. Even if Congress does nothing, the deferred funds are released at the end of the fiscal year. § 1013(b), 88 Stat. at 335.

43. They were used extensively during the Ford administration in an effort to contravene Congressional spending programs. *See* FISHER, *supra* note 22, at 200.

44. § 1011(3), 88 Stat. 333.

45. *Id.*

46. § 1014(b), 88 Stat. at 335.

society. From then on, it was clear that two separate views would exist. The Republican view as espoused by Nixon and later President Reagan called for decreased social spending and less intervention by the federal government.[47] The Democratic view demanded sustained government spending and intervention with the goal of achieving social equality.[48] The provisions in the CBICA demonstrated the loss of budgetary consensus which had existed in previous years. The creation of the CBO and the congressional budget committees exhibited Congress's realization that presidents may not always share Congress' values regarding budgeting. A congressional alternative had to exist so that alternative spending priorities could be devised. The new impoundment rules also indicated that Congress no longer felt comfortable with the amount of budgetary discretion which it had granted to the executive during the years of consensus.

President Reagan's first few years in office set the political tone for the rest of the 1980s as the battle over the budget, which began with Nixon, resumed. The difference between the Reagan budget battles and those which occurred under Nixon was that Congress had the institutional resources to circumvent the President's budget and formulate its own. Unfortunately, this meant that neither side could be held entirely accountable for the budget and its problems.[49]

The change in the economy in the late 1970s left America's politicians searching for a new philosophy of spending. The conflict between the President and Congress was an essentially political battle.[50] President Reagan's priorities were reduced taxes and increased defense spending.[51] Balancing the budget was a distant third and easily sacrificed on behalf of these other two goals. Likewise, the Democrats in Congress placed a higher priority on maintaining the rate of spending on domestic programs than on a balanced budget.[52] As a result, compromising around deficit reduction plans was easier than making the cuts necessary to move toward a balanced budget.

The CBICA was enacted primarily to reassert congressional influence in

47. *See, e.g.,* CONGRESSIONAL QUARTERLY, NATIONAL PARTY CONVENTIONS, 117-179 (1995) (reprinting all platforms from presidential elections from 1972-1992).

48. *Id.*

49. In his essay, Louis Fisher argues that the creation of the congressional budget by the CBICA has added to the problem by allowing both sides to avoid their responsibilities. *See* Fisher, *supra* note 39, at 696 ("The confusion of multiple budgets creates substantial costs for democratic government. Neither the president nor Congress can be held publicly accountable for the national budget. Both branches and both parties practice the 'politics of blamesmanship' by attacking each other's fiscal record. Witnessing this crossfire, voters cannot fix responsibility.").

50. *See* Richard E. Neustadt, Presidents, Politics and Analysis, The Brewster C. Denny Lecture at University of Washington (May 13, 1986) at 22-23.

51. *See* CONGRESSIONAL QUARTERLY, *supra* note 47, at 134-36.

52. *See id.* at 138-41.

the budget process, rather than to lower the deficit. Indeed, bias toward increased expenditures within the system may have existed.[53] As a result of budget control gone out of control, the Gramm-Rudman-Hollings Acts[54] (GRH) were passed to eliminate the deficit. Described as a "bad idea whose time has come," the first Act was passed by Congress in 1985.[55] That Act eliminated the second budget resolution process established by the CBICA and it created a table of deficit reduction numbers to be met by Congress each year until the budget was balanced in fiscal year 1991.[56] If Congress failed to meet the deficit reduction numbers, the Comptroller General was given the power to direct the President to sequester appropriated funds in order to meet the projection.[57] The programs which were subject to sequestering included the defense budget and a variety of smaller social programs, but not larger ones, such as social security, AFDC and Medicaid.[58] The percentage of cuts were to be divided equally between the defense and social programs in order to ensure that neither the Republican President nor the Democratic Congress would have an incentive to stall the budget negotiations process in an effort to trigger automatic sequestering.[59]

GRH failed to meet its goals. Instead of focusing on deficit reduction, Congress and the President merely resorted to creative accounting methods to make the budget appear as if it was meeting the Act's requirements.[60] A commentator has suggested that instead of encouraging the President and Congress to bargain before the threat of sequestering (due to the drastic nature of the cuts that might be made as a result), GRH might actually have encouraged brinkmanship on both sides. The President and Congress were inclined to wait until they saw where the brunt of the mandatory sequestering was going to fall before beginning their negotiations.[61]

Despite its drawbacks, the GRH plan was still in effect in 1990. The drastic reduction in spending which the plan called for prompted President Bush

53. *See* AARON WILDAVSKY, THE NEW POLITICS OF THE BUDGETARY PROCESS 156 (1988).

54. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1987).

55. *See* JOSEPH WHITE & AARON WILDAVSKY, THE DEFICIT AND THE PUBLIC INTEREST: THE SEARCH FOR RESPONSIBLE BUDGETING IN THE 1980S 445 (1989). The second GRH was passed in 1987. *Id.*

56. *See Bowsher v. Synar*, 478 U.S. at 717.

57. §§ 251-52, 99 Stat. at 1063-78.

58. § 255, 99 Stat. at 1082-86.

59. *See* Darrell M. West, *Gramm-Rudman-Hollings and the Politics of Deficit Reduction*, 499 ANNALS AM. ACAD. POL. & SOC. SCI. 90 (September 1988); WHITE & WILDAVSKY, *supra* note 55, at 456.

60. One such gimmick involved the moving of government paydates from the last day of fiscal year. *See* PENNER & ABRAMSON, *supra* note 21, at 98.

61. *See* WILDAVSKY, *supra* note 53, at 263.

and the Democratic leadership in Congress to meet and design a new budget procedure which would have less draconian results. The result of these meetings was the Budget Enforcement Act of 1990 (BEA).[62] The BEA did not incorporate a balanced budget, focusing instead on simply reducing expenditures by $500 billion over the next five years.[63] Spending was only peripherally matched with revenues in the sense that President Bush was forced to recant on his campaign promise of "no new taxes"[64] in order to shrink the gap between income and outgo. The cornerstone of the BEA was its pay-as-you-go (paygo) provision that all new spending or tax cut measures would have to be balanced by spending cuts or revenue increases somewhere else in the budget.[65] Budgeting was supposed to become a zero-sum game, in which nobody won a budget increase without somebody losing.[66] At the end of five years, the BEA was supposed to revert back to the GRH deficit target and sequestration procedures.[67]

The deficit reduction program was scrapped by President Clinton and the Democratic majority in Congress soon after Clinton took office. Problems with President Clinton's relationship with the Republican Congress elected in 1994 culminated in the 1995-1996 budget impasse. How the President and Congress can resolve their differences and balance the budget is a problem that remains to be solved. Whether the solution is allowed to come to fruition depends on the federal judiciary. Before suggesting the changes in federal budgeting that may occur and analyzing their viability, it will be useful to make a brief examination of basic separation of powers doctrine.

IV. SEPARATION OF POWERS

A full accounting of separation of powers doctrine would require a much more lengthy Article than this one. This Article will merely identify some

62. Pub. L. No. 101-508, 104 Stat. 1388-573 (1991).

63. *See* WILDAVSKY, *supra* note 53 at 513.

64. CONGRESSIONAL QUARTERLY, *supra* note 47, at 162.

65. § 13204, 104 Stat. at 1388-616.

66. This paygo provision was buttressed by the creation of budgetary spending categories. These categories which were separated into defense spending, domestic discretionary spending, international, and entitlement spending (Social Security was placed off budget) were protected by firewalls. Reductions in spending in one category could not be used to increase spending in another. Thus decreases in defense spending as a result of the peace dividend from the end of the Cold War had to go toward deficit reduction and could not be used to fund new social programs. *See* James Thurber & Samantha Durst, *The 1990 Budget Enforcement Act: The Decline of Congressional Accountability*, *in* CONGRESS RECONSIDERED at 383 (Lawrence Dodd and Bruce Oppenheimer eds., 5th ed. 1993). In order to keep spending in line within these categories, a categorical sequestration was allowed which would automatically have cut expenditures for all programs within the spending category until the spending ceiling was reached. *Id.* at 382.

67. § 13101, 104 Stat. at 1388-575.

general ideas and theories underlying separation of powers doctrine and indicate how they may affect the development of the new budget regime and processes that may accompany it. While the new budget regime will emerge regardless of the Supreme Court's application of the separation of powers, the emergence could occur much more swiftly and painlessly if an accommodating vision of separation of powers is adopted.

Separation of powers is not a command that flows from any particular section of the Constitution. Rather, it is a doctrine that proceeds from the structure of the federal government.[68] The tripartite structure of the government and its delineation of different powers to different branches indicate the intent to separate powers.[69] Under the Constitution, the Congress exercises legislative power;[70] the President exercises executive power;[71] and the federal courts exercise judicial power.[72] However, that the government's powers are nominally separated does not fully explain the separation of powers. How the executive, legislative and judicial branches may exercise power is a key consideration of separation of powers jurisprudence.

While the Constitution is sometimes quite explicit as to the allocation of specific powers, it is vague as to how to assign powers not explicitly granted to a particular branch. On what basis a power is deemed executive, legislative or judicial is not clear under the Constitution. That legislative and executive power are not explicitly defined by the Constitution is part of the problem.[73] Some powers that are exercised by the federal government, e.g., the power to budget, may not be clearly executive or legislative. Although the Constitution's structure suggests that legislative power differs from executive power, depending on how a power is defined, particular powers may entail aspects of

68. Indeed, any argument based on Framer's intent regarding what the particular contours of the separation of powers may be misguided. *See* Russell K. Osgood, *Early Versions and Practices of Separation of Powers: A Comment*, 30 WM. & MARY L. REV. 280 (1989) (arguing that the beginning of the post-Constitutional era is a particularly bad time to try to assess the state of separation of powers or its overarching effect on government because those who ran the government were searching for methods to run the government and may have jettisoned ideals for the sake of harmonious government function).

69. *See* William B. Gwyn, *The Indeterminacy of the Separation of Powers in the Age of the Framers*, 30 WM. & MARY L. REV. 263, 266 (1989) (noting that the Constitution provides a structure for separation of powers, but does not define legislative, executive or judicial power); Russell Osgood, *Governmental Functions and Constitutional Doctrine: The Historical Constitution*, 72 CORNELL L. REV. 553, 563 (1987) (suggesting that the separation of powers is not a uniform doctrine, but rather a concept that stems from the government's structure).

70. *See* U.S. CONST. art. I, § 1.

71. *See* U.S. CONST. art. II, § 1.

72. *See* U.S. CONST. art. III, § 1.

73. Conversely, the judicial power of the government is relatively well defined or well circumscribed by Article III and the Eleventh Amendment of the Constitution.

both.

Legislative power is the power to create laws. Executive power is the power to administer laws and to run the government. The power to administer laws is arguably derivative of legislative power, and does not exist independently of the legislative power to create law. The power to run the government can be defined as the whole power of the government that is neither legislative nor judicial. While this amalgamated definition of executive power is expansive and somewhat all encompassing, it may reflect the Framers' intent. The Constitution was a break with a monarchical power structure, in which all government power was vested in the sovereign.[74] When government power is divided into executive, legislative and judicial power, the executive power can be viewed as the residual power which encompasses all power that the judicial and legislative powers do not. Indeed, the duty to run the government entails responsibilities that are independent of legislative power and which must be executed, even in the absence of congressional lawmaking.[75]

These views of executive power are not mutually exclusive. As applied to some functions, executive power is residual; as applied to others, it is derivative. Which vision of executive power is appropriate depends on the particular power that is involved. For example, the power to conduct foreign policy might be viewed as a part of the residual executive power the President exercises. Conversely, the power to administer Department of Labor regulations may be a derivative power that flows from the President's duty to execute the laws that Congress passes. How a court views the relationship between presidential authority and congressional power will drive its determinations regarding the implementation of separation of powers doctrine.

A. Three Visions of Separation of Powers

A multitude of visions of separation of powers exists.[76] Even the Supreme Court has appeared to adopt different views of separation of powers at differ-

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74. *See* Gwyn, *supra* note 69, at 266-67 (suggesting that as executive power used to be the whole power of government, executive power as originally understood by English may have been whatever remained after legislative and judicial power was removed from the whole power of government).

75. For example, the duty to act as commander-in-chief may be independent from Congress' legislative power. *See* U.S. CONST. art. II, § 2.

76. *See* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 220 (1989) (suggesting the absence of "a coherent and generally shared view of separation of powers" at the 1787 Constitutional Convention) and at 261 (stating that "no clear doctrine" of separation of powers existed in the formative years just after the Constitution was passed); Keith Werhan, *Normalizing the Separation of Powers*, 70 TUL. L. REV. 2681, 2684 (1996) (suggesting indeterminacy of separation of powers at the founding of the Republic).

ent times.[77] This Article will very briefly sketch three visions of separation of powers doctrine and delineate them as loose, blended, and strict visions. As befits their designations, these visions range from the least restrictive to the most restrictive view of separation of powers. The loose vision of separation of powers is based on the idea that the entire power of the government should not rest in the same hands.[78] The blended vision rests on the notion that some governmental powers must be exercised by particular branches, but that many powers can be shared between branches even without explicit constitutional authority for the sharing of power. The strict vision is grounded in the notion that every governmental power must be exercised solely by the particular branch to which the power is assigned.

The loose version of separation of powers provides an organizing principle that allows and promotes flexibility in government administration. Its central concern is that government power be exercised by multiple branches of government.[79] Having any separation of power promotes the dispersion and nonaggregation of power.[80] The mere existence of three branches of government with power allocated to each branch may be sufficient to enforce this version of separation of powers.[81] If the existence of three branches and some

77. *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 489 (1987) (stating:

> The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues grounded in the perceived necessity of maintaining three distinct branches of government (and consequently appearing to draw rather sharp boundaries), and a functional approach that stresses core function and relationship, and permits a good deal of flexibility when these attributes are not threatened.).

Cf. Casper, *supra* note 76, at 214 ("As put forward by Montesquieu, separation of powers is a functional concept; separation is a necessary, if not a sufficient, condition of liberty. Its absence promotes tyranny.").

78. The Federalist Papers provides a good description of the idea. *See* THE FEDERALIST No. 47 (James Madison) (Separation of powers "can amount to no more than this, that where the *whole* power of one department of the government is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.").

79. The separation must be more than merely physical. One branch cannot exercise control over other branches. *See* Victoria Nourse, *Toward a "Due Foundation" for the Separation of Powers: The Federalist Papers As Political Narrative*, 74 TEX. L. REV. 447, 456-96 (1996) (suggesting that without separation of powers doctrine problems arose when one branch of government controlled the people of another branch, e.g., English monarchs controlled the House of Commons through patronage and state legislatures controlled governors by exercising the ability to elect them and the ability to raise or lower theipay). *Cf.* Casper, *supra* note 76, at 226 (suggesting that some initial matters of separation of powers were reactions against the British parliamentary system).

80. While an absence of an aggregation of power is a key factor for this vision of separation of powers, it is not exclusive to this version of separation of powers.

81. Providing checks and balances may give life to a generalized doctrine of separation of

allocation of power is enough to end separation of powers concerns, the business of government may be executed in many different ways under a wide variety of structures.[82] Flexibility of function promotes creative solutions to real problems that government must solve, and arguably is the most efficient way to run the government.[83] As changes in the functions that government must execute occur, flexibility allows the government to meet those changes quickly. Of course, flexibility can have negatives, since a loose separation of powers doctrine does not offer definitive protection against the aggregation of power. Fortunately, the checks and balances in the Constitution guarantee that any branch that attempts to become too powerful will be checked by other branches as they exercise their constitutional perogatives.[84] In addition, public opinion can be a check on the power of a rogue branch of government.

The judiciary's limited role in enforcing the separation of powers is of particular interest under a loose version of separated powers. The judiciary's role in the loose version is relatively small because the power structure created in the Constitution is itself a brake on the aggregation of power.[85] Relying on nonjudicial methods to control the distribution of power through the government may seem odd. However, if one considers that a judiciary that determines which branch of government has the power to perform what function is a judiciary with the power to remake or remold the constitutional order, it is very possible that the Framers preferred a relatively wide open system of checks and balances to tight control by the judiciary.

A blended vision of the separation of powers embraces a government of core and shared powers. Core powers refer both to specific powers that constitutionally must be exercised by a particular branch and to powers essential to the branch's exercise of those powers. For example, while powers essential to

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powers by allowing the branches to assert and reassert themselves, thereby protecting their power and avoiding the improper aggregation of power. However, that checks and balances exist does not ratify any particular vision of separation of powers jurisprudence. Simply, the Constitution may provide checks and balances as an implementation of or a prelude to nearly any vision of separation of powers that exists.

82. The variety of structures may be limitless if separation of powers does not envision a strict compartmentalization of powers. Indeed, the Framers may not have envisioned such a regime. *See* Nourse, *supra* note 79, at 451-52 (arguing Madison's separation was of political power rather than government function).

83. However, efficiency is not necessarily a value honored in constitutional theory. *See INS v. Chadha*, 462 U.S. 919, 958-59 (1983) (suggesting constitutional values are more important than efficiency).

84. *See* Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 434-35 (1987) (suggesting that separate branches with interrelated checks and balances tends to characterize separation of powers).

85. *Id.* at 441-42 (explaining the idea advocated by Jesse Choper that courts should stay out of many separation of powers issues because checks and balances exist to correct power imbalances that may occur when one branch overreaches).

the exercise of Congress's legislative power would be core powers, powers relevant to (congressional) oversight of the bureaucracy would not be. Thus core powers are exercised by a particular branch, whereas noncore powers may overlap and be shared by multiple branches.[86]

The Constitution envisions some explicit blending of powers,[87] but it is unclear whether a shared power regime is generally to be viewed as the rule or the exception. If a wide range of core powers must be exercised by specific branches, some flexibility in governmental administration is lost, as each branch is somewhat more confined in its possible functions. However, if the core powers involved must be exercised by a particular branch in order to have that power be exercised properly, any loss in flexibility can be viewed as a sacrifice to the greater good. Where the Constitution grants a core power to a particular branch, that power arguably may not be exercised by another branch because such a shift in power might upset the balance created under the Constitution. Under a blended vision, non-aggregation concerns are managed structurally by the Constitution's grant of core powers to particular branches.[88] As long as core powers are exercised by the proper branch, how the branches exercise shared powers is of little concern.

Under a blended vision, the judiciary's role is a bit broader than under the loose vision. At a minimum, the judiciary must distinguish core powers from shared powers. Given this responsibility, the judiciary is bound to intrude to a greater degree in determining the allowable government power re-structuring under the blended version than under the loose vision. The judiciary, while more active in a blended separation of powers scheme, could view the range of core powers relatively narrowly or broadly, thus permitting a large or small measure of power sharing between and among the branches.

A strict vision of separation of powers would entail completely separate branches of government with separate duties and power shared only where such an arrangement was constitutionally mandated. A strict vision would require that every government power or function not explicitly mentioned in the

86. *See* Lloyd N. Cutler, *Now is the Time For All Good Men . . .*, 30 WM. & MARY L. REV. 387, 387 (1989) (arguing that the U. S. Constitution "is a system based on the principle of separate branches exercising shared powers.").

87. For example, while Congress maintains the legislative power, the President has a primary right to affect that power with his veto. *See* U.S. CONST. art. I, § 7. Similarly, the President has the right to appoint government officials, but only with the advice and consent of the Senate (or Congress). *See* U.S. CONST. art. II, § 2.

88. A non-aggregation doctrine is a reason to have separation of powers, but does not comment on the allocation of specific powers. Of course, this is the context of most, if not all, separation of powers jurisprudence. Non-aggregation indicates that once the parameters of a separation of powers doctrine are set, no branch should exercise functions inconsistent with those parameters.

Constitution be designated an exercise of executive, legislative, or judicial power and that that power or function be exercised only by whatever branch the Constitution authorizes to exercise that type of power. This is a somewhat simple and simplistic vision of separation of powers.[89] While it is defensible under the plain language of the Constitution, it would render government unworkable and unduly restrained by eliminating a great deal of flexibility in government administration.[90] These effects are at odds with a conception of separation of powers as a doctrine that promotes the effective use of government power.

This strict vision also gives the judiciary the most power to structure and restrict governmental power and functions. The central issue under this view of separation of powers would be how to define particular governmental powers. Once the power was defined, how the power could be exercised and who could exercise it would be strictly circumscribed. Consequently, the branches would have little if any room to maneuver regarding power sharing and power structuring.

The vision of separation of powers the Court chooses to apply may depend heavily on what that court believes to be the general purpose of separation of powers. If the ultimate goal of separation of powers as reflected by the Constitutional structure is to allow the government to run smoothly, the Court may be willing to embrace a vision that allows for maximum flexibility. Conversely, if the ultimate goal is deemed to be the cementing of power relations between the branches of government to avoid the improper aggregation and exercise of power, the Court may embrace a restrictive view of separation of powers that vindicates that goal. Regardless of the vision that the Court chooses, each has some support in the Constitution, and none is completely foreclosed by the language of the Constitution. The next section will briefly examine how the Supreme Court has applied the separation of powers in various contexts.

B. Supreme Court Applications of Separation of Powers

While the Supreme Court's general vision of the separation of powers may guide its decisions, of greater interest is how the Court has decided particular cases involving power-sharing and the creation of mechanisms and processes meant to aid in governmental administration, but which were foreign to the Constitution. *Bowsher v. Synar*[91] is the most relevant decision regarding

89. It is also problematic. *See* Strauss, *supra* note 77, at 493 (suggesting that theory of separation of powers that refuses to allow some combining of functions is unworkable).

90. Indeed, commentators have argued that a particularly strict view of the separation of powers might render the government ungovernable. *See generally* Cutler, *supra* note 86.

91. 478 U.S. 714 (1986).

budgetary restructuring. *Bowsher* concerned an allocation of budgetary power between Congress and the President under the Gramm-Rudman-Hollings Act of 1985 (GRH or the "Act").[92] The Act was passed in order to provide a balanced federal budget by 1991.[93] The GRH plan required that budget deficits be cut to a certain level every year until balance was reached.[94] Under GRH, once it was apparent from budget estimates that the deficit would exceed the target, the CBO and OMB provided lists of projected budget cuts.[95] The Comptroller General was given the power to reconcile the budget cuts necessary to meet the deficit target. GRH then forced the President to execute those budget cuts without changes.[96] The Supreme Court overturned this allocation of power.

After finding that the duties given to the Comptroller General were part of the executive power, the Court determined that Congress's power to remove the Comptroller General made him a legislative branch officer whose exercise of executive power was incompatible with separation of powers doctrine.[97] The Court ruled:

> [W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws .... To permit an officer controlled by Congress to execute the laws would be, in essence, to permit a congressional veto.[98]

That the Supreme Court deemed the power to cut the budget to be an executive function that could not be exercised by the legislative branch is inter-

92. The Act was formally named the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (1987).

93. *See Bowsher*, 478 U.S. at 717.

94. § 251(a)(1), 99 Stat. at 1038 (codified at 2 U.S.C. § 622(7) (Supp. III 1985).

95. § 251, 99 Stat. at 1063.

96. *Bowsher*, 478 U.S. at 718 (indicating that once the Comptroller General determined what cuts were to be made, the President had to issue a sequestration order for the cuts without change).

97. Some commentators have suggested that Congress' ability to remove the Comptroller General is only the beginning of the analysis regarding whether he is a legislative branch officer. *See* L. Harold Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings and Beyond*, 72 CORNELL L. REV. 527, 536 (1987) (arguing that issue should not have been Comptroller General's removability, but whether he would be influenced by removability when drafting report required under GRH); Nourse, *supra* note 79, at 519-21 (suggesting that the question of removal power matters for autonomy and independence reasons, but that the main consideration should be whether the ability to remove has the effect of giving the legislature power over the executive branch).

98. *Bowsher*, 478 U.S. at 726.

esting.[99] The line between legislative and executive power regarding the budget and fiscal control is unclear. Congress retains the power of the purse.[100] Congress appropriates funds, develops the budget, and sets deficit targets that must be respected. Yet, Congress, through a legislative branch officer, cannot make budget cuts to reach the deficit target because that function is an executive function.[101] This distinction is worrisome and problematic.[102] The power to make budget cuts is the power to determine priorities regarding how to spend a limited amount of money. Similarly, the power to spend a limited amount of money is the power to budget. Therefore, Congress can determine priorities in creating a budget and can constrain the amount of money that can be spent through a binding budget deficit target, but cannot enforce that budget deficit target through its own mechanisms once it is clear the target will be exceeded.

Bowsher reflects a formalist[103] and proceduralist view of separation of powers. Under *Bowsher*, Congress can maintain minute control over fiscal matters, but only by exercising the specific legislative powers given to it under the Constitution. Unfortunately, the substance of the power exercised by a particular branch appears less important than how the power is exercised. Pre-

99. Some commentators have suggested that the Comptroller General's power under GRH was not exercise of executive power. *See, e.g.*, Levinson, *supra* note 97, at 533-34.

100. *See* Arnold, *supra* note 4, at 20 ("[T]he major source of power that Congress has under our system is the power to appropriate money, or to refuse to appropriate money, or to appropriate money only under certain conditions."); *see generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343 (1988).

101. One issue that the Court did not explore is why the President cannot delegate or at least acquiesce in the delegation of his power to another branch of government. As we have seen since the New Deal, Congress can delegate significant portions of its power. *See* Abner S. Greene, *Checks and Balanced in An Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 126 (1994) ("Congress may give away legislative power and insulate such delegated power from total presidential control[.]"); Sargentich, *supra* note 84, at 437-38 (suggesting that rulemaking is so akin to legislating that allowing rulemaking outside of legislative branch arguably diminishes requirement of separation of powers). Although there may be presidential delegations that directly run afoul of specific Constitutional provisions, e.g. the duty to give periodic updates on the state of the Union, if the President is not constitutionally compelled to perform a particular function, why the President cannot delegate it is unclear.

102. *See Bowsher*, 478 U.S. at 733. (The *Bowsher* Court explained what constitutes executive power as such:

> Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law. Under Section 251, the Comptroller General must exercise judgment concerning facts that affect the application of the Act. He must also interpret the provisions of the Act to determine precisely what budgetary calculations are required. Decisions of that kind are typically made by officers charged with executing a statute.)

103. *See* Suzanna Sherry, *Separation of Powers: Asking a Different Question*, 30 WM. & MARY L. REV. 287, 292-93 (1989) (criticizing *Bowsher* Court's formalism).

sumably, Congress can exercise its general power to appropriate by providing a limited amount of money through piecemeal appropriations designed to keep the government funded only in the short term. If Congress had the sustained will, it could provide such piecemeal appropriations in order to maintain very strict control over its deficit targets. However, once Congress provides appropriations for a full year, it loses the ability to revisit its appropriations even when its deficit target will be surpassed, because the president retains the specific power to control the appropriations mix once Congress appropriates funds.[104]

The Court seemed to ignore the fact that using the Comptroller General to determine the necessary budget cuts was an agreed upon way to ensure that Congress's legitimate budget deficit projection was properly met without undue political wrangling.[105] Using the Comptroller General's projections was the political solution chosen, given that some entity's projections had to be used. This was particularly so, given that the ultimate budget cuts were largely formulaic.[106] More importantly, the solution was ratified by President Reagan when he signed GRH.

A general bar to congressional usurpation of purely executive power is clearly reasonable. However, the idea that Congress, even with the consent of the President, cannot exercise a power that arguably is both executive and/or legislative is troublesome. Such a restriction hamstrings the type of responsive and responsible government the public deserves. If the Court retains a narrow view of Congress's power over budget cuts, other creative compromises in budget matters could be invalidated. The remaining issue would be where Congress's legislative power ends and where the President's executive power begins in the budget process. If the area in which the legislative and executive branches can share power is too small to allow the branches to compromise

104. Executive power may be viewed temporally. Executive power may be that power that is exercised once Congress has legislated. Viewed in that manner, Congress is disallowed from revisiting appropriations mix once budget legislation passes. *See* Sargentich, *supra* note 84, at 481-82 (suggesting that *Bowsher* majority distinguishes legislative and executive functions sequentially—Congress passes law, once it is gone, actions that interpret and implement the law are executive in nature); *see also*, *Bowsher*, 478 U.S. at 733 ("[A]s *Chadha* makes clear, once Congress makes its choice in enacting legislation, its participation ends.").

105. While the ability of GRH to actually fulfill its promise is debatable, the Supreme Court's dismissal of a mutually agreed upon means of moving toward a balanced budget is troubling.

106. Given the nature of the budget cuts, the determination to cut was largely formulaic. Oddly enough, that the budget cuts were not the product of Congressional deliberation may have been the problem with the Gramm-Rudman-Hollings procedures. *See* Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 349 (1989) (arguing that the real problem in Bowsher was that the Congress completely abdicated its duty to legislate deliberately on the issue of budget cuts); *see also* Stith, *supra* note 100, at 1394-95 (arguing that Congress has both power to authorize appropriations and duty to monitor and restrict appropriations).

meaningfully, the new budget regime may have little or no chance of being implemented in a creative and efficient way.

Unfortunately, in deciding other separation of powers cases, the Supreme Court has indicated a willingness to rely on formalism. In *INS v. Chadha*,[107] the Court invalidated the legislative veto, ruling that bicameral passage and presentment is the proper way for Congress to exert its legislative will. Under the legislative scheme in *Chadha,* Congress assigned the Attorney General the duty to determine whether a deportable alien could remain in the U.S.[108] That determination was subject to a legislative veto that allowed either house of Congress to reverse the Attorney General's decision by a simple majority vote.[109] The Court ruled that once the initial power to decide the alien's fate was given to the Attorney General, the exercise of that power was an exercise of executive power alterable only through bicameral passage and presentment of a bill requiring the alien's deportation.[110]

Chadha proceeds from a formalist vision. The *Chadha* Court required bicameral passage and presentment without regard for the substance of the legislative power involved or the functional similarity between the subject rule and bicameral passage and presentment. In the absence of the statute at issue in *Chadha*, Congress could have exercised the power to determine whether a particular deportable alien could remain in the United States. Before the subject statute was passed, a deportable alien had to present a private bill to Congress requesting to remain in the United States.[111] Both houses of Congress had to approve the bill, and the President had to sign the bill. The private bill was treated like any other bill. If the deportable alien could convince both houses of Congress and the executive branch that she should be allowed to remain in the U.S., she could remain.[112] The legislative veto in *Chadha* required the same consent, but with a twist. The legislative veto reversed the order of consent and allowed Congress's silence on an alien's request to stay in the U.S. to be deemed consent.

The legislative veto scheme in *Chadha* retained the requirement that both houses of Congress and the executive branch be convinced that the alien be allowed to stay. However, it made the process simpler by declining to involve Congress unless one house of Congress was sufficiently interested in a particular case that that house voted by majority to block the Attorney General's

107. 462 U.S. 919 (1983).

108. *Id.* at 924-25.

109. *Id.* at 925.

110. *Id.* at 954-55.

111. *Id.* at 932-33.

112. *See* Sherry, *supra* note 103, at 291-92 (criticizing the *Chadha* Court's formalism and suggesting that the legislative veto is the functional equivalent of bicameral passage and presentment).

decision. Functionally, no separation of powers problem exists, as Congress merely exercised its legitimate legislative power, albeit at a different time in the legislative process than usual. Apparently, the Court either believed that the legislative veto scheme was not the equivalent of bicameral passage and presentment or that this fact did not matter.[113] Based on its reasons, the *Chadha* Court refused to allow legislative flexibility on an issue that arguably does not impact the basic structure of the Constitution. This suggests a relatively strict and formal interpretation of separation of powers.[114]

Although *Chadha* and *Bowsher* suggest that the formalism may defeat attempts at creative government, they can be read more narrowly. The two most important principles that flow from these cases is that one branch cannot exercise power not granted to it and that one branch may not unduly burden the legitimate exercise of another branch's power.[115] These principles have been applied in different cases with differing results for creative government. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*,[116] the creative government solution was overturned. In *Morrison v. Olson*,[117] the solution was approved.

At issue in *Metropolitan Washington Airports Authority* was Congress's power to create a Review Board that could exercise veto power over decisions made by a regional airport authority that was to run two airports formerly owned by the federal government. Congress created the Review Board, consisting of nine members of Congress acting in their personal capacities, when it ceded government control over National Airport and Dulles Airport to the Metropolitan Washington Airports Authority.[118] Citizens for the Abatement of Aircraft Noise, a citizen group, complained that the Board unconstitutionally exercised power in violation of separation of powers.[119] The Court agreed, ruling the scheme unconstitutional.[120] More importantly, the Court provided some of the most formalistic language ever written. Without deciding the na-

113. A legislative veto scheme arguably is not the equivalent of bicameral passage and presentment in that a legislative veto appears to frustrate legitimate executive authority. *See* Sargentich, *supra* note 84, at 469 (concern with legislative veto often is that executive authority becomes contingent on congressional will, with the result being that the President is not really hegemonic is his legitimate domain). *Cf.* Greene, *supra* note 101, at 151 (suggesting that Federalist Papers proposed a strong executive acting within narrow confines).

114. *But see* Sherry, *supra* note 103, at 295-99 (suggesting that *Morrison v. Olson* was much less formalistic opinion and may signal an end to formalism in separation of powers analysis).

115. *See* Greene, *supra* note 101, at 126 ("Congress may neither draw executive power to itself nor seek to legislate outside the Article I, Section 7 framework.").

116. 501 U.S. 252 (1991).

117. 487 U.S. 654 (1988).

118. *Metropolitan Wash. Airports Auth.*, 501 U.S. at 255.

119. *Id.* at 261-67.

120. *Id.* at 276.

ture of the power the Review Board exercised, the court ruled: "If the [Board's] power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, Sec. 7."[121]

Such language represents a stark view of the separation of powers. Arguably, such language suggests a single, inflexible way to run the government. Fortunately, the language may not be as strict as it appears on first reading. The opinion can be read to comment only on how power must ultimately be exercised. The language may mean only that the ultimate exercise of legislative power must come from Congress. Simply, whenever a rule is to have prospective, general application, or power is exercised in a way that it will have the force of law, Congress must legislate through bicameral passage and presentment procedures.[122] Such a ruling would not render creative solutions to government problems impossible, it would only restrict how ultimate power could be exercised.

Some of the parameters for the creative use of power were sketched in *Morrison v. Olson*. *Morrison* involved a challenge to the independent counsel provisions to the Ethics in Government Act.[123] Those provisions allowed the appointment of an independent prosecutor when charges against members in the executive branch were deemed to require a counsel somewhat independent of the Department of Justice.[124] In *Morrison*, the appointment of the independent counsel was challenged, in part, on the grounds that the Attorney General's ability to remove counsel only for good cause unduly impacted the executive branch's ability to exercise inherently executive prosecutorial powers. The Court ruled the independent counsel procedure constitutional, noting that the Attorney General retained the discretion to request that an independent counsel be appointed, that the Attorney General retained some power to remove the independent counsel, and that all power to supervise the independent counsel rested with the executive branch.[125]

Morrison and *Metropolitan Washington Airports Authority* suggest that the application of principles under separation of powers is fact-specific. If unconventional government structures are not dismissed out of hand as unconstitutional it may allow for the sanctioning of flexible governmental solutions to serious governmental problems. If the solutions are well-structured and contain powers that are carefully delineated, such solutions may yet be acceptable

121. *Id.*

122. Such statements seem to run counter to the modern understanding of the administrative state in which rulemaking is present and allowed. *See supra* note 101 (suggesting that rulemaking is legitimate exercise of legislative power).

123. *Morrison*, 487 U.S. at 654.

124. For summary of relevant independent counsel provisions, *see id.* at 660-65.

125. *Id.* at 693-96.

to a formalist court. Whether such a solution can be crafted for our nation's budget process is unclear.

V. THE BUDGET PROCESS

Prior to the Budget and Impoundment Control Act of 1974, Congress generally reacted to the sitting President's proposed budget, rather than questioning his policy objectives. In the aftermath of the Nixon impoundments and the CBICA, Congress assumed a much stronger role vis-à-vis the president in creating the federal budget. Currently, the President submits a detailed budget proposal which provides general initiatives and areas of emphasis. At times, the President's budget becomes the working paper for the budget process. On other occasions, it is deemed so out of tune with congressional budgetary ideas that it is scrapped. Once Congress sees the President's proposal, Congress creates a budget consonant with its desires. After some period of discussions and meetings, Congress passes a non-binding budget resolution presenting its general ideas for the budget.[126] Congress then passes multiple appropriations bills that comprise the budget.[127] These appropriations provide the funds necessary for government agencies and entities to perform their statutory mandates.

During the process, Congress and the President discuss and negotiate various budget proposals. That the President retains the power to veto spending bills provides the impetus for compromise. The historical give and take between the President and Congress has led to many diverse procedural arrangements designed to preserve the power relationship between the President and Congress, skirt the issue of partisan divisiveness, control the size of the deficit, and preserve economic prosperity.

A. Shared Executive and Legislative Power Over Budgeting

As with many government processes, the power to budget is functionally shared by the executive and legislative branch. Each has the power to stop the budget process. As importantly, each branch must consider the goals and desires of the other branch before acting. Some measure of cooperation must exist between the branches because each is a repeat player in the budget process. The knowledge that both parties will have to agree on appropriations every year suggests that some measure of coordination must occur to avoid annual impasses.[128]

126. For general explanation of the budget process, *see* Tiefer, *supra* note 3, at 427.

127. The Constitution requires that Congress appropriate money for particular purposes before it can be drawn from the Treasury. *See* U.S. CONST. art. I, § 9. ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

128. *See* Tiefer, *supra* note 3, at 439 (mentioning that Congress and the President's ability to close government combined with the annual nature of appropriations suggests that Congress and

Congress's effective power over budgeting rests with the fact that Congress retains control over the timing of the process and the procedures related to the budget.[129] Depending on how Congress structures the appropriations process, it can retain significant control over the budgeting process. By passing appropriations bills in any way it wishes, Congress can retain functional control over the policy initiatives in the budget process in the same way it controls policy initiatives in all laws. By providing appropriations in many bills or a few bills, Congress can package the budget in whatever way makes sense to advance the congressional leadership's agenda.

However, the President also has power. The President retains the same veto power over appropriations bills that he has over any other law Congress passes. Consequently, he can advance his budget initiatives by threatening to veto appropriations bills. While this power is effective, it is quite a bit more blunt than Congress's power. A presidential veto stops the show. However, the President's power is not absolute, as his veto can be overridden with a two-thirds vote of both houses of Congress.[130]

In addition to his constitutionally mandated veto power, the President has recently been given a statutory line item veto for budget issues.[131] Though considered a possible solution to the deficit problem, the line item veto may be ineffective in augmenting the President's effective power over budgeting. The line item veto allows the President to cut appropriations, but does not grant him wholesale power to reshape the budget. The line item veto does not affect the President's ability to get his initiatives funded, since the veto does not give the President the power to augment appropriations. Additionally, many budget items are not subject to the presidential veto.[132] Consequently, the amount of federal expenditures actually subject to the veto is arguably too small to have any real effect on the budget.[133] Indeed, the line item veto may provide the President little power to effect change. Aside from functional weaknesses in

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the President will bargain to conclusion).

129. See Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 479 (1994) (suggesting that Congress has lion's share of power in budget debates).

130. *See* U.S. CONST. art. I, § 7.

131. *See* 2 U.S.C.A § 1021 (West 1997). Of course, the line item veto may ultimately be ruled unconstitutional, as the U.S. District Court for the District of Columbia did in Byrd v. Raines, 65 U.S.L.W. 2660 (April 10, 1997), before that decision was vacated by the Supreme Court on the basis of a lack of standing. Raines v. Byrd, No. 96-1671, 1997 WL 348141, (June 26, 1997).

132. *But see* Tiefer, *supra* note 3, at 442-43 (suggesting that future expansion of line item veto power may augment it).

133. *See* Petrilla, *supra* note 129, at 471-72 (noting that when the article was published, 60% of the federal budget was non-discretionary and that that would lead to problems with what budget cuts could be made).

the line item veto's ability to help end budget deficits, any attempt by the President to use the line item veto can be circumvented by an organized Congress.

Even if a President planned to trim expenditures, Congress could control the order in which appropriations bills are presented to the President. Congress may pass a few or many hundred appropriations bills in whatever order it likes. If Congress knows particular budget areas where its priorities do not match the President's, Congress may withhold appropriations until an agreement is reached on those areas. Once Congress's desires are met, a President could be left with only the opportunity to veto appropriations for programs that are important to him. One result of passing bills in strategic order could be to force the President to choose between vetoing bills providing appropriations to his pet projects or unbalancing the budget.[134] Frustrating the President's control over the budget can hardly be viewed as problematic, as allowing the President any significant control over budgeting initiatives might be unconstitutional under a particularly strict view of separation of powers.[135]

Under different circumstances, a line item veto could provide a president with significant power over the appropriations process.[136] The line item veto can check a spendthrift Congress and can be used to reshape budget initiatives when the object of budgetary policy is smaller government. Although current conditions suggest that the line item veto would not be missed, it would be a mistake to reject it outright on separation of powers grounds.[137] Such a decision would negate the idea that both the executive and legislative branches can defend their institution from abuse by the other. Simply, if Congress and the President can agree to some method that allows both branches to maintain the power over the budget that each wants to maintain, and that agreement does not violate an explicit provision of the Constitution, a beneficial doctrine like

134. *Cf.* Arnold, *supra* note 4, at 28 (noting different ways in which the line item veto can be used by Congress in the budgeting process). Of course, maneuvering around a line item veto is only necessary if Congress cannot repeal or restrict the statutory line-item veto in times of budgetary discord. *See* J. Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498, 1500 (1995) ("The 104th Congress simply cannot credibly commit future Congresses to forbear from exercising their discretion to repeal, suspend, or otherwise circumscribe line-item veto authority conferred to the President by statute.").

135. *See* Sidak, *supra* note 134, at 1501 ("Ironically, a line-item veto purportedly conferred by statute is likely to survive attack on Presentment Clause grounds *only* if it creates no legal authority that the President does not already possess under the Constitution.") (emphasis in original).

136. A change in Congressional attitude could make more items of spending subject to budgeting in general or the line item veto in particular. *See, e.g.*, Tiefer, *supra* note 3, *passim* (suggesting that health care entitlements will soon become budget items subject to cuts).

137. Others have suggested that such a rejection would not be problematic. *See* Sidak, *supra* note 134, at 1502 (arguing that executive and legislative branch "agree[ment] to exchange or commingle . . . duties and prerogatives" violates separation of powers doctrine).

separation of powers should not invalidate the agreement.

Congress and the President can press their budget policy initiatives by altogether stopping the budget process. The line item veto is a mechanism that recognizes the legitimacy of competing presidential and congressional budgeting desires and seeks to avoid a destructive clash by ceding the absolute power to reshape the budget over some limited range of appropriations. Developing a mechanism to avoid budget impasse is the essence of good government, not the beginning of an inter-branch power struggle. Indeed, no real interbranch struggle can occur since Congress has the unilateral ability to maneuver around the President's line item veto power whenever necessary.

B. The Balanced Budget Imperative

The changed economic outlook of the political elites and the political mood of the electorate are the primary factors at work in the move toward a balanced budget philosophy of spending. The first condition has developed from a growing realization that the federal government no longer possesses the capability of using Keynesian fiscal policy to stimulate and control the economy.[138] Recognition of the electorate's historic predilection for balanced federal budgets[139] is also occurring. During the 1980s and into the 1990s, the general public did not seem to act on its preference for balanced budgets. This failure to act may be related to the President and Congress's ability to hide behind the facade of the budget control philosophy and the bifurcated philosophy of responsibility so as to avoid being held accountable for the deficits. This disjunction between the public's general beliefs and their willingness to act on them arguably ended with the 1992 presidential candidacy of Ross Perot.

Although the suggestion that a regime change is imminent implies that the current state of the economy and/or budget are in or near a crisis state, objective indicators suggest that no such crisis exists. Unemployment and inflation are both fairly low, the stock market is very strong, and the economy has been growing slowly, but surely, for the past five years. Even the latest deficit figures show that it has decreased each of the last few years and has decreased around $100 billion.[140] However, the impending bankruptcy of the largest en-

138. The large amount of uncontrollable spending within the budget coupled with the size of the economy means that the amount of extra deficit spending needed to maintain social spending and promote economic growth during recessionary periods may be enormous. As Herbert Stein states, the old Keynesian nostrum that "in the long run we are all dead" has been abandoned after twenty years of holding sway. We are instead living in the long run. HERBERT STEIN, PRESIDENTIAL ECONOMICS 375-76 (1994). This change in focus from maintaining short-run prosperity to building security for the long run will most certainly be reflected in the emergent philosophy of spending.

139. *See* JAMES D. SAVAGE, BALANCED BUDGETS AND AMERICAN POLITICS 1 (1988).

140. For a listing of budget figures, *see* OMB Historical Tables, *supra* note 16, *passim*.

titlement programs has forced many politicians to consider the present time period to be critical. According to a recent report by the Bi-partisan Committee on Entitlements, the hospital insurance segment of the Medicare system will be insolvent in 2002 and social security will be bankrupt within forty years unless changes are made in the entitlement system.[141] The press for a balanced budget has emerged from such concerns and will remain for the foreseeable future.[142]

In 1995 and 1996, the federal government was closed twice due to the President's and Congress's failure to agree on a budget compromise.[143] In trying to fulfill their *Contract with America*, the Republican majority in the House pushed for large tax cuts for the middle class, huge savings in Medicare and Medicaid expenditures, and block grants to states for many social services.[144] The Republicans claimed that they could balance the budget by 2002, and, after a great deal of negotiation, President Clinton agreed.[145] A balanced budget will arrive soon, the only question is whose policy preferences will drive it.

Under the new balanced budget regime, many policy differences that were driven to the background in prior budget control years will come to the forefront. In the era of huge deficits, almost all policy initiatives could be funded. When the budget must balance, the policy choices become stark and painful. Once the budget battle hinges solely on conflicting policy initiatives, whether the President or Congress controls the implementation of those initiatives is particularly important. Congress controls legislative policy preferences; the President controls executive policy preferences. At issue is how to distinguish legislative policy preferences from executive policy preferences and how power can be allocated between the executive and legislative branches. Whatever solution is chosen must comport with separation of powers principles and be ratified by the judiciary in order to be effective.[146] Under the new regime, a philosophy of responsibility must prevail which can hold both branches responsible rather than one that will allow both branches to avoid responsibility.

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141. James Popkin et al., *The Medicare Fight and The Budget War*, U.S. NEWS AND WORLD REPORTS, May 15, 1995, at 45.

142. If nothing else, the press for a balanced budget amendment will keep the debate in the forefront of public policy.

143. John F. Harris & Eric Pianin, *President Praises Passage of Budget*, WASH. POST, April 26, 1996, at A1, A11.

144. David Cloud & Jackie Koszczuk, *GOP's All or Nothing Approach Hangs on a Balanced Budget*, CONGRESSIONAL QUARTERLY WEEKLY REVIEW, Dec. 9, 1995, at 3709, 3713.

145. Harris & Pianin, *supra* note 143.

146. A balanced budget amendment might cause greater judicial involvement in the budget process. *See* Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J. L. & POL. 153, 191 (1996).

C. *New Methods of Balanced Budget and Deficit Control*

The country should expect unconventional solutions to the budget problem.[147] If Congress and the President can agree on a balanced budget deal, it will rest on predictions regarding the economy. When the economy inevitably under performs, the parties will need a mechanism to bring the budget back into balance.[148] When that occurs, some of the same policy disagreements that led to the 1995-1996 impasse will arise. A possible solution would be the establishment of a Deficit Control Commission whose function would be to monitor the federal budget and propose cuts to the budget to achieve balance. Preliminary suggestions for the Commission's structure would involve the sharing of power to help avoid the use of each branch's constitutional powers to stop the budget process. The members of the Commission would be chosen by or drawn from both the executive and legislative branches. The members could be removable only by agreement of both the executive and legislative branches.[149]

The Deficit Control Commission would only function when the deficit target or balanced budget appeared unlikely to be met. At such a point, the Commission would issue a report on the deficit and propose budget cuts to meet the expressed budget target. Congress would vote on whether to accept the commission's recommendations without amendment, and then make the budget cuts. The President could sign or veto the resulting legislation. If the Commission's recommendations were rejected by either side, the commission could either revisit the issues or both sides could acknowledge the failure to meet the goal and move through the regular budget process, deficit and all.[150]

This commission is not an ultimate solution, but a way to make budget cuts as bipartisan and nondisruptive as possible. The plan offers three advantages over the current system. First, it allows for the normal budgeting process to occur every year. Since the Commission would only become active when the budget target is not met, it should not be considered a substitute for the political process. The reasons the target might be exceeded may range from faulty economic forecasts to partisan intransigence. Based on its assessment of the economy, the Commission could recommend minor or substantial cuts.

Second, every program, including entitlements, could be subject to the

147. Expectations that budget problems would lead to structural governmental change is not novel. *See* Levinson, *supra* note 97, at 552 n.94 (professing concern that massive budget breakdown could lead to pressure for radical change in the government institutions).

148. This is very similar to the situation faced in *Bowsher* regarding budget cuts that had to be made in order to reach deficit targets.

149. One can consider how the *Bowsher* Court would have viewed GRH if the Comptroller General had been more easily removable. *See* Levinson, *supra* note 97, at 548 (hypothesizing a Comptroller General removable both by Congress and the President).

150. Of course, a balanced budget amendment could make of budget failure less likely.

Commission's recommendations. This would allow the Commission to spread the cuts across a number of different programs rather than focusing on a few. A baseline for sequestering might be established to keep any programs from being scrapped entirely. The Commission could also offer political cover for those who support cutting entitlements, but fear the political consequences of voting in that manner. Assenting to the recommendations of a neutral commission may appear more forthright than merely standing by one's party.

The third and most telling advantage is that the Commission would allow the public to affix responsibility to one branch or the other if the budget goals were not met. Either Congress has failed to act by not passing the cuts, or the President has side-tracked the goal by vetoing the cuts. These distinctions make for the accountability that has been missing from the current budget regime. While a presidential veto can stop the proposed budget cuts, a veto of legislation proposed by a bipartisan commission has different political implications than a veto of legislation born of party politics. A veto of the Commission's work suggests that the President has put his policy initiatives above the collective judgment of a body of experts; a veto of possibly partisan budget cuts merely suggests disagreement with congressional leadership.

However, a separation of powers issue remains. If making budget cuts is an exercise of executive power, passing legislation regarding budget cuts could be deemed as violative of separation of powers principles as granting the Comptroller General sequester power under GRH. If the problem with the budgetary scheme in *Bowsher* was that a legislative branch member dictated to the President, the Deficit Control Commission does not eliminate this concern. Even though the Commission would not have the power to make budget cuts, budget cuts would eventually become part of a legislative command to the President, particularly if Congress ever overrode a presidential veto in order to enforce the Commission's suggestions. In such a situation, the legislative branch would be dictating an arguably executive function to the executive branch.[151] A refusal to allow this power, even in the face of presidential acquiescence, demonstrates how a formalist separation of powers doctrine could frustrate responsible government.

Even if making budget cuts is an exercise of executive power, Congress

151. Commentators have suggested that *Bowsher* rests on the fact that Congress was improperly exercising executive power. *See* Greene, *supra* note 101, at 166-68 (discussing *Bowsher* in nonaggrandizement terms); Strauss, *supra* note 77, *passim* (considering aggrandizement as a key to explaining *Bowsher*). *See also*, *Morrison*, 478 U.S. at 734. The problem may be even starker. The *Bowsher* Court determined that Congress had "retain[ed] control over the execution of the Act and . . . intruded into the executive function." *Bowsher*, 478 U.S. at 734. Arguably, Congress may impermissibly intrude into the executive function whenever it exercises undue influence over budget cuts.

retains the right to influence that exercise of power.[152] Congress can reference past budget problems in passing future appropriations bills or indicate that future appropriations will depend on current budget cuts. Simply, both the legislative and executive branches are constitutionally responsible for budgets and politically responsible for deficits. If the branches can reach an agreement on sharing budgetary power, the separation of powers doctrine should not stop it.[153] The separation of powers doctrine exists to ensure the effective use of power, and thus, should not impact the political solution that Congress and the President reach.[154]

The Constitution does not force the branches to handle the budget in any particular way. Arguably, any method that Congress and the President agree to use to meet the nation's budget problems should be constitutional.[155] The tension between shared budgetary power and separation of powers doctrine rests on the following two questions. First, if the President and Congress install a power sharing method that is not expressly or implicitly prohibited by the Constitution, does it stand? Second, if the President and Congress install a mechanism that is not specifically ratified by the Constitution, does it stand? Neither of these questions ought to stop good government.

VI. CONCLUSION

The 1995-1996 budget impasse suggests that the United States is about to embark on a new budget regime that entails a balanced budget imperative

152. *See* KENNETH DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW, § 2.2 (1994) ("The departments exercise 'coercive influence' over each other on a routine basis; indeed, the Constitution is designed to imbue each department with that coercive influence.").

153. Of course, a less charitable explanation for budgetary power sharing and compromise exists. Congress and the President desire to control the entire budgeting process because each believes it has the proper initiatives to solve fiscal problems. If the issue is merely the raw power that each branch will exercise, separation of powers doctrine may be relevant to the debate. Conversely, any issue regarding raw power may be solved by reference to the constitutional powers that each branch can use to protect itself. If one branch feels that its power is being taken, it can regain that power by vigorously exercising its constitutional prerogatives.

154. *But see* Paul R. Verkuil, *Separation of Powers, The Rule of Law and The Idea of Independence*, 30 WM. & MARY L. REV. 301, 341 (1989) (suggesting that the judiciary should play a reserve role in separation of powers jurisprudence to ensure that executive or legislative hegemony does not become an issue).

155. Other commentators might agree. *See, e.g.*, Sherry, *supra* note 103, at 289 (suggesting that courts' refusal to allow certain power arrangements between political actors which solve "real world problems" amounts to formalism that "can be characterized as an abdication of responsibility by careless deference to a prior determination"). Robert F. Nagel, *A Comment on the Rule of Law Model of Separation of Powers*, 30 WM & MARY L. REV. 355, 358-59 (1989) (suggesting that under *Chadha*, the mere agreement to share power is not sufficient to end separation of powers concern, as the President and Congress agreed to the legislative veto that was struck).

combined with explicit power sharing by Congress and the President. The new budget regime may require the installation of mechanisms unfamiliar to the Constitution. These mechanisms may push the current limits of the separation of powers. Whether such mechanisms are absolutely necessary and whether they will work if necessary remains to be seen. Whether such methods should be allowed to work is clear. They should.