

**RETURN OF THE LINE ITEM VETO? LEGALITIES,  
PRACTICALITIES, AND SOME PUZZLES**

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## I. INTRODUCTION

In his 2006 State of the Union Address, President George W. Bush called on Congress to address the federal government's deficit problem by enacting a line item veto.<sup>1</sup> The House of Representatives passed a version of his proposal in June 2006; in the Senate, the measure was reported out of committee favorably but then failed to receive a floor vote before the end of the Republican-led 109th Congress.<sup>2</sup> Since the Democrats took control of Congress in January 2007, President Bush has continued to call for enactment of the proposal, and some members of Congress (mostly Republicans, but a few prominent Democrats as well) remain committed to some form of it.<sup>3</sup> Legislation has once again been introduced.<sup>4</sup>

Someone observing these events from a distance could quite reasonably wonder what all of these people are thinking. Do they not recall that Congress enacted a line item veto statute a decade ago, and that the Supreme Court soon thereafter struck it down in *Clinton*

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<sup>1</sup> George W. Bush, U.S. President, State of the Union Address (Jan. 31, 2006), in N.Y. TIMES, Feb. 1, 2006, at A18.

<sup>2</sup> The House version was House Bill 4890, H.R. 4890, 109th Cong. (2006). House Bill 4890's companion bill in the Senate was Senate Bill 2381, S. 2381, 109th Cong. (2006). The version reported out by the Senate Budget Committee, S. 3521, 109th Cong. (2006), packaged together several other budget reforms along with the new line item veto measure. See generally S. REP. NO. 109-283 (2006) (recommending the passage of S. 3521, as amended); VIRGINIA A. McMURTRY, CONG. RESEARCH SERV., LEGISLATIVE LINE ITEM VETO ACT OF 2006: BACKGROUND AND COMPARISON OF VERSIONS (2006), [http://openocrs.cdt.org/rpts/RL33517\\_20060705.pdf](http://openocrs.cdt.org/rpts/RL33517_20060705.pdf) (comparing the details of the various bills).

<sup>3</sup> See George W. Bush, Op-Ed., *What the Congress Can Do for America*, WALL ST. J., Jan. 3, 2007, at A13; Elana Schor, *Gregg, DeMint Plan to Revive Presidential Line-Item Veto Bid*, HILL, Jan. 9, 2007, <http://thehill.com/leading-the-news/gregg-demint-plan-to-revive-presidential-line-item-veto-bid-2007-01-09.html> (describing attempts to pass a line item veto as a "conservative perennial," while also noting that Senator John Kerry (D-Mass.) has supported some form of line item veto).

<sup>4</sup> See, e.g., S. 1186, 110th Cong. (2007) (introduced by Sen. Russell Feingold (D-Wis.)); H.R. 1998, 110th Cong. (2007) (introduced by Rep. Paul Ryan (R-Wis.)); H.R. 689, 110th Cong. (2007) (same).

*v. City of New York*?<sup>5</sup> Do they think that a new Supreme Court might see matters differently than the Court did a decade ago?

The explanation for this seemingly strange behavior is that the new “line item veto” the President and legislators have in mind is very different from the one that the Supreme Court declared unconstitutional a decade ago. In truth, it is not really any type of “veto” at all, for it does not allow the President unilaterally to cancel any provision of law. The proposed statute would, however, restructure the legislative process in an attempt to achieve similar effects. In particular, it would allow the President to pull together lists of “wasteful” spending projects and tax breaks from recently enacted laws, temporarily suspend the targeted items, and then present the lists to Congress for a speedy up-or-down re-vote. The proposed mechanism would regulate each house’s parliamentary procedures in great detail; amendments to the President’s lists are barred, as are filibusters and other dilatory tactics. The targeted spending and tax items are not rescinded unless both houses approve the President’s list. In other words, the new so-called line item veto does not let the President unilaterally amend any law but instead employs the Constitution’s ordinary process of bicameral passage and presentment, albeit in a procedurally privileged and streamlined form that is meant to promote the enactment of presidential rescissions. According to supporters, this mechanism is similar *in effect* to a line item veto and yet evades the *Clinton v. City of New York* holding.

So, the new proposal is not really a line item veto, or indeed any type of veto. Nor is it completely new, though it is currently enjoying renewed popularity. This type of mechanism, often called “expedited rescission,” has in fact been proposed on a number of occasions, both before and after the Line Item Veto Act of 1996.<sup>6</sup> The expedited rescission approach seems likely to continue to attract interest, at least as long as politicians want to be seen as doing something about budget deficits and a true line item veto remains off the table. For reasons I will explain later, it should prove especially popular the next time the same party controls both Congress and the presidency.

Expedited rescission raises a number of legal and policy questions worthy of study. One question, which figures prominently in con-

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<sup>5</sup> 524 U.S. 417 (1998).

<sup>6</sup> See H.R. REP. NO. 109-505, pt. 2, at 10–12 (2006) (describing various proposals for expedited rescission); H.R. REP. NO. 109-505, pt. 1, at 26–27 (2006) (same); S. REP. NO. 104-14, at 1–5 (1995) (same). The House of Representatives previously passed expedited rescission proposals in 1993 and 1994.

gressional hearings and committee reports, is whether expedited rescission truly would, as supporters claim, survive the constitutional holding in *Clinton v. City of New York*.<sup>7</sup> But that is not the most interesting question that expedited rescission raises. Indeed, it is not even the most interesting purely legal question that expedited rescission raises.

The most compelling purely legal question about expedited rescission, I would submit, is not the validity of the statute that results when Congress follows the special procedures, but instead whether Congress is really *required* to follow the procedures in the first place. As explained below, it turns out that Congress cannot be required to follow the statutory procedures—and not just because the matter is nonjusticiable, such that no court would order Congress to do so. Rather, on the constitutional merits, it is impermissible for a statute to dictate congressional procedure in the way that statutes characteristically bind their objects. (This is somewhat ironic, of course, given that the whole point of the new law is supposedly to *require* quick up-or-down votes.) Thus, somewhat paradoxically, the expedited rescission framework is constitutional only because Congress can choose to ignore it.

The most interesting questions about expedited rescission, though, concern not so much constitutional doctrine per se but instead the institutional dynamics that surround the statute. To begin with, why would Congress want to pass such unenforceable legislation at all? If, as seems likely, much of the answer is that Congress will sometimes follow the special procedures in practice, then that raises a second set of questions concerning the institutional circumstances in which we should expect to see compliance. Once we determine how expedited rescission is likely to work in practice, we will be in a better position to discern the true purposes of this puzzling legislation.

These questions are important not just for purposes of understanding the expedited rescission proposals that are now in the news, but because they also have broader significance. Although it may seem strange that Congress would attempt to deal with overspending by using a statute that would intrude on the details of its parliamentary procedures—matters that each house typically governs through its own standing rules and other unilateral means—Congress has in fact taken this same approach of “statutizing” its rules in an increasing number of other important contexts. A prominent example of

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<sup>7</sup> See *infra* Part II.C (discussing congressional findings regarding the constitutionality of expedited rescission).

such regimes of statutory governance of parliamentary procedure is the “fast track” legislation governing congressional consideration of trade agreements. Under the fast track parliamentary rules, all of which are set forth by statute,<sup>8</sup> the President submits a bill implementing a proposed trade agreement, and committee action and floor votes are then mandated within a fixed number of days (effectively preventing filibusters in the Senate). Various dilatory motions are deemed out of order, and the implementing bill cannot be amended. Statutory frameworks governing debate are now used in a growing number of areas ranging from review of new agency regulations to closures of military bases.<sup>9</sup> The new line item veto proposal essentially carries over this fast track approach to the context of budgetary rescission requests. The proliferation of these streamlined statutory frameworks that sidestep the usual legislative process represents an important phenomenon for students of Congress.<sup>10</sup>

This Article has the dual aims of examining the legal issues surrounding the new line item veto proposal and exploring some of the institutional dynamics it is likely to reflect and promote.<sup>11</sup> Part II pro-

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<sup>8</sup> The fast track procedures described in this paragraph are set forth at 19 U.S.C. § 2191 (2000).

<sup>9</sup> *See, e.g.*, 2 U.S.C. §§ 631–645a (2000) (congressional budget process); 2 U.S.C. §§ 658d–685e (2000) (legislation containing unfunded mandates); 5 U.S.C. § 802 (2000) (legislation that nullifies agency regulations); 5 U.S.C. §§ 901–912 (2000) (executive reorganization plans); 8 U.S.C. § 1254a(h) (2000) (Senate rules for legislation adjusting the status of certain aliens); 15 U.S.C. § 719f (2000) (procedures for approving presidential determinations concerning Alaskan natural gas pipelines); 16 U.S.C. § 1823 (2000) (procedures for disapproving international fisheries agreements); 19 U.S.C. § 2191 (2000) (fast track for trade agreements); 29 U.S.C. § 1306b (procedures for considering Pension Benefit Guaranty Corporation premium revisions); 42 U.S.C. § 2210i (2000) (procedures for nuclear accident compensation legislation); 42 U.S.C. § 6249c (2000) (legislation implementing certain petroleum contracts); 50 U.S.C. § 1622 (2000) (procedures for terminating presidentially declared states of emergency); National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2908, 104 Stat. 1485, 1816–18 (1990) (military base closures).

<sup>10</sup> These statutes have recently begun to attract increased scholarly interest. *See generally* Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003) (evaluating fast track rules and providing an alternative theoretical framework for understanding related constitutional concerns); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) (exploring the purposes of, and necessary conditions for, “framework legislation,” which creates rules that structure congressional lawmaking); Charles Tiefer, *How To Steal a Trillion: The Uses of Laws About Lawmaking in 2001*, 17 J.L. & POL. 409 (2001) (highlighting the impact of streamlined rules on high-stakes budget controversies); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 427–31 (2004) (discussing potential rationales for rule-prescribing statutes).

<sup>11</sup> I previously noted some of the interesting features of expedited rescission in an online, editorial-length posting for the *Yale Law Journal Pocket Part*. *See* Aaron-Andrew P. Bruhl,

vides a context for understanding the new expedited rescission proposal by explaining the problem that expedited rescission is supposed to solve and briefly discussing previous failed solutions to that problem. It undertakes an initial analysis of expedited rescission, presenting both its purported policy rationale and the legal case for why the expedited procedures would pass constitutional muster under *Clinton v. City of New York*.

Having explored expedited rescission's rationale and purported advantages, the rest of the Article then takes a more critical look at the proposal. Part III considers the question of whether Congress is actually required to follow the expedited procedures, arguing that Congress is not required to do so for two reasons. First, tucked away in the new proposal itself is surprising statutory language that allows each house of Congress to change the rules by unilateral action, thus undoing the supposed commitment to consider the President's proposals on the fast track. Second, even without that language, each house possesses a constitutional right to change its own rules, notwithstanding any statute. Given that congressional compliance with the statutized rule is legally nonobligatory, Part IV then turns to a consideration of the purposes of this peculiar statute. As the analysis there shows, past statutized rules often (though not always) attract compliance despite their nonbinding nature. Once we determine how this framework would actually be expected to work in practice, I suspect we will find that its real purpose is not—or is at least not only—the “good government” purpose that supporters advertise. Nor is it merely symbolic. Instead, the statute likely has distinctly partisan goals as well. This Part also discusses how these conclusions are useful not just for understanding expedited rescission, but also as a way of appreciating the whys and hows of the phenomenon of statutized rules more generally. Finally, it explains how the expedited rescission proposal would differ in practice from a more conventional line item veto.

## II. THE ALLURE OF EXPEDITED RESCISSION

Expedited rescission has a number of features that make it attractive to budget reformers. This Part explains the political and legal theory behind expedited rescission and, looking more broadly, shows

how such fast track mechanisms can provide an attractive way for Congress to divide authority between itself and the President.

A. *The Problem and Previous Attempted Solutions*

Expedited rescission could be viewed as the latest in a series of attempts to deal with deficits and other budget maladies through structural innovations, an effort that has generated foundational legislation such as the congressional budget framework.<sup>12</sup> But this effort has also run into constitutional difficulties on several occasions.<sup>13</sup> The interest in structural innovations may well reflect a belief that the “ordinary” legislative process is dysfunctional: left to its own devices, Congress and its members will prove unable to deal with pressing and sensitive matters, like the budget, in a responsible and timely manner. In that regard, frameworks like expedited rescission may represent another aspect of what the political scientist Barbara Sinclair calls “unorthodox lawmaking” in Congress—the increasing use of procedures that sidestep the familiar model portrayed in civics texts.<sup>14</sup>

The various incarnations of the line item veto are often touted as general deficit reduction measures, but they are actually narrower than that. Typically, they have not been aimed at the extremely expensive, but popular, existing entitlement programs (such as Social Security or Medicare) that represent the most difficult part of the budget problem on the spending side.<sup>15</sup> Nor have they been aimed at increasing revenues through across-the-board tax increases. Rather, the line item veto is advertised as targeting “pork,” which is a politi-

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<sup>12</sup> 2 U.S.C. § 601 et seq. (2000).

<sup>13</sup> In addition to striking down the 1996 Line Item Veto Act in *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court declared a portion of the Gramm-Rudman-Hollings Act’s deficit-control mechanism unconstitutional in *Bowsher v. Synar*, 478 U.S. 714 (1986). Finally, one aspect of the 1974 Impoundment Control Act contained an unconstitutional legislative veto. See *infra* text accompanying notes 49–50.

<sup>14</sup> See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2d ed. 2000). Of course, structural innovations in the budget context are certainly not a recent phenomenon. See generally CHARLES H. STEWART III, BUDGET REFORM POLITICS: THE DESIGN OF THE APPROPRIATIONS PROCESS IN THE HOUSE OF REPRESENTATIVES, 1865–1921 (1989). Thus, the budget process has long been more unorthodox than other aspects of the legislative process.

<sup>15</sup> See DANIEL SHAVIRO, DO DEFICITS MATTER? 289–93 (1997) (noting that, in general, the 1996 legislation did not involve multi-year entitlements, such as Social Security); see also DONALD B. MARRON, ACTING DIR., CONG. BUDGET OFFICE, CBO’S COMMENTS ON S. 2381, THE LEGISLATIVE LINE ITEM VETO ACT OF 2006 at 3, 6 (2006), <http://www.cbo.gov/ftpdocs/71xx/doc7177/05-02-LineItemVeto.pdf> (noting the budgetary impact of automatic spending increases in large entitlement programs).

cally salient—even if not the most quantitatively important—component of the budget problem.

Later I will discuss whether a line item veto is truly the cure for the “pork” problem, and, if it is not, what a line item veto is actually for. I should also emphasize at the outset that concepts like “wasteful” spending and “pork” are often in the eye of the beholder. Further, any particular line item veto mechanism (or similar measure) might, as actually drafted, permit the President to attack broad-based spending programs like Head Start and much else—not only the “bridge to nowhere” earmarks and exquisitely tailored tax loopholes that are cited as the mechanism’s justification. For the moment, however, we will put those matters to one side and accept the standard lore regarding why a line item veto is needed. The standard case for a line item veto posits that pork—more neutrally, spending items and tax breaks with narrow, particularized benefits—is plentiful and normatively bad (at least for the most part) and needs to be reduced. In simplified terms, the story runs as follows:<sup>16</sup> If Congress passed a bill composed only of a spending program or special tax break that the President deemed wasteful, he could veto it. But this is not how Congress typically legislates. Instead, legislators attach extraneous material as riders, and Congress often passes massive omnibus bills that cover several distinct subject areas and include many discrete policies and programs. Members of Congress have incentives to include narrow spending or tax cut measures that benefit their constituents, or that please their campaign contributors, but do not promote the overall public good. Members gain support for their own narrow programs by agreeing to support their colleagues’ programs, leading to bills larded with wasteful items. The President, who represents a nationwide constituency and is therefore supposed to be less inclined toward such narrow special-interest measures, would like to veto some of those items. But since they are rolled together in the same bill along with measures he deems essential to the national interest, he must hold his nose and sign the whole bill. (In order to get funding for operations in Afghanistan, for example, he might have to

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16 As noted, the usual description of the “pork” problem contains a number of assumptions that are highly contested; these include the motivations of legislators, the comparative fiscal virtue of the President as compared to Congress, and so forth. See Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217 (2006) (questioning the assumption that Congress pursues narrow, parochial interests); Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 119–35 (1997) (critiquing the standard policy case for the line item veto—that the President is particularly well suited to the task of cutting wasteful spending).

swallow funding for a useless bridge in a remote corner of Alaska.) Through its bundling together of disparate legislative items, the legislature can effectively nullify the President's veto. The results are increased deficits and the misallocation of funds—thus the need for the line item veto, which permits the President to strike out offensive items while still accepting the rest of the bill. Or, as one commentator encapsulates the argument, “Congress is inherently pork-ridden whereas the President is not, and therefore we should give the President the power to veto pork.”<sup>17</sup>

There are, of course, other mechanisms besides a true line item veto that could address the same underlying problem, and current law provides one such solution in the form of provisions of the Impoundment Control Act of 1974 (“1974 Act”).<sup>18</sup> The 1974 Act includes, among many other things, a mechanism for Congress to reconsider possibly ill-advised spending decisions. In particular, it allows the President to freeze certain appropriated sums for a period of forty-five days, during which Congress is invited to reconsider them.<sup>19</sup> If Congress finds the President's proposed rescission meritorious, it can enact a rescission bill that the President then signs like any other piece of legislation. If Congress fails to act on the President's rescission proposals, the original spending legislation remains in force and the funds are expended.<sup>20</sup>

The 1974 Act is limited in some respects, including that Congress can simply ignore the President's suggestions and go about its business.<sup>21</sup> The President merely proposes that Congress act but, as usual, has no direct control over the legislative agenda. (Mechanisms such as the expedited rescission proposal at issue in this Article, we will see, are intended to remedy this perceived defect by *requiring* congressional action at the President's behest.) In other words, the forces of inertia and inaction are on the side of spending rather than rescinding funds. Further, under the 1974 Act, legislators can amend the President's proposals like any other bill. This, of course, runs the

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17 Sargentich, *supra* note 16, at 125. Note that Sargentich is describing this view but not endorsing its accuracy.

18 See 2 U.S.C. §§ 681–688 (2000). There are other institutional arrangements that serve similar functions. For example, many states have “single subject” rules in their constitutions. See Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803, 804 (2006).

19 2 U.S.C. §§ 683, 688.

20 *Id.* § 683(b).

21 See S. REP. NO. 104-10, at 1 (1995) (“While the [1974 Act] provided legislative procedures for the consideration of the President's proposed spending reductions in a rescission bill, Congress has routinely ignored these procedures.”).

risk of defeating the purpose of allowing the President to pick out wasteful items that he believes Congress would eliminate if considered on their own merits. Presidents have used the rescission procedures in the 1974 Act sparingly (especially in recent administrations), and Congress has not enacted most of the President's proposals.<sup>22</sup>

The next important step in the budget story, for our purposes, came in 1996. In the debates that eventually yielded the Line Item Veto Act of 1996 ("1996 Act"), Congress considered a number of veto-like proposals ranging from the expedited rescission approach now at issue to a "separate enrollment" proposal under which massive spending bills would be divided into hundreds of separate bills so that each would be separately susceptible to the President's veto pen.<sup>23</sup> The legislation that eventually emerged was a variety of what is sometimes called enhanced rescission (as opposed to the *expedited rescission* at issue now). The 1996 Act gave the President the authority to unilaterally "cancel" discretionary budget authority, new direct spending, or focused tax breaks by sending a message to Congress within five days after signing the bill containing the items to be cancelled.<sup>24</sup> Congress could overturn the President's cancellations only if it affirmatively enacted a disapproval bill through the Article I, Section 7 process.<sup>25</sup> Congressional inaction thus favored spending cuts. Moreover, because the President would be expected to veto any bill disapproving of his proposed cancellations, reversing the President's cancellation decision would require a two-thirds supermajority in each house. In sum, the 1996 Act loaded the dice heavily in favor of the President's cancellations succeeding.

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<sup>22</sup> See generally MARRON, *supra* note 15, at 1–4. From 1976 to 2005, Presidents proposed rescission of only about \$73 billion out of over \$15 trillion in discretionary spending in that period (about 0.5%), and Congress enacted only about one-third of those proposals (in dollar terms). *Id.* at 2. More rescissions have been initiated by Congress itself—about \$142 billion over the period. *Id.*

<sup>23</sup> See Elizabeth Garrett, *The Story of Clinton v. City of New York: Congress Can Take Care of Itself*, in ADMINISTRATIVE LAW STORIES 46, 58–60 (Peter L. Strauss ed., 2006) (discussing alternatives considered in the 1996 debate). For discussions of the legality of separate enrollment provisions, see Eugene Gressman, Observation, *Is the Item Veto Constitutional?*, 64 N.C. L. REV. 819, 821–22 (1986), and Sargentich, *supra* note 16, at 91–92.

<sup>24</sup> Line Item Veto Act of 1996, Pub. L. No. 104-130, § 2(a), 110 Stat. 1200, 1200 (1996).

<sup>25</sup> *Id.* § 2(a), 110 Stat. at 1202. The statute created special streamlined procedural rules for considering disapproval bills that are not unlike the expedited procedures for considering approval bills under the new expedited rescission approach. See *id.* § 2(a), 110 Stat. at 1203–07.

The question of the constitutionality of the 1996 Act reached the Supreme Court in *Clinton v. City of New York*.<sup>26</sup> The parties challenging the line item veto raised a number of arguments sounding in the separation of powers, but Justice Stevens's opinion for the Court rested on the narrower ground that the cancellation procedure violated Article I, Section 7's requirement of bicameralism and presentment.<sup>27</sup> According to the 1996 Act's definitions, "cancel" meant "to prevent . . . from having legal force or effect."<sup>28</sup> By exercising the cancellation authority, the Court concluded, "the President has amended two Acts of Congress by repealing a portion of each."<sup>29</sup> And that is of course impermissible because the amendment or repeal of statutes is not given unto the President alone, but rather can be effected only by going through the full process of bicameralism and presentment.<sup>30</sup> Q.E.D.

The three dissenters (Justices O'Connor, Scalia, and Breyer—strange bedfellows both politically and methodologically) concluded that the President had not amended any statute nor, despite the 1996 Act's name, engaged in a forbidden "line item veto."<sup>31</sup> Instead, Congress had simply delegated to the President the authority to decide whether to spend or collect certain money. In other words, the 1996 Act provided that certain parts of tax and spending bills could henceforth be considered options that the President could carry out or not, as he chose. By choosing, he was executing the given statute—

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26 524 U.S. 417 (1998). The previous year, the Supreme Court heard a challenge to the Act brought by legislators who opposed it; their suit was dismissed on the ground that the legislators lacked Article III standing. See *Raines v. Byrd*, 521 U.S. 811, 830 (1997).

27 *Clinton*, 524 U.S. at 447–48; see U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it . . ."). Justice Kennedy's concurrence relied on broader themes of separation of powers. See generally *Clinton*, 524 U.S. at 449–53 (Kennedy, J., concurring).

28 § 2(a), 110 Stat. at 1207. That definition of "cancel" applied to items of direct spending and limited tax benefits. *Id.* In the context of discretionary budget authority, "cancel" was defined as "rescind." *Id.* There is a greater history of presidential rescission of discretionary budget authority than there is of the cancellations of the type at issue in the *Clinton* case. See *Clinton*, 524 U.S. at 465–68 (Scalia, J., concurring in part and dissenting in part).

29 524 U.S. at 438.

30 *Id.* (citing *INS v. Chadha*, 462 U.S. 919, 954 (1983)).

31 See generally *id.* at 453–69 (Scalia, J., concurring in part and dissenting in part); *id.* at 469–97 (Breyer, J., dissenting). Justice Scalia's dissent also concluded that some of the challengers lacked standing, so he did not reach the merits as to those parties. *Id.* at 463 (Scalia, J., concurring in part and dissenting in part).

following it, not amending it.<sup>32</sup> Although the Constitution does impose some minimal restraints on the legislature's ability to delegate policymaking authority to the executive, the dissenters found this delegation well within the bounds that historical practice and the Court's precedents had set.<sup>33</sup> The dissenters did not believe the 1996 Act violated any other principle of the separation of powers.<sup>34</sup> But their view did not carry the day, and so ended the previous experiment with the line item veto.

### B. *The Theory of Expedited Rescission*

As noted above, current law already provides a process whereby the President can temporarily withhold funds while Congress considers his proposal to rescind certain spending items.<sup>35</sup> The current line item veto proposal is similar in that it too requires that Congress affirmatively endorse the President's suggested rescissions. Nonetheless, it would work a subtle but potentially important change in current law. As a committee report explains, under the 1974 Act's rescission process, "Congress can simply ignore presidential rescissions."<sup>36</sup> That is, there is no requirement that Congress actually consider the President's rescission proposals, and Congress could also amend them and package them in ways that frustrate passage, thus

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32 *Id.* at 474–75 (Breyer, J., dissenting); *see also id.* at 469 (Scalia, J., concurring in part and dissenting in part) ("The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, has succeeded in faking out the Supreme Court."); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871, 877–78 (1999) (criticizing the Court's invalidation of the 1996 Act because the Court mistakenly equated the 1996 Act to a traditional line item veto). The expedited rescission mechanism under discussion here is even farther from a true line item veto, of course.

33 *See Clinton*, 524 U.S. at 484–96 (Breyer, J., dissenting). On the nondelegation doctrine, *see generally* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 319–23 (2d ed. 2002), and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5–19 (3d ed. 1999).

34 *See Clinton*, 524 U.S. at 480–84 (Breyer, J., dissenting).

35 *See supra* text accompanying notes 18–20.

36 H.R. REP. NO. 109-505, pt. 1, at 12 (2006); *see also* S. REP. NO. 104-14, at 2 (1995) (stating that under the 1974 Act "[i]t frequently happens that special messages submitted by the President to rescind funds receive no action at all by Congress"). It should be noted that the committee reports are political documents meant to illustrate the need for expedited rescission and, accordingly, do not necessarily give a complete account of the history. While it is true that Congress can ignore presidential rescission requests, that is not the only reason why presidential rescissions under existing law have not amounted to much. Presidents have not requested much, and Congress sometimes simply prefers (and enacts) different rescissions than those the President proposes. *See supra* note 22.

defeating to some degree the purpose of letting the President submit a remedial rescission proposal in the first place. Current law provides an *opportunity* for quick action *if* legislators want it,<sup>37</sup> but does not mandate it.

The expedited rescission approach, in contrast, “*requires* Congress to vote up or [down] on a stand-alone bill containing the items the President seeks to cancel.”<sup>38</sup> In repeated uses of mandatory language, the new legislation states that the President’s approval bill “shall” be introduced within five days of the President’s message transmitting his proposed rescissions<sup>39</sup> and provides that the committee “shall report it to the House without amendment not later than the seventh legislative day after the date of its introduction.”<sup>40</sup> The rules of floor debate are regulated in detail to provide for speedy consideration.<sup>41</sup> Amendments are barred.<sup>42</sup>

One might wonder why the above mandates are necessary. If Congress favors certain rescissions on the merits it can pass them, the thinking would run, and if Congress does not favor them it will vote against them in the final vote, regardless of the special procedure. The response is that expedited rescission would work by manipulating political visibility and accountability. Legislators have a number of tools at their disposal that can reduce the profile of legislative activity and deflect accountability: omnibus bills, complex procedural votes, delay, delegation to executive agencies, and so on. Expedited rescission seeks to simplify and make salient what might otherwise be obscured. The theory of expedited rescission is that wasteful items

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<sup>37</sup> See 2 U.S.C. § 688(b) (2000). This section in effect creates an optional “semi-fast track” procedure.

<sup>38</sup> H.R. REP. NO. 109-505, pt. 1, at 13. The new legislation differs from current law in other ways as well, such as by adding direct spending and targeted tax benefits to the list of items that can be proposed for rescission; current law covers only budget authority in appropriations measures. *Id.* at 21–22.

<sup>39</sup> H.R. 4890, 109th Cong. § 2 (2006) (proposed amendment to § 1012(a)(1) of Congressional Budget and Impoundment Control Act of 1974). As noted earlier, there were a few different expedited rescission bills under consideration in the last Congress, which differ in some particulars. See MCMURTRY, *supra* note 2, at 6–8 (comparing the details of the various bills). I will typically cite H.R. 4890 as passed by the House, but the analysis presented herein applies to the general approach and does not depend on the various details.

<sup>40</sup> H.R. 4890, § 2 (proposed amendment to § 1012(a)(2)(A) of Congressional Budget and Impoundment Control Act).

<sup>41</sup> *Id.* (proposed amendment to § 1012(a)(2)–(3) of Congressional Budget and Impoundment Control Act).

<sup>42</sup> *Id.* (proposed amendment to § 1012(b) of Congressional Budget and Impoundment Control Act).

would not be enacted if they had to stand on their own in a re-vote, severed from the desirable piece of legislation to which they were attached.<sup>43</sup> Unlike under a true line item veto, the President cannot cancel them unilaterally, but expedited rescission is designed to achieve that result through forced public “position taking.”<sup>44</sup> Without the excuse that a certain pork-laden bill was necessary because it also provided for ongoing military operations, would legislators still be able to vote for million-dollar crawfish research institutes named after themselves?<sup>45</sup> The theory of expedited rescission, at least, is that they would not be able to take such a stand. Moreover, beyond the results of any particular vote, the risk that one’s own frivolous special project could be presented in a rescission bill, thus raising its profile, can itself act to deter wasteful measures.<sup>46</sup>

The bar on amending the President’s proposals is, obviously, crucial to the success of expedited rescission. If the wasteful projects

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43 See H.R. REP. NO. 109-505, pt. 1, at 13 (“This bill provides another opportunity to expose such [special interest] measures to scrutiny. If they can stand on their own merits, they will survive.”). As explained below, the President need not put all the wasteful items from a bill into the same rescission package; rather, he can create several separate lists to be voted upon separately. See *infra* text accompanying notes 99–100.

44 The notion of position taking as a species of legislative activity is most closely associated with David Mayhew. Some position taking is voluntary in the sense that a legislator can take a position or not, but voting (especially roll call voting) is less voluntary. See DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 61–66 (2d ed. 2004); see also Benjamin Highton & Michael S. Rocca, *Beyond the Roll-Call Arena: The Determinants of Position Taking in Congress*, 58 POL. RES. Q. 303, 304 (2005) (explaining that “roll-calls effectively ‘require’ that a position be taken”).

45 In his 1988 State of the Union Address, President Reagan famously claimed that with a line item veto he could cut millions of dollars in wasteful spending on items such as cranberry and crawfish research projects. See Ward Sinclair & Tom Kenworthy, *Hill’s Cranberry and Crawfish Crowd Choleric*, WASH. POST, Jan. 28, 1988, at A17.

46 Cf. Garrett, *supra* note 32, at 925–32 (discussing the informational effect of cancellation procedures). As noted earlier, some of the assumptions underlying the standard policy case for expedited rescission (and all item vetoes more generally) are highly debatable. Here, one should note the possibility that legislators would be proud to have their special interest projects highlighted, because their contributors and key constituents like those “wasteful” projects. See *infra* notes 97–98 and accompanying text. I note as well that increasing the public visibility of particular votes does pose some risks, as greater transparency also makes it even easier for rent-seeking interest groups to monitor and then punish or reward legislators. See generally Elizabeth Garrett & Adrian Vermeule, *Transparency in the U.S. Budget Process*, in FISCAL CHALLENGES: AN INTERDISCIPLINARY APPROACH TO BUDGET POLICY 68 (Elizabeth Garrett, Elizabeth A. Graddy & Howell E. Jackson eds., 2008). These groups, however, already possess enough incentives and organization to monitor how their interests fare in the markup sessions and other bargaining that goes into creating a thick bill—processes that are relatively more opaque to the unorganized general public. The high salience of a rescission vote therefore tends to erode interest groups’ relative advantage in information.

could be repackaged or linked with other measures, the same pathologies that generated the bloated bill in the first place could simply reappear at the rescission stage. This attentiveness to the dynamics of legislative packaging and logrolling is characteristic of a number of schemes of statutized rules. The framework governing closure of military bases, for example, bars amendments to the executive's list of facilities slated for closure; every member of Congress has powerful incentives to try to remove the facility in his or her own district from the list, so the package is presented to Congress as an unamendable whole.<sup>47</sup>

The theory behind expedited rescission can also be appreciated on a more generalized theoretical level by considering how this device compares to another method of structuring executive-legislative interactions, the legislative veto. The legislative veto lets Congress, one house, or even one committee nullify the executive's decisions by passing a disapproval resolution (i.e., "vetoing" the executive action). It is easy to see why the legislative veto was so popular, for it essentially lets Congress have its cake and eat it too.<sup>48</sup> It lets Congress delegate broad policymaking authority to the executive *ex ante*, which has the usual advantages of saving Congress time, allowing it to avoid controversial decisions, and taking advantage of agency expertise. But, at the same time, it gives Congress much greater *ex post* control than would be possible if the only way to override the executive's decision were to go through the full dress Article I, Section 7 process of passing a new statute. (Passing the new statute, incidentally, would likely require a two-thirds majority, since the President could be expected to veto a bill that attempted to overturn his administration's prior decision.) And greater control means more confidence in larger and more numerous delegations.

Given the legislative veto's evident attractions, it should come as no surprise that it, too, was once called into duty as a way of dealing with the deficit problem. In particular, the 1974 Act created (in addition to the rescissions procedures discussed already) a scheme whereby the President could unilaterally defer spending money

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<sup>47</sup> On the dynamics of the base closure process, see *Dalton v. Specter*, 511 U.S. 462, 481–82 (1994) (Souter, J., concurring in part and concurring in the judgment), and Garrett, *supra* note 10, at 760.

<sup>48</sup> See *INS v. Chadha*, 462 U.S. 919, 967–74 (1983) (White, J., dissenting) (explaining how the legislative veto has become the "central means by which Congress secures the accountability of executive and independent agencies"); see also Girardeau A. Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473, 477–78 (1984) (explaining factors contributing to the legislative veto's popularity).

within the fiscal year, subject to legislative veto by a resolution passed by either chamber of Congress.<sup>49</sup> Of course, when the legislative veto was declared unconstitutional in *INS v. Chadha*, that also doomed the 1974 Act's deferral procedures and their one-house legislative veto.<sup>50</sup> Thus, the legislative veto, just like the 1996 Act's approach, is off the table when it comes to structural innovations aimed at curing the pork problem.

That brings us back to the allure of fast track mechanisms such as expedited rescission, for the key point here is that a fast track regime can act as a close functional substitute for the unconstitutional legislative veto by likewise giving Congress both flexibility and control.<sup>51</sup> The following chart illustrates, by arranging various mechanisms along a scale from most to least control over presidential authority.

THE PRESIDENT'S DECISION WILL FAIL IF . . .

Majority of a Committee Opposes	Majority of One House Opposes	Majority of Both Houses Oppose	2/3 of Both Houses Oppose
<i>Most Control Over President</i>		←————→	<i>Least Control Over President</i>
Corresponding Device:			
<ul style="list-style-type: none"> <li>• Committee Legislative Veto</li> </ul>	<ul style="list-style-type: none"> <li>• One-House Legislative Veto</li> <li>• Fast Track (e.g., Expedited Rescission)</li> </ul>	<ul style="list-style-type: none"> <li>• Two-House Legislative Veto</li> </ul>	<ul style="list-style-type: none"> <li>• Delegation to Executive, Reversible Via New Statute—Veto Override Required</li> </ul>

<sup>49</sup> Pub. L. No. 93-344, § 1013, 88 Stat. 297, 334 (1974).

<sup>50</sup> See *City of New Haven v. United States*, 809 F.2d 900, 901-02 (D.C. Cir. 1987) (invalidating the deferral procedures and the associated legislative veto in the 1974 Act). Congress amended the law to permit temporary unilateral deferrals for managerial reasons only (as opposed to policy based-deferrals). See 2 U.S.C. § 684(b) (2000); see also Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 287 (1993) (describing the history of the deferral provision); MORTON ROSENBERG, CONG. RESEARCH SERV., LINE ITEM VETO: A CONSTITUTIONAL ANALYSIS OF RECENT PROPOSALS 8-10 (2006), <http://fas.org/sgp/crs/misc/RL33365.pdf> (same).

<sup>51</sup> The functional similarity between fast track regimes and the legislative veto was discussed by then-Judge Breyer. See Stephen Breyer, Circuit Judge, United States Court of Appeals for the First Circuit, *The Legislative Veto After Chadha*, Thomas F. Ryan Lecture at the Georgetown University Law Center (Oct. 13, 1983), in 72 GEO. L.J. 785, 792-96 (1984); see also H.R. REP. NO. 98-257, pt. 3, at 3 (1983) (suggesting that fast track schemes will become more popular in the wake of the *Chadha* decision); Tiefer, *supra* note 10, at 423 (noting that *Chadha* and the line item veto decisions increased the importance of the alternative strategy of passing laws that streamline the legislative process).

The Supreme Court has removed several of the mechanisms by declaring them unconstitutional. The various versions of the legislative veto are impermissible under *Chadha*.<sup>52</sup> After *Chadha*, there remained the possibility (represented on the far right of the chart) of delegating broad authority to the executive and then using the normal Article I, Section 7 process of passing a new statute to override the President's action. This arrangement gives Congress relatively less control than do other mechanisms, as the President would likely veto the override statute.<sup>53</sup> And of course, in the budget context, at least some versions of this arrangement are constitutionally impermissible under *Clinton v. City of New York*, in which the Supreme Court refused to characterize the "cancellation" authority as a form of run-of-the-mill delegation, and instead construed it as violating Article I, Section 7.<sup>54</sup>

Here fast track can fill the void. Under a fast track regime, the President's decision will be overturned if a majority of either house opposes it, for a majority of both are needed to enact the approval bill. This mirrors a one-house legislative veto (the middle-of-the-road variety, in terms of degree of control over the executive), under which the President's decision will also be overturned if a majority of either house opposes it. Put differently, under both mechanisms the President will prevail only if a majority of both houses supports him.

While both mechanisms condition presidential success on the same level of congressional support—a majority in both houses—the two mechanisms differ in terms of the burden of legislative inaction. With the one-house veto, the President's decision prevails as long as

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<sup>52</sup> *Chadha* itself concerned a one-house legislative veto, but the Court's broad language and its summary dispositions of subsequent cases concerning other varieties of the legislative veto make it clear that all forms are unconstitutional. See *Process Gas Consumers Group v. Consumer Energy Council of Am.*, 463 U.S. 1216, 1216 (1983) (summarily affirming the invalidation of a two-house legislative veto).

<sup>53</sup> I should emphasize that we are here discussing the degree of congressional control over the President only in terms of what proportion of the legislature has to disagree with the President in order to defeat his decision after the fact. In this basic sense the delegation option gives Congress relatively little control. In any arrangement, Congress can of course also exercise control *ex ante*, such as by exempting certain measures from the operation of the delegated power. For example, under the 1996 Act, Congress could protect its interests by limiting the President's ability to cancel tax breaks to those items designated as limited tax benefits by the Joint Committee on Taxation; the Committee could decide that a particular bill contained no such items, and such determination would not be subject to any judicial review. Line Item Veto Act of 1996, Pub. L. No. 104-130, § 2(a), 110 Stat. 1200, 1210-11 (1996); see also Garrett, *supra* note 23, at 88.

<sup>54</sup> See *supra* notes 26-34 and accompanying text.

Congress does *not* act (i.e., refrains from passing a disapproval resolution); under fast track, the President's decision prevails only when Congress *does* act (i.e., passes the approval statute). This difference between acting and refraining from acting is ordinarily extremely important, for there are countless ways in which a bill can fail to pass even if a majority supports it: an unfavorable committee vote, opposition by a key legislative leader, the Senate filibuster, et cetera. This is where the fast track procedures really come into play, for the key feature of an effective fast track regime is that it *reduces the inertia that stands in the path of passing a law*, making for a much more purely majoritarian process. The special procedures are supposed to guarantee that the measure comes up for a vote quickly and automatically, thus overcoming the procedural roadblocks and vetogates that characterize the usual legislative process. In terms of the amount of congressional effort required, approving the confirmation statute when it automatically comes up for a vote is not that much different from refraining from adopting a legislative veto resolution. In this way fast track and the one-house legislative veto are meant to approach a rough equivalence in terms of policy outcomes.

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According to its supporters, expedited rescission has one other important virtue, too. Though it is functionally similar to the legislative veto, there may be all the difference in the world as a matter of constitutional law. We turn, then, to the legal analysis of expedited rescission, considering first a relatively easy legal question and then introducing a harder one.

### C. *Solving the Clinton v. City of New York Problem*

Is expedited rescission constitutional? For what it is worth, Congress certainly thinks that expedited rescission solves the constitutional problem identified in *Clinton v. City of New York*. Indeed, as one of the committee reports on the Legislative Line Item Veto Act of 2006 states, the proposal was “*specifically designed*”<sup>55</sup> to avoid that defect:

In the case of the Legislative Line Item Veto Act [of 2006] . . . the President merely *proposes* that a particular provision be canceled—he does not do so unilaterally. To invalidate budgetary resources under this act re-

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<sup>55</sup> H.R. REP. NO. 109-505, pt. 1, at 32 (2006).

quires an act of Congress and the assent of the President, the same as any other law enacted pursuant to the Constitution of the United States.

. . . This is indistinguishable from any other exercise of legislative or executive power.<sup>56</sup>

Congress is correct in its assessment that the new line item veto would not be susceptible to the constitutional holding of *Clinton v. City of New York*. Unlike the 1996 Act, which (as the Supreme Court conceptualized it) allowed the President to “cancel” provisions of law unilaterally, here the President can in no way be said to amend any duly enacted statute. Rather, he signs the statute and then merely proposes to Congress that it pass new legislation rescinding certain items of spending. Proposing legislation is of course something the President is constitutionally entitled to do.<sup>57</sup> Both houses of Congress then vote on the bill proposing rescissions (bicameralism), and the President signs the bill (presentment), thus satisfying Article I, Section 7 of the Constitution. The enacted rescission legislation is thus formally unexceptionable. The original spending statute has simply been amended by a second statute, just as *Chadha* requires. True, the amendment was given preferential parliamentary treatment. But, as noted earlier, the *United States Code* is filled with statutory frameworks for considering various types of legislation, and no court has ever said that the enactments that come out of those frameworks—which still observe the dictates of Article I, Section 7—are defective.<sup>58</sup>

Thus, at least as regards the *Clinton v. City of New York* problem, it seems reasonably clear that expedited rescission is constitutional.<sup>59</sup>

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<sup>56</sup> *Id.* at 32–33.

<sup>57</sup> See U.S. CONST. art. II, § 3 (stating that the President may “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient”).

<sup>58</sup> Other commentators agree that statutes passed pursuant to such a regime do not run afoul of *Chadha*. See, e.g., Breyer, *supra* note 51, at 792–96; Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 18–20 (1984).

<sup>59</sup> To be sure, the expedited rescission approach does give the President the authority to temporarily suspend items that are subject to his rescission requests, so that Congress has time to consider whether to rescind. See H.R. REP. NO. 109-505, pt. 2, at 4, 18 (2006); S. REP. NO. 109-283, at 16–17 (2006). One might ask whether, if presidential “cancellation” is forbidden under *Clinton v. City of New York*, a temporary suspension should in principle fare any better. Even accepting *Clinton* as correct, I believe that a temporary freeze is distinguishable. Current law has for decades provided that same temporary power. See 2 U.S.C. §§ 683, 688 (2000) (outlining the procedure for the President’s rescission of budgetary authority and the procedure for the rescission within the House and the Senate, respectively); *supra* text accompanying notes 18–20.

I should note that some versions of expedited rescission could potentially permit the temporary freezes to become de facto permanent rescissions, such as if the withholding period lasted through the end of the fiscal year, or if the President repeatedly targeted the same item again and again until the budget authority expired. See S. REP. NO. 109-

*D. A Different Constitutional Problem?*

Challengers might, however, attempt a different, and more promising, line of attack. Might there not be some problem, they would say, with the fact that Congress was *required*—at the President’s insistence—to follow a quick, fixed timetable and vote on an unamendable package concocted by the President himself? After all, Article I, Section 7 envisions Congress as the body that packages legislation and presents take-it-or-leave-it propositions to the President, and this fast track regime reverses that. Does the President have any business forcing Congress to hold votes on proposals of his choosing on a schedule of his liking?

Those are all very good questions, and they require us to acknowledge the unmentioned elephant standing in the middle of the debate over the recent expedited rescission bills. The bills are full of mandatory language: the majority leader of each house “shall” introduce the President’s approval bill within five days of the special message, the relevant committees “shall” report it within seven days after that, certain dilatory motions “shall not” be entertained, debate “shall not” exceed a fixed number of hours, and amendments “shall [not] be in order.”<sup>60</sup> Likewise, in the committee reports, one reads that the majority leader is “required” to introduce the President’s bill, the committee is “require[d]” to report it, the Speaker “must” schedule debate, each house is “required” to take an up or down vote, and so forth.<sup>61</sup> Indeed, that is supposed to be the *point* of the new law. Under the old rescission process in the 1974 Act, “Congress can simply ignore rescissions submitted by the President. The Legislative Line

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283, at 15–17 (noting risks in the administration’s proposed bill and explaining that the bill had been amended to address concerns over the risks and to improve rescission procedures); Seema Mittal, Note, *The Constitutionality of an Expedited Rescission Act: The New Line Item Veto or a New Constitutional Method of Achieving Deficit Reduction?*, 76 GEO. WASH. L. REV. 125, 139–48 (2007) (discussing constitutional problems with suspension provisions); RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, PROPOSED LINE-ITEM VETO LEGISLATION WOULD INVITE ABUSE BY EXECUTIVE BRANCH: PRESIDENT COULD CONTINUE WITHHOLDING FUNDS AFTER CONGRESS VOTED TO RELEASE THEM 6–8 (2006), <http://www.cbpp.org/3-23-06bud.pdf> (discussing the potential for abuse in the administration’s proposal). Given that skillful drafting could avert de facto unilateral rescissions, I do not think that this is a decisive constitutional objection to expedited rescission more generally.

<sup>60</sup> H.R. 4890, 109th Cong. § 2 (2006).

<sup>61</sup> See, e.g., H.R. REP. NO. 109-505, pt. 2, at 16–17, 23; H.R. REP. NO. 109-505, pt. 1, at 9, 15, 16, 23, 42 (2006); S. REP. NO. 109-283, at 16, 30–31.

Item Veto Act [of 2006] *requires* Congress to vote up or [down] on a stand-alone bill containing the items the President seeks to cancel.”<sup>62</sup>

Could that really be true? Is Congress required to follow the expedited procedures set forth in the statute? Could a statute so requiring be constitutional? We turn to those questions next.

### III. THE LEGAL (NON)EFFECT OF EXPEDITED RESCISSION

This Part of the Article addresses several legal questions surrounding whether Congress is really required to follow the special statutory rescission procedures. At the outset, I should acknowledge that one easy answer is to respond that, even if Congress is acting illegally by failing to honor the fast track procedures, no earthly power could force them to act. That is, it appears that the controversy is nonjusticiable, either for want of standing or as a political question or both. Regarding standing, a challenge to Congress’s failure to obey the procedures is quite different from a challenge to the statute that results when Congress does follow the procedures and approves a rescission. In the latter case, the beneficiaries of the cancelled program would have Article III standing to sue under the reasoning of *Clinton v. City of New York*.<sup>63</sup> Parties suffering concrete and particularized injuries are harder to find in the situation where Congress simply fails to act, and a spending item or tax break remains law. Further, the challenge smacks of a political question inasmuch as a court would be asked to intrude into Congress’s manner of handling its calendar, and possibly to require Congress to hold a vote it did not want to hold. Thus, Congress would probably be immune from judicial correction if it failed to follow the statutory fast track procedures. (Readers interested in the analysis that supports the conclusions just stated can find it in Part VI of this Article, which considers justiciability in some detail.)

But justiciability is not the end of the matter. One can do wrong even if there is no chance of being caught. A dismissal for want of justiciability is not an endorsement of the defendant’s position on the

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<sup>62</sup> H.R. REP. NO. 109-505, pt. 1, at 13.

<sup>63</sup> See *Clinton v. City of New York*, 524 U.S. 417, 429–36 (1998) (holding that the President’s cancellation of a limited tax benefit and a spending item caused an immediate injury in fact). Beyond the Article III requirements, there is of course the problem of prudential standing and the existence of a statutory right to sue. In the 1996 Act, Congress expressly provided that “any individual” adversely affected by the Act could sue for declaratory and injunctive relief. Line Item Veto Act of 1996, Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996).

merits.<sup>64</sup> Congress is oftentimes the only judge of whether its actions are legal, and legislators do care *to some degree* whether their judicially unreviewable acts are legal or not.<sup>65</sup> And whether or not they care about legality, some of us on the outside do. So, therefore, while acknowledging problems regarding justiciability, we can and should still ask whether it is legal for Congress to ignore the statutory procedures providing for expedited consideration of the President's rescission bills.

This is simply one aspect of the more general question of whether Congress is required to follow rules set down by statute. When a statute says that each house "shall" vote on the President's bill, "shall not" amend it, et cetera, one would ordinarily think that a law-abiding Congress would need to amend that statute if it wished to do otherwise. After all, *Chadha* tells us that "repeal of statutes, no less than enactment," must conform with Article I's path of bicameralism and presentment.<sup>66</sup> But could it really be true that a house of Congress could be required to follow statutory procedures it later does not wish to follow?

Congress recognizes that there is a problem here. Amid all the statements about what Congress "must" and is "required" to do, one finds in one of the committee reports the rather dissonant statement that "Congress is constitutionally empowered to deactivate any expedited consideration procedures if either [h]ouse chooses . . . ."<sup>67</sup> Indeed, though it is certainly easy to miss, *Congress has provided itself an escape hatch in the line item veto legislation itself*. Section 3 of House Bill 4890, labeled "Technical and Conforming Amendments," would amend an uncodified provision of the 1974 Act to include a new cross-reference to the fast track procedures that House Bill 4890

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64 Cf. *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2573 (2007) (Kennedy, J., concurring) ("Government officials must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations."); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 589 (1975) ("Decisions *not* striking down laws do not always mean that the laws are constitutional, however, for a court's failure to invalidate may only reflect its institutional limitations.").

65 Most political scientists recognize that legislators' opinions of a bill's constitutionality have some effect on their behavior, along with more tangible factors such as impact on electoral prospects. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, in CONGRESS AND THE CONSTITUTION 245–47 (Neal Devins & Keith E. Whittington eds., 2005). See generally JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS (3d ed. 1989) (explaining that legislators pursue a mixed set of goals in their decision making).

66 *INS v. Chadha*, 462 U.S. 919, 954 (1983).

67 H.R. REP. NO. 109-505, pt. 1, at 22.

would enact.<sup>68</sup> When one turns to the relevant provision in the 1974 Act, one finds a statement that the Code sections setting out special parliamentary procedures in the budget context

are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.<sup>69</sup>

Thus, despite all the language in the bill about what Congress “shall” do, and the similarly mandatory tone sounded in the committee reports, in reality Congress is not so willing to bind itself. Variations on this language are routinely inserted into the dozens of statutory provisions that regulate congressional rules of debate.

The above escape clause is puzzling in a few ways. As a legal matter, the reservation of the right to effectively repeal a statute by action of one house would seem to conflict with *Chadha’s* teaching that “repeal of statutes, no less than enactment,” must conform with bicameralism and presentment.<sup>70</sup> As a practical matter, it appears to nullify the binding commitment that is the new act’s *raison d’être*. Why would Congress pass a law that depends on tying its own hands and then untie them in the next breath?

Perhaps part of the answer is that Congress is not really serious about the proposal. But, more charitably, it may also be true that Congress sincerely believes that, try as it might, it just cannot, as a matter of constitutional law, tie its hands with binding statutory procedures. In previous work, I have explained at some length why, as a matter of constitutional law, Congress is correct that each house remains free to set its own rules regardless of any statute governing parliamentary procedures.<sup>71</sup> The short of it is that the contrary result—

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68 H.R. 4890, 109th Cong. § 3(a) (2006). The Senate versions, Senate Bill 2381 and Senate Bill 3521, contained equivalent provisions, and such clauses are typical of statutes that enact parliamentary rules.

69 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 904(a), 88 Stat. 297, 331 (1974). This uncodified provision is set out in a note following 2 U.S.C. § 621 (2000).

70 *Chadha*, 462 U.S. at 954.

71 Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 976–1010 (2007); Bruhl, *supra* note 10, at 372–413.

that is, binding statutory rules—would impair each chamber’s autonomy in a way that conflicts with the Constitution’s decision to vest each chamber with control over its order of business, a decision that is manifested in a variety of ways but most notably through the Rules of Proceedings Clause.<sup>72</sup> The rules power is thus an important aspect of our system of separation of powers, just like each house’s power to discipline its members, to judge their elections, and to have its members be free from prosecution based on internal communications.<sup>73</sup> These considerations all work towards making Congress, in the plan of the Constitution, the most autonomous branch.

In sum, then, each house of Congress is constitutionally empowered to abrogate any statutory procedures that purport to bind it. As further security, Congress has provided itself with a statutory “out” that permits it to change the statutory rules. But the escape hatch inserted in statutized rules merely restates what is the case as a matter of constitutional law.

Yet we are still left with the puzzle of why Congress would pass a law, the supposed rationale for which is that it ties Congress’s hands, when Congress’s hands are not really tied and constitutionally cannot be. This is what the next Part of this Article seeks to explain.

#### IV. THE PRACTICAL EFFECT OF EXPEDITED RESCISSION: WHY WOULD CONGRESS PASS THE STATUTE AND HOW WOULD IT WORK (OR NOT)?

Congress has passed dozens of statutized rules and framework laws, notwithstanding that legally they do not bind. Why would it do such a thing? This Part of the Article seeks to move beyond the purely legal questions surrounding expedited rescission and to derive some more practically oriented conclusions about the proposal’s likely effects and true purposes.

There are at least two different questions regarding why Congress would enact an expedited rescission framework. First, why employ the vehicle of a statute instead of an internal parliamentary rule? Second, why deviate from the usual legislative process by creating a special framework regime (using either vehicle) at all? To give structure and context to our answers, it is useful to turn to the recent work

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<sup>72</sup> U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

<sup>73</sup> *See id.* cl. 1 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . .”); *id.* cl. 2 (“Each House may . . . punish its Members for disorderly Behaviour . . .”); *id.* § 6, cl. 1 (“[A]nd for any Speech or Debate in either House, they shall not be questioned in any other Place.”).

of Elizabeth Garrett, which seeks to provide an account of the purposes of, and conditions for, the enactment of statutized procedural frameworks. As to the first question—the choice between statute and rule—Garrett proposes three potential answers, namely that (1) a statute may do more to signal an important and durable change, (2) a statute may be necessary because the internal procedural changes are part of an integrated bargain that includes items that have legislative effect and thus must be accomplished by statute, and (3) the use of a statute may reflect path dependence and institutional learning (i.e., a statutized rule has been used before in a related context, giving legislators familiarity with it and making it a ready candidate to be used again).<sup>74</sup> Garrett believes the second factor is usually the most important, and it seems a likely explanation here as well: although most of the expedited rescission framework involves internal rules that could be adopted through a simple or concurrent resolution,<sup>75</sup> some aspects of the bill have effect outside of the two chambers and require genuine legislation, notably the provisions allowing the President to suspend certain tax and spending items while a rescission request is pending.<sup>76</sup> Garrett's third factor likely also plays a role, for fast track regimes are familiar, tested tools, and other types of statutized frameworks have been used in the budget process before. The first factor, as Garrett recognizes, is somewhat questionable given that statutized rules are, as a formal matter, no more binding than internal rules. But it is possible that using the statutory form is meant to send some sort of message that Congress is serious about the reform.

I believe we can reach some more interesting and novel conclusions, however, on the question of why a framework would be enacted at all, apart from whether it is in the form of a statute or a rule. Here again Garrett provides a useful typology. Among the purposes that frameworks can serve, she identifies (1) symbolism, (2) the establishment of neutral rules, (3) coordination, (4) pre-commitment to (and entrenchment of) certain substantive outcomes, and (5)

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<sup>74</sup> See Elizabeth Garrett, *Conditions for Framework Legislation*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 294, 307–18 (Richard W. Bauman & Tsvi Kahana eds., 2006).

<sup>75</sup> A simple resolution is a resolution passed by only one house; a concurrent resolution is passed by both houses but is not presented to the President. Neither has external legislative effect but instead typically involves internal affairs. A joint resolution, in contrast, is passed by both houses and presented to the President and is functionally equivalent to an enacted bill.

<sup>76</sup> See *supra* note 59.

changes to the intra-/inter-branch balance of power.<sup>77</sup> Which of these explains expedited rescission? If one follows the “official” explanation for expedited rescission presented in Part II above, its purpose would appear to be mostly a combination of (4) and (5): Congress is trying to commit to budgetary restraint and, as part of the method of doing so, shifts more budget-cutting power to the President. But whatever the precise account, the “official” story takes a major hit once one recognizes that, as we have seen above, the framework is not legally binding at all. Perhaps, then, the real purpose is just option (1), i.e., symbolism?

That could end up being correct, but in order to decide with any confidence what this statute’s true point is, one needs first to figure out how it would work in practice. As we will see, the statutory framework may be quite effective in practice, under certain institutional circumstances, even though it lacks legally binding force. Congress has passed dozens of these statutes, after all, so perhaps there is more going on here than just symbolism.

Once we determine how this framework would actually be expected to work, I suspect we will find that its main purpose is not the official good-government one, but neither is it just symbolism. Rather, there is good reason to think that the statute has a distinctly partisan aspect: it will help the ruling party and harm the minority party.

#### A. *How Statutized Rules Can Attract Compliance*

Given that we are trying to predict congressional behavior, the following analysis is necessarily somewhat tentative. We had only very limited experience under the Line Item Veto Act of 1996 before it was declared unconstitutional. Although there is a more substantial body of data from the many states with some form of a line item veto,<sup>78</sup> differences between the federal and state legislative processes mean that we cannot assume the effects will be the same. Further, a

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<sup>77</sup> See Garrett, *supra* note 10, at 733–64.

<sup>78</sup> See, e.g., Glenn Abney & Thomas P. Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?*, 45 PUB. ADMIN. REV. 372 (1985) (examining the ends for which state governors use the line item veto); James Alm & Mark Evers, *The Item Veto and State Government Expenditures*, 68 PUB. CHOICE 1 (1991) (suggesting that the line item veto only minimally reduces state spending); Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets: Evidence from the States*, 36 J. PUB. ECON. 269 (1988) (examining the claim that gubernatorial line item veto power reduces state spending); Catherine C. Reese, *The Line-Item Veto in Practice in Ten Southern States*, 57 PUB. ADMIN. REV. 510 (1997) (attempting to account for nonuse and low fiscal impact of the line item veto).

basic limitation of all the prior data is that here we are not dealing with a real line item veto. Under expedited rescission, the executive cannot undo law unilaterally; rather, Congress must still pass the proposed rescissions, which adds an additional layer of decisions and decision makers whose actions we must predict.

Another potential source of guidance comes from the dozens of other fast track procedures and statutized rules tucked away in the *United States Code*. Again, though, their relevance is limited by the fact that different policy areas and their associated frameworks each tend to have their own special characteristics; Congress's behavior under a framework for Amtrak reorganization bills does not necessarily bear much relationship to its behavior under the Electoral Count Act. Looking to the evidence in the aggregate, Congress's record of compliance with statutory regimes presents a distinctly mixed bag. On the one hand, Congress has on numerous occasions decided not to follow statutized rules, and it has done so in at least two different ways. *First*, as the statutes themselves usually state, the statutized rule can be changed "in the same manner, and to the same extent as in the case of any other rule of such House."<sup>79</sup> Thus, like the standing rules themselves, the statutory procedures are in no way immutable, and the statute itself provides an authorized way to evade the expedited procedures. In the House of Representatives, the typical method for regulating the procedural details of debate on a bill is a special rule reported by the Rules Committee,<sup>80</sup> and such a special rule could be used here to trump the statutory provisions. Thus, in the 1980s, a Democratic House at one point decided not to follow special preferential statutory procedures regarding one of President Reagan's requests for aid to the Nicaraguan Contra rebels, following instead the special rule reported by the Rules Committee.<sup>81</sup> *Second*, leaders in key gatekeeping or scheduling positions could simply decide to flout the rules, perhaps on the principled basis of the long-standing congressional view that each house can circumvent statutory

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79 See *supra* text accompanying notes 68–69.

80 See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 125–26 (7th ed. 2007).

81 For descriptions of this incident, see Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69, 99 n.141 (1988), and Edmund W. Sim, *Derailing the Fast-Track for International Trade Agreements*, 5 FLA. INT'L L.J. 471, 507–10 (1990). In the Senate, unanimous consent agreements play a similar role in setting the terms of debate on particular bills. See OLESZEK, *supra* note 80.

procedures, or perhaps on the basis of a simple prudential calculation that the will of the house is with them.<sup>82</sup>

Nonetheless, it would be a serious mistake to think that statutized rules are mere dead letters. One of the most important regimes of statutized rules, the fast track system for trade agreements, in fact has a strong record of compliance.<sup>83</sup> In the most recent big test of fast track, the vote on the Central American Free Trade Agreement, the Senate did not filibuster the implementing bill, even though the margin was razor thin and some senators fiercely opposed passage.<sup>84</sup> Similarly, the bar on filibustering budget reconciliation bills has facilitated the passage of highly controversial measures, such as President Bush's 2001 tax cut and President Clinton's 1993 economic program, the latter of which passed by virtue of the Vice President's tie-breaking vote.<sup>85</sup> While there is no way to know for sure that statutized rules made the difference in these cases, both pieces of legislation certainly look like the types of high-stakes, contentious measures that, in the modern Congress, can usually succeed only with supermajority support.

As with any question of compliance with a rule, one way to understand the compliance decision is by thinking in terms of how the statutized rule aligns with (or fails to align with) Congress's preexisting preferences apart from the rule. In cases where using the statutory procedures benefits those in Congress in a position to ensure the procedures are used (e.g., key majority leaders and committee chairs, and the majority party more broadly), the procedures will of course tend to be used, other things being equal. In such cases the statutized rule does little independent work (though perhaps it would provide legitimacy to preexisting desires to suppress minority obstruction), since it matches what Congress would like to do anyway.

The more interesting case, of course, is when the statutized procedures conflict with what Congress (as its will is aggregated and expressed) would otherwise prefer to do if it were writing on a blank slate. The statutized rules have some force as a focal point; they have some claim to legitimacy inasmuch as they represent the prearranged

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<sup>82</sup> See generally Bruhl, *supra* note 10, at 366–70.

<sup>83</sup> See, e.g., S. REP. NO. 107-139, at 54 (2002) (noting that “neither House has ever acted unilaterally to withdraw application of fast track procedures”).

<sup>84</sup> Edmund Andrews, *Senate Approves Free Trade Pact*, N.Y. TIMES, July 1, 2005, at A1.

<sup>85</sup> See Tiefer, *supra* note 10, at 427, 433–41 (recounting the 2001 budget reconciliation fight); David E. Rosenbaum, *Clinton Wins Approval of His Budget Plan as Gore Votes To Break Senate Deadlock*, N.Y. TIMES, Aug. 7, 1993, at 1 (reporting President Clinton's victory in the 1993 budget fight).

method of handling contentious legislation.<sup>86</sup> Further, if some legislators attempt to defect from the statutory settlement, those who support the procedures can be counted on to harangue their opponents for breaking prior commitments and changing the rules of the game—charges that might resonate with the public. That is, those with an interest in following the special rules can use the statute to batter opponents, portraying themselves as occupying the moral high ground.

The statutized rule can work in another way as well. Not only can some legislators use it as a sword against others, but it can also act as a shield to be used against constituents. Consider, for instance, a Rust Belt Democrat who is a free-trader at heart, but dare not admit that to her constituents. When interested constituents demand that she filibuster or amend a proposed trade pact, the legislator responds that, while she deeply wants to do so, the fast track statute unfortunately has tied her hands. Similarly, in the expedited rescission context, a legislator could cite the statutory procedures in order to produce some slack to allow him to take a position his supporters oppose.<sup>87</sup>

The basic point is that the existence of the statutized rule is one factor among many that will play into the calculus of decision; in some cases it will not change behavior, but in other cases it will. The following Part will turn to expedited rescission in particular and assess how the dynamics can be expected to play out in practice.

*B. A Tentative Account of How Expedited Rescission Could Serve Partisan Aims*

If Congress were actually to enact the expedited rescission proposal, it would provide lawyers and political scientists with a wonderful experiment in compliance with statutized rules, for the President's rescission proposals would generate frequent test cases. Until that happens, we can approach the problem of predicting compliance through some educated guesswork based on theoretical and empirical studies of the legislative process and distributive politics.

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<sup>86</sup> See Bruhl, *supra* note 71, at 1011–13 (discussing factors that promote practical compliance with inconvenient procedural rules).

<sup>87</sup> Highly sophisticated observers might realize that the statute is nonbinding and thus see through the legislator's rationalizations, but other constituents would be less informed regarding the procedural and constitutional details. *Cf. infra* note 98 (comparing the knowledge of interest groups to that of the public at large).

The reader will recall that the standard theory of how the expedited rescission statute works is that it would simply allow the President to single out undesirable special interest pork, while leaving substantive policymaking unaffected. That vision is almost certainly incomplete because, among other things, it neglects the fact that the existence of a presidential rescission authority would affect the dynamics of the legislative process and alter the legislation that is sent to the President in the first place.<sup>88</sup> Thus, while one might initially think that the only effect would be on the parts of bills subject to rescission, that view would be mistaken or at least oversimplified. The narrow spending projects that find their way into so many bills cannot uniformly be regarded as mere add-ons to bills that would have passed in any event.<sup>89</sup> It is extremely difficult to pass substantive legislation. Not only must the same text be approved by both houses of Congress and the President, which means multiple majorities or even supermajorities, but there are numerous stops along the way—committees with jurisdiction over the subject matter, the House Rules Committee, et cetera—where a bill can stall in countless ways. Each of these procedural hurdles, or vetogates, is controlled by one or more gatekeepers with the power to kill a bill.<sup>90</sup> All of these people ordinarily must support (or at least not actively oppose) the bill. Some bills can succeed only by adding “wasteful” projects targeted toward interests or localities dear to needed legislators. In other words, pork can grease the hinges of vetogates.

Given the deal-making power of pork, a tool that lets the President slice out pork could easily have the effect of thwarting the agreements that led to passage of a particular bill in the first place. Why would a pivotal legislator be persuaded to support a bill he otherwise does not like, if he knows that the sponsor’s enticing promises

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88 For attempts to discern how a true line item veto would impact legislative bargaining, see, for example, Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403, 412–19 (1988), Robert J. Spitzer, *The Item Veto Reconsidered*, 15 PRESIDENTIAL STUD. Q. 611 (1985), and Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 412–22 (1992). For a discussion of the broader topic of how legislators use particularized benefits to form the coalitions needed to pass general interest legislation, see DIANA EVANS, *GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS IN CONGRESS* (2004).

89 To be sure, a few bills are “must pass” legislation. These are especially prone to attracting wasteful riders. But the pork phenomenon is in no way limited to that type of bill.

90 For expositions of the vetogate/proceduralist approach to the legislative process, see generally, for example, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 68–81 (2000), and McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994).

of a new federal building in his district are subject to abrogation through a later rescission? Quite possibly he would not. The risk of subsequent rescission means that legislators would want, to the extent feasible, assurances that their projects are safe before agreeing to support a bill. Those assurances could come from at least two places: from the President (who can pledge not to propose rescission in the first place) and from fellow legislators (who are in a position to control use of the procedures if rescission is proposed). We should therefore examine how these actors would go about making their decisions.

Looking first at the political dynamics surrounding the President's decision making, we see that members of his own party have the advantage for multiple reasons. For one, because their policy preferences are generally closer to his than are the policy preferences of the other party, members of the President's party will have an easier time pledging to support his favored bills as the price of protecting their projects.<sup>91</sup> Further, when the number of legislators seeking to hitch themselves and their projects to the President's bill comfortably exceeds the number needed to win passage, he can choose whom to protect. There are a variety of considerations that could influence the President's decision, some of which are independent of party membership. Indeed, Presidents need the support of members of the opposing party for various reasons, most obviously when the opposing party is the majority party in one or both houses of Congress.<sup>92</sup> And a President might be motivated to benefit an anticipated swing state in an upcoming presidential election regardless of the party of its representatives. Nonetheless, in general, a President will be more inclined to rescind items that belong to members of the opposing party. (One reason is that pork can help members curry favor with constituents and contributors and thus aids their reelection.)<sup>93</sup>

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91 It is worth noting in this regard, if only for comic relief, that House Bill 4890 § 4 contains a "sense of Congress" statement that the President should not use his rescission authority abusively as a bargaining chip. That statement was inserted as a substitute for a somewhat more serious-sounding amendment that would have purported to prohibit the President from using rescission threats in negotiations. See H.R. REP. NO. 109-505, pt. 1, at 20 (2006).

92 See, e.g., John M. Broder, *Clinton Gently Vetoes \$144 Million in Military Budget Items*, N.Y. TIMES, Oct. 15, 1997, at A12 (noting that President Clinton did not cancel large appropriations benefiting Senate Majority Leader Trent Lott and House Speaker Newt Gingrich).

93 While this proposition may seem intuitively obvious, proving the case is actually a bit more difficult than one might expect. Incumbents in extremely safe districts may have little need to distribute pork, and it may be that most voters in a district are uninformed

Therefore, we could expect that the type of congressperson most likely to be targeted by the President, other things being equal, is (1) a member of the opposing party (2) when the opposing party is in the minority in both houses.<sup>94</sup>

Let us next consider the dynamics on the legislative side. In those cases in which the President proposes rescissions, what is Congress likely to do? Broadly speaking, there are three options: (1) follow the fast track procedures and enact the rescission proposal, (2) follow the fast track procedures and reject the rescission proposal, and (3) not follow the procedures and thus avoid an up-or-down vote, silently letting the targeted spending items remain law.

In considering which option Congress will choose, it should not be controversial to start with the proposition that there will be a relationship between members' preferences on the merits of a particular rescission proposal and their willingness to follow the fast track procedures. If the legislature *supports* the rescission proposal on the merits, then that increases the chances that it will follow the fast track procedures in order to ease passage (such as by preventing a Senate filibuster or circumventing a troublesome committee chairman). In such a case, the procedures and self-interest reinforce each other.

If, in contrast, a house were inclined to oppose the President's rescission on the merits, it faces a choice between options (2) and (3). Let us explore these two options a bit more.

Under what circumstances would legislators choose option (2)—that is, follow the procedures only to vote *against* rescission? The official theory of expedited rescission suggests that this should be rare: the crawfish research station can pass when hidden away in a massive highway bill, but not when the pork (or crawfish, as the case may be)

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and unaffected anyway. Still, district-based benefits could matter to some attentive voters, and organized interests outside the district certainly might make campaign contributions based on particularized benefits directed their way—and this matters at least for some legislators. See Robert M. Stein & Kenneth N. Bickers, *Congressional Elections and the Pork Barrel*, 56 J. POL. 377, 382–84 (1994). Further, legislators may believe that distributing pork helps even if that belief in fact overstates the reality. See MAYHEW, *supra* note 44, at 57.

94 One might wonder how a member of the minority would get pet projects into a bill to begin with. There are a number of answers, which include the following: (1) the ordinary (non-fast track) legislative process is supermajoritarian, especially in the Senate, so that support from the minority is useful or even required, even in partisan votes, (2) not all legislation will attract the support of enough of the majority party to succeed, so some members of the minority are needed for passage, and (3) there may exist norms or incentives that encourage all members to support other members' projects with little regard to party. For citations supporting (3), see MAYHEW, *supra* note 44, at 88–91, 97.

is put in the spotlight.<sup>95</sup> If that theory is right, then the President's rescission proposals would be hard to turn down, either because the legislators genuinely wish, on policy grounds, that the bill they passed was not larded with pork, or because, politically, they need to appear budget conscious in the spotlighted re-vote (whether for individualized reasons, or in order to preserve their party's reputation as responsible).<sup>96</sup> But there is reason to doubt the hypothesis that legislators would always be so eager to embrace rescissions. It is certainly not obvious that electoral incentives would lead legislators to vote for restraint. The loss of geographically concentrated benefits deprives legislators of valuable credit-claiming opportunities with their constituents; after all, the voters (or, at least, many of them) might appreciate public works projects in *their* district. In that case, legislators might indeed hold an up-or-down re-vote, but only to vote for their projects once more and showcase their position in favor of their constituents' goodies.<sup>97</sup> It is plausible, then, that there is some nonnegligible subset of cases in which the procedures are followed, even though the rescissions are rejected on the merits.

There will also be a subset, however, in which legislators likewise disfavor the rescission on the merits but decide to defeat the rescission through option (3)—that is, by ignoring the fast track rules. This scenario is especially likely in the case of projects or loopholes meant to enrich special interests that provide campaign donations. Because of these groups' financial support, legislators have a reason to support the groups' items, even when the voters of the district are somewhat opposed (or would become opposed when a future electoral challenger highlighted the vote). Ordinary voters are relatively less able to understand the mysterious procedural machinations that

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<sup>95</sup> See *supra* Part II.B.

<sup>96</sup> Members of a party have an interest in the party having a good reputation. But the reputation is a collective good that each member will have an incentive to underproduce in favor of advancing individual aims. Safeguarding the party reputation by limiting the behavior of legislators is one good produced by party leaders. See GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 123, 190 (1993) (comparing individual reputations to private goods and party reputations to public goods); see also Gregory L. Hager & Jeffery C. Talbert, *Look for the Party Label: Party Influences on Voting in the U.S. House*, 25 *LEGIS. STUD. Q.* 75, 76–77 (2000) (comparing party reputation to a “brand name”).

<sup>97</sup> See Edmund L. Andrews & Robert Pear, *With New Rules, Congress Boasts of Pet Projects*, *N.Y. TIMES*, Aug. 5, 2007, at A1 (“Far from causing embarrassment, the new transparency [mandated by earmark reform] has raised the value of earmarks . . . [L]awmakers have often competed to have their names attached to individual earmarks and rushed to put out press releases claiming credit for the money they bring home.”). On the electoral value of credit claiming and position taking, see MAYHEW, *supra* note 44, at 52–73.

can kill a bill through inaction as compared to the relative ease of understanding an explicit vote in favor of pork.<sup>98</sup> Thus, the most attractive alternative in this kind of case would be to kill the bill silently by ignoring the fast track voting requirement: the contributors get what they want, but legislators do not have to take a public stand in support of the projects. In other words, legislators would evade the forced public scrutiny upon which the theory of expedited rescission relies.

In sum, there are certainly scenarios under which the President's rescissions will fail, either through an actual vote or through inaction. The odds of failure would seem larger when the President's rescission bill includes many items dear to lots of legislators. But it is at this point that we need to pay attention to how the President is permitted to package his rescission proposals. Under the version of expedited rescission that passed the House in 2006, he could submit five or, in the case of the larger bills, ten separate rescission proposals for each bill Congress passes.<sup>99</sup> He might therefore improve his odds of success by putting together bills with shorter lists of wasteful items.<sup>100</sup> The crawfish research station and the bridge to nowhere could be made to stand (or fall) mostly on their own.

But, still, which would it be, stand or fall? Even disaggregation does not guarantee an attractive rescission bill that Congress would want to enact. Just as a single bill containing all of the proposed rescissions could face stiff opposition, legislators might be able to credibly agree among themselves to support each other's special projects when they are separately targeted. And even if legislators did not band together in that way, individual members could seek protection from key leadership figures who are in a position to derail the expedited procedures. Although there is no sure way to predict

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98 The assumption that organized special interests have a relative advantage over the public at large when it comes to understanding and reacting to less salient, behind-the-scenes procedural matters should not be controversial. See MAYHEW, *supra* note 44, at 115–16 (discussing interest group monitoring and mobilization); Tim Westmoreland, *Standard Errors: How Budget Rules Distort Lawmaking*, 95 GEO. L.J. 1555, 1600 (2007) (discussing the effect of complicated budget process rules on accountability). See generally R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 64–68 (1990) (discussing how Congress distinguishes between “attentive” and “inattentive” publics).

99 H.R. 4890, 109th Cong. § 2 (2006) (proposed amendment to § 1011(b)(1)(D) of the Congressional Budget and Impoundment Control Act of 1974).

100 In the short experience with the line item veto under the Clinton Administration, the record shows that, after a large rescission featuring many items was overturned by Congress, the President switched to using more modest proposals featuring fewer items. See Garrett, *supra* note 32, at 919–20; Broder, *supra* note 92, at A12.

whether, how often, and how durably such deals might emerge, basic common sense does tell us that there are certain factors that likely help, and others that likely hinder, their formation. One obvious hypothesis is that, while there is some universalistic regard for protecting all incumbents, members of the same party are generally more likely to protect each other's projects than they are to go out on a limb for members of the other party.<sup>101</sup> Therefore, rescission bills that target members of the minority party are, other things being equal, more attractive to the chamber than are bills targeting the majority party. Since a rescission proposal is not enacted unless both houses pass it, rescissions should be more likely to be enacted when the same party is in the minority in both houses.

Combining together our predictions about presidential and congressional behavior, we see that the most reliably attractive kind of rescission bill—and thus the kind that we can be most confident will trigger compliance with the fast track rules—is one that targets a congressional minority not of the President's party. Under the 2006 configuration in Washington, when expedited rescission passed the House and a Senate committee, that meant bills targeting Democrats. Viewed in that light, it is little wonder that the Republican majority in Congress was so supportive of a measure that at first glance appeared to erode its legislative prerogatives.<sup>102</sup> And is it any wonder that the 2006 bills contained a sunset provision under which the line item veto authority would expire several years down the road, to limit the

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101 Recent rules requiring disclosure of earmarks have provided useful data on the partisan dimension of distributive politics. The data show that members of the majority party receive substantially more earmarks than members of the minority party. Erik Engstrom & Georg Vanberg, *The Politics of Congressional Earmarking* (Dec. 24, 2007) (unpublished manuscript), available at <http://ssrn.com/abstract=1081654>.

102 The measure was supported 212-15 by Republicans and opposed 35-156 by Democrats. See Final Vote Results for Roll Call 317, <http://clerk.house.gov/evs/2006/roll317.xml> (last visited Jan. 16, 2008). Vote tallies can of course be misleading indicators of legislator preferences for numerous reasons. Pressure from party leaders can produce greater partisan polarization; at the same time, if passage or failure is already ordained, a legislator can vote solely for position-taking purposes.

It is worth noting that the Congress that passed the 1996 Act was controlled by Republicans, and the strongest opposition came from Democrats, even though Democrat Bill Clinton was President. This does not, necessarily, mean that Republicans were acting against their partisan interests in passing the law. Enacting a line item veto had been a campaign pledge, part of the Republicans' 1994 "Contract with America." Republican presidential candidate and Senate Majority Leader Bob Dole made passing the law a key campaign issue. The law also included a delayed effective date, meaning that it would not become effective until after the presidential election, holding out the possibility that Dole would be the first President to wield the power. See Garrett, *supra* note 23, at 58, 77-79, 81-83.

damage should Republicans in a few years have found themselves in the minority under a Democratic President?<sup>103</sup>

### C. *Implications of the Analysis*

Having explored how expedited rescission might actually function, we can now decide what our analysis tells us about the likely purposes of the expedited rescission proposal. And we are also now in a position to discern how this proposal would differ in effect from a more conventional line item veto.

#### 1. *The Purpose of Expedited Rescission*

If one credits the “official” explanation for expedited rescission, its purpose would be cutting pork by entrenching anti-pork procedures and/or by shifting budget-cutting power to the President. The analysis above suggests that expedited rescission might do relatively little to reduce special interest projects. So the official line regarding the purpose of the new line item veto is at best incomplete. Yet that does not mean that we must embrace the alternative hypothesis that the statute is just symbolic and without actual effect. Rather, the analysis points toward the mechanism’s ability to benefit the President and the legislative majority (especially the leaders who can control use of the procedures). The effect is most powerful when there is unified government.

To be sure, one should not overstate the case and portray the dynamics surrounding expedited rescission exclusively in terms of partisan opportunism. I would not contend, for example, that the desire to harm the minority is the only reason that legislators would favor the proposal; certainly that desire is not itself sufficient to explain observed events. Otherwise we would see line item vetoes enacted whenever there is unified government, which we have not. Whatever their place in the institutional configuration—ruling party, minority party, participant in divided government—Republicans tend to favor the line item veto in its various forms more than do Democrats. This might be because Republicans’ official party ideology and platform favors lower spending (whether recent conduct matches that position is left as an exercise for the reader) or because, having spent so much

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<sup>103</sup> House Bill 4890 specified expiration in 2012. H.R. 4890, 109th Cong. § 2 (2006). Senate Bill 3521 specified expiration in 2010. S. 3521, 109th Cong. (2006). On reasons for and dynamics of sunset provisions, see generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 261–86 (2007).

of the post-1930 era in the congressional minority, they are less institutionalist and less protective of legislative power. Media attention given to scandalous earmarks also helps to explain the recent burst of interest. In sum, multiple factors are at play.<sup>104</sup> The partisan angle is worth emphasizing, however, because it contrasts with the “good government” and budget-cutting rationales offered in support of the proposal.

We can situate our findings within a larger ongoing debate about the causes of congressional procedural change. Different observers have put forward various theories for explaining the occurrence procedural changes that enhance or diminish minority rights, ranging from workload pressures to legislators’ socialization regarding the importance of minority rights.<sup>105</sup> One popular theory, advocated by Sarah Binder and Douglas Dion (among others), is that procedural change is driven by calculations of partisan advantage; rules, just like ordinary legislation, are made to advance and facilitate substantive goals.<sup>106</sup> Although it is difficult to draw any conclusions from a single

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104 Cf. ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 12–26* (2001) (explaining legislative organization and institutional change as reflecting the influence of multiple intersecting interests).

105 See DOUGLAS DION, *TURNING THE LEGISLATIVE THUMBSCREW: MINORITY RIGHTS AND PROCEDURAL CHANGE IN LEGISLATIVE POLITICS 14–18* (1997) (summarizing various theories of congressional procedural change).

106 See generally SARAH A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* (1997); DION, *supra* note 105. Although both writers focus on partisanship, they have somewhat different views of when restrictions on minority rights are most likely. To simplify, Dion’s position is that small majorities, which are more cohesive and face more powerful minorities, are more tempted to restrict minority rights. See *id.* at 17, 36–37. But Binder emphasizes the importance of the majority’s ability to restrict minority rights, which may increase as the majority becomes somewhat larger. See BINDER, *supra*, at 11–12. The Senate’s failure to pass the expedited rescission bill in 2006 might support Binder’s position, if the reason was that the Democratic minority in the Senate was strong enough to defeat the bill. See Keith Koffler, *White House Vows To Keep Pushing for Line-Item Veto Bill*, CONGRESS DAILY, July 21, 2006, <http://nationaljournal.com/cgi-bin/iffetch4?ENG+CONGRESS+7-cdindex+REVERSE+0+0+51830+F+5+23+1+koffler+line+item> (noting that most Democrats were opposed and that the sixty votes needed to close debate might not have been available). But it is also possible that the real reason the bill failed was that Republicans could not agree among themselves on how to proceed. See *id.* (noting the different approaches taken by the White House and some Senate Republicans and citing opposition from Republicans on the Appropriations and Finance Committees). The bill reported to the Senate floor and championed by Budget Committee Chairman Judd Gregg (R-N.H.) combined expedited rescission with a host of other budget-cutting proposals not included in the White House proposal or the House bill. See Judd Gregg, *Stop Federal Overspending: Plan Controls Spigot and Offers Line-Item Authority*, WASH. TIMES, June 21, 2006, at A21, available at <http://budget.senate.gov/republican/pressarchive/2006/2006-06-21WashTimesop-ed.pdf>. It could even be the case that some ostensible supporters of the bill worked from the inside to undermine it.

data point, especially when a proposal was not adopted, the analysis of expedited rescission tends to support, or is at least consistent with, the partisan theory in that it seems calculated to confer various advantages on the majority party in unified government. Further, both Binder and Dion find little support for a variant of partisan theory that emphasizes reciprocity, the idea that majorities will refrain from repressing minorities when the odds of an impending reversal of minority and majority positions are higher.<sup>107</sup> The reciprocity account fares poorly here, too: the 2006 proposal's failure likely cannot be traced to Republicans' fears that the legislation would come back to haunt them if they suffered electoral reversals, for the sunset provision would limit any such damage.

## 2. *How Would Expedited Rescission Differ from a Line Item Veto?*

Armed with our tentative conclusions about how expedited rescission would work, what can we say about how it would differ from a more conventional line item veto? One major difference, of course, is that expedited rescission is constitutional under *Clinton v. City of New York*,<sup>108</sup> but we are here more concerned with differences in how the two mechanisms would function in practice.

In some ways, commonalities predominate. Neither device seems very likely to make much of a difference to the budget: pork is not the main driver of budget problems and, even as regards pork, the main effect may be to shift it around.<sup>109</sup> Although the line item veto appears to give even more power to the President than does expedited rescission, that effect should not be overstated. Under both devices, Congress has the ability to exempt any particular item from being cut before the spending bill even reaches the President; it need only insert a clause to the effect that no items in the bill (or, only selected items) are subject to presidential targeting.<sup>110</sup>

<sup>107</sup> See BINDER, *supra* note 106, at 9–10, 203–05; DION, *supra* note 105, at 17, 248–50.

<sup>108</sup> 524 U.S. 417 (1998); see *supra* Part II.C.

<sup>109</sup> See, e.g., Spitzer, *supra* note 88, at 614–15 (“There is no reason to believe that an item veto would stem the pork tide; rather, it would simply bias the legislative process more heavily in favor of the president’s pork, and that of his congressional colleagues.”); Stearns, *supra* note 88, at 417 (arguing that the line item veto might not decrease pork barrel legislation); LOUIS FISHER, CONG. RESEARCH SERV., ITEM VETO: BUDGETARY SAVINGS 3 (2005), [http://www.opencrs.com/rpts/RS22155\\_20050526.pdf](http://www.opencrs.com/rpts/RS22155_20050526.pdf) (“Aside from modest savings, the impact of an item veto may well be felt in preferring the President’s spending priorities over those enacted by Congress.”).

<sup>110</sup> See *Clinton*, 524 U.S. at 482 (Breyer, J., dissenting) (making this point with regard to the 1996 Act). Indeed, the 1996 Act contained a provision stating that no limited tax break

The plainest difference is that expedited rescission makes the legislature the final decision maker after the President acts, because the legislature must endorse the President's cuts. (With a line item veto like the 1996 Act, in contrast, the President will more frequently have the final word because reenacting the cancelled provisions would typically require a two-thirds veto override.) In circumstances of divided government, this could give the congressional majority some added comfort that the projects it puts in bills would survive (when they were not exempted *ex ante*). Thus, other things being equal, expedited rescission is a less powerful presidential tool than a line item veto in such circumstances.

A more interesting difference emerges when there is unified government. When there is unified government, the discussion above indicates that the most likely targets for rescissions will be items that belong to members of the minority party. That is probably also true of a line item veto. So what difference does it make whether the President unilaterally cuts those items (as with a line item veto), or the legislature accepts his invitation to cut them (as with expedited rescission)? Perhaps the main difference is in relative opportunities for legislative position taking. When the President proposes a rescission, it gives legislators an opportunity to take a high profile, campaign-flyer-ready, public stand against waste by axing the useless bridge or some other notorious boondoggle from the latest appropriations bill. That the projects the President happens to target likely belong mostly to the minority makes it painless to boot. There is very little risk of negative publicity because, if the President should happen to target a project the majority wants to preserve, Congress can simply fail to vote, secure in the knowledge that the public will not grasp the finer points of parliamentary procedure. In short, expedited rescission offers greater opportunity to manipulate voting opportunities for purposes of political showmanship. This is ironic, given that expedited rescission is advertised as replacing legislative subterfuge and manipulation with straightforward public accountability.

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could be eliminated by the President, unless the Joint Committee on Taxation specified in the bill at issue that certain tax breaks were susceptible to being cut. *See supra* note 53. Some versions of the recent expedited rescission proposals contained somewhat similar provisions. *See* H.R. 4890, 109th Cong. § 2 (2006) (proposed amendment to 2 U.S.C. § 1014 (2000)).

## V. CONCLUSION

The current “line item veto” proposal is on its surface paradoxical. If its supporters are to be believed, the problem with Congress is that its usual processes cannot be trusted to yield responsible budgetary decision making. Thus, it is necessary to alter the structure of the budgeting process to *require* legislators to consider the President’s rescission proposals under special rules favorable to the President and conducive to responsibility. Yet despite all of the mandatory language in the bills themselves and in the committee reports, the fact is that the statute itself gives Congress the keys to unlock its self-imposed handcuffs through an explicit escape clause. And apart from the statutory out, Congress’s past practice and sound constitutional principles both indicate that Congress cannot bind itself by statute to follow rules it would later like to change. So whom is Congress trying to fool here? The statute seems like an exercise in either blind self-deception or clear-eyed public deception.

Some of the puzzles of expedited rescission can be solved when one looks at prior experience under statutized rules. Congress has passed many such statutes in the past, and for good reason. The reason is that they can work in practice despite their legal impotency. My tentative assessment of the current proposal’s practical effect is that it would tend to work under the right institutional conditions, if for reasons of partisanship as much as any principled belief that the statutized rules legitimately demand adherence. Whether or not enacting an expedited rescission bill actually did any good on the budget front—and there is reason to think it would not have a large salutary effect—it would at least provide excellent opportunities for exploring the practical impact of the increasingly common strategy of managing congressional procedures through statutes rather than through rules.

## VI. APPENDIX ON JUSTICIABILITY

In the main body of this Article, I contended that a court would be unlikely to require Congress to comply with a statutized rule.<sup>111</sup> I left that contention mostly unexplained, on the theory that most readers would readily agree. In the following pages, I will explain that conclusion in greater detail for those interested in this aspect of the interaction between the legislature and the judiciary.

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111 See *supra* text accompanying note 63.

To set up the justiciability analysis, let us first try to imagine the substantive basis of a suit seeking to require legislative compliance with expedited rescission procedures. One apparent problem with any suit challenging Congress's decision not to follow the statutized rules is the disclaimer clause that Congress would almost certainly include. That language, as noted earlier, says that either house may change the statutized rules at any time and in the same way as any other rule of that house (i.e., unilaterally).<sup>112</sup> Further, even if the expedited rescission statute lacked that kind of disclaimer language, the same power of each house to change the rules would follow, as I have argued, as a matter of substantive constitutional law. There are, however, nonfrivolous merits arguments to the contrary. If the statute lacked disclaimer language, a suit could charge that Congress was required to follow the statutory rules (which are, after all, written in mandatory language) unless it formally amends the statute. And whether or not there is a disclaimer clause in the statute, one could argue that unilaterally changing the statutized rule is unconstitutional under *INS v. Chadha*, which states that “[a]mendment and repeal of statutes, no less than enactment, must conform with” the requirements of bicameralism and presentment.<sup>113</sup>

With that view of the substance of the challenge in mind, let us now consider whether a court could reach the merits.

#### A. *Standing*

To establish standing, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>114</sup> That is a constitutionally required minimum for there to be a cognizable “case or controversy” under Article III; statutes can remove other, merely prudential barriers to standing, but they cannot abrogate the Article III requirements.<sup>115</sup>

A case challenging Congress’s failure to follow rescission procedures stands on a much different footing from the case in which

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<sup>112</sup> See *supra* text accompanying notes 67–69.

<sup>113</sup> 462 U.S. 919, 954 (1983). The short responses on the merits to the *Chadha* argument are (1) that a statutized rule could not, as a matter of constitutional law, purport to be binding in the first place, and/or (2) that regulating procedure (even in the form of a statute) is not “legislative” activity subject to *Chadha*’s requirements. See Bruhl, *supra* note 10, at 391–93, 413, 415 (discussing the impact of *Chadha*).

<sup>114</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984).

<sup>115</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61, 571–78 (1992).

Congress does follow the procedures and approves a rescission. In the latter situation, the beneficiaries of the now-cancelled program suffer a fairly straightforward harm and would have Article III standing to sue under the reasoning of *Clinton v. City of New York*.<sup>116</sup> Injured parties are harder to find in the case where Congress *fails* to act, but candidates would include (1) private citizens claiming injury, (2) aggrieved legislators, and (3) the President.<sup>117</sup> None of these look especially promising under conventional doctrines of standing.

### 1. *Suits by Private Parties*

Citizens and taxpayers upset about Congress's failure to follow the fast track rules, but with no individualized stake in the matter, would almost certainly lack standing. The Supreme Court generally bars citizens from suing to vindicate a generalized interest in having the government follow the law and strictly limits taxpayer standing to the narrowest situations, such as certain Establishment Clause violations.<sup>118</sup>

Less clearly futile would be a suit brought by a person who would have benefited had Congress voted to rescind an item targeted in the President's special message. For instance, the President might have proposed to eliminate a special tax subsidy that benefited the potential plaintiff's competitor. Injuries resulting from governmental decisions favoring competitors are often deemed sufficient to support

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116 524 U.S. 417, 429–36 (1998) (holding that parties affected by a cancelled program suffered a sufficiently direct injury to attain standing). Beyond the Article III requirements, there is of course the problem of prudential standing and whether there needs to be a statutory right to sue. In the 1996 Act, Congress expressly provided that “any individual” adversely affected by the Act could sue for declaratory and injunctive relief. Line Item Veto Act of 1996, Pub. L. No. 104-130, § 3, 110 Stat 1200, 1211 (1996); *Clinton*, 524 U.S. at 428.

117 Standing focuses on the plaintiff, but one might also question whether there are justiciability problems on the defendant side of the equation. After all, the Constitution's Speech or Debate Clause, U.S. CONST. art. I, § 6, generally bars suits against legislators based on their legislative conduct. However, the immunity can evidently be defeated by naming the entire legislative body or its non-legislator officials as defendants. See *Powell v. McCormack*, 395 U.S. 486, 501–06 (1969); see also Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 238 (1997) (“At most the Speech and Debate Clause prevents suits against individual members of Congress; no suit ever has extended it to prevent suits against the government or the Senate as a whole.”). The matter of the remedy that could be awarded in such a suit is discussed *infra* in text accompanying notes 153–56.

118 See, e.g., *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553, 2568–70 (2007); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 476–87 (1982); *United States v. Richardson*, 418 U.S. 166, 174–75 (1974).

standing, especially where there is a statute broadly authorizing challenges by any aggrieved person.<sup>119</sup> The Line Item Veto Act of 1996 contained a provision permitting any affected person to sue, but the expedited rescission proposals do not.<sup>120</sup> Moreover, even if Congress included a judicial review provision and eliminated all nonconstitutional barriers to suit, a competitor would still have great trouble satisfying the constitutional requirements of causation and redressability. Among other things, even if a plaintiff could secure an order requiring Congress to vote on the rescission bill, that would not mean Congress would enact the rescission and thus cancel the competitor's tax subsidy.<sup>121</sup> In fact, Congress's failure to hold a vote tends to suggest the opposite: that the rescission bill lacked the support necessary to pass.<sup>122</sup>

If so inclined, one could imagine more exotic ways to manufacture standing in disputes over congressional procedure. Recognizing the difficulties associated with an institution trying to impose rules on itself in the absence of any external enforcement,<sup>123</sup> Congress could attempt to create standing for an individual by creating a monetary award for policing parliamentary violations. This would be somewhat

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119 For instance, in *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), the Supreme Court held that data processing companies had standing under the Administrative Procedure Act's judicial review provision to challenge agency action permitting banks to enter the data processing market. *See id.* at 158. For background on the development of competitor standing, see generally Monica Reimer, Comment, *Competitive Injury as a Basis for Standing in Endangered Species Act Cases*, 9 TUL. ENVTL. L.J. 109, 114–27 (1995), and Note, *Competitors' Standing To Challenge Administrative Action Under the APA*, 104 U. PA. L. REV. 843 (1956).

120 *See supra* note 63. Note that the Administrative Procedure Act will not suffice to provide for review here because Congress is not an "agency" whose actions are subject to judicial review under the statute. *See* 5 U.S.C. § 701(b)(1) (2000).

121 For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), the Court denied standing to indigent plaintiffs challenging an IRS ruling that allowed tax-exempt hospitals to reduce the amount of care they provided indigents. The Court reasoned that it was speculative whether a reversal of the IRS policy would cause plaintiffs to receive care they desired, since a number of factors affected the hospitals' decisions. *Id.* at 43–46.

122 To be sure, as a general matter the failure to hold a vote does not necessarily provide strong evidence that a measure would not enjoy majority support if a vote were held. Because the legislative process contains so many vetogates, bills with majority support can fail to come to a vote for many reasons. But the implication is much stronger under fast track rules, since they eliminate many procedural roadblocks and produce a more majoritarian process.

123 *See, e.g.*, Frederick Schauer, *Legislatures as Rule-Followers*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE*, *supra* note 74, at 475–76 (“[R]eposing the power to modify or avoid rules in the same body allegedly constrained by them is likely to produce far more frequent modification or avoidance than genuine constraint . . .”).

along the lines of the bounty awarded to private plaintiffs for prosecuting frauds on the government under the *qui tam* provisions of the False Claims Act.<sup>124</sup> Would this work? In passing upon whether a *qui tam* relator has standing, the Supreme Court said the following:

An interest unrelated to injury in fact is insufficient to give a plaintiff standing. The interest must consist of obtaining compensation for, or preventing, the violation of a legally protected right. A *qui tam* relator has suffered no such invasion—indeed, the “right” he seeks to vindicate does not even fully materialize until the litigation is completed and the relator prevails. This is not to suggest that Congress cannot define new legal rights, which in turn will confer standing to vindicate an injury caused to the claimant. As we have held in another context, however, an interest that is merely a “byproduct” of the suit itself cannot give rise to a cognizable injury in fact for Article III standing purposes.<sup>125</sup>

The Court nonetheless decided that a *qui tam* relator had standing based on the theory that the United States had assigned part of its own right to recover (assignees have standing under long-established doctrine) and due to the long history of *qui tam* suits, which were known at the Founding.<sup>126</sup> Neither the assignment theory nor the long history is available in the case of the *qui tam* citizen-parliamentarian, and so the legal case for standing is doubtful. And, on a more practical note, it is unlikely that Congress would seek out opportunities to let persons enforce its rules against it.

Let us turn next to the less exotic, though not necessarily more promising, alternative of suits by legislators.

## 2. *Legislator Standing*

The initial challenge to the Line Item Veto Act of 1996 was brought by members of Congress who argued that the 1996 Act diminished the power of their votes and unconstitutionally shifted authority from Congress to the President. In *Raines v. Byrd*, the Supreme Court dismissed the case on the ground that the legislator plaintiffs lacked standing.<sup>127</sup> Apart from its specific holding, *Raines* is highly relevant because it reshaped the law of legislator standing by giving an extremely narrow reading to the prior leading case uphold-

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124 31 U.S.C. § 3730(b)–(d) (2000). I credit Seth Barrett Tillman for suggesting a version of this idea to me; I do not claim that my brief discussion of his idea explores all the nuances.

125 *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772–73 (2000) (footnote omitted).

126 *Id.* at 773–74.

127 521 U.S. 811, 816, 821 (1997).

ing legislator standing, *Coleman v. Miller*.<sup>128</sup> In *Coleman*, state legislators brought suit claiming that state officials had unlawfully deemed the state legislature to have ratified a proposed constitutional amendment by counting the deciding vote of the state lieutenant governor, whom the legislators contended was not entitled to vote.<sup>129</sup> *Coleman* was sometimes read rather expansively as a statement that legislators have standing to vindicate institutional interests regarding the power of their votes. According to the *Raines* Court, however, *Coleman* “stands (at most) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.”<sup>130</sup>

If a legislator sues on the theory that the House or Senate violates the law by not holding a vote on a rescission request, she cannot really claim that her *vote* was “completely nullified.” Rather, the problem is that she did not get the chance to vote at all; the *opportunity to vote* has been nullified, perhaps. Given the Supreme Court’s evident distaste for the *Coleman* holding, that would be an uphill battle at best.

The law on legislator standing is more fully developed in the D.C. Circuit, and there, too, the best bet is that a legislator today would be deemed to lack standing in the suit we are contemplating. To be sure, the D.C. Circuit’s rather expansive pre-*Raines* decisions may well have upheld standing in this case on the theory that the denial of a “voting opportunity” suffices to establish a legislator’s standing.<sup>131</sup>

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128 307 U.S. 433 (1939).

129 *Id.* at 436–37.

130 *Raines*, 521 U.S. at 823 (citation omitted). Legislators can still have standing in cases in which they suffer some particularized personal injury, such as denial of their salary. See *id.* at 820–21 (discussing the holding of *Powell v. McCormack*, 395 U.S. 486 (1969)). But here we are concerned with institutional injuries.

131 See *Goldwater v. Carter*, 617 F.2d 697, 702 (D.C. Cir. 1979) (en banc) (“To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or *withdrawal of a voting opportunity*; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown.” (emphasis added)), *vacated on other grounds*, 444 U.S. 996 (1979); see also *Kennedy v. Sampson*, 511 F.2d 430, 436 (D.C. Cir. 1974) (“[T]he office of United States Senator does confer a participation in the power of Congress which is exercised by a Senator when he votes . . . . No more essential interest could be asserted by a legislator. We are satisfied, therefore, that the purposes of the standing doctrine are fully served . . . .”); cf. Fisk & Chemerinsky, *supra* note 117, at 234–36 (arguing, in a pre-*Raines* article, that a senator would have standing to challenge a filibuster because it denies him the opportunity to vote); Lee Renzin, Note, *Advice, Con-*

Thus, the D.C. Circuit held nearly three decades ago that legislators had standing to challenge the President's unilateral termination of a treaty on the ground that they were denied their (alleged) constitutional right to vote on whether the treaty should be terminated.<sup>132</sup> Yet since *Raines*, the D.C. Circuit has tightened its law of standing. Though none of the more recent decisions are directly on point, it has ruled that executive actions that deprive legislators of an alleged constitutional right to vote on an issue generally do not suffice to confer standing.<sup>133</sup>

In any event, what the D.C. Circuit gaveth under its formerly loose doctrine of legislator standing, it often tooketh away through a doctrine of equitable discretion. The doctrine, rooted explicitly in the separation of powers, generally denies jurisdiction when a legislator's dispute does not involve an overreaching executive, but instead represents a quarrel "primarily with his fellow legislators."<sup>134</sup> That doctrine counsels dismissal of, inter alia, "challenges concerning congressional action or inaction regarding legislation."<sup>135</sup> Such a challenge is what is involved here, and so equitable discretion would probably doom a legislator's suit even if lack of standing did not.

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*sent, and Senate Inaction—Is Judicial Resolution Possible?*, 73 N.Y.U. L. REV. 1739, 1775 n.179 (1998) (reaching the same conclusion, even after *Raines*).

132 *Goldwater*, 617 F.2d at 701–03. The court went on to hold that the suit was nonetheless nonjusticiable because it presented a political question. *Cf. Williams v. Phillips*, 360 F. Supp. 1363, 1366 (D.D.C. 1973) (upholding senators' standing where the President had appointed an official allegedly in contravention of the need for a Senate vote consenting to the nomination).

133 *See, e.g., Chenoweth v. Clinton*, 181 F.3d 112, 113–17 (D.C. Cir. 1999). A district court case applied *Raines* and *Chenoweth* to deny standing in a case in which legislators alleged that the President's unilateral termination of a treaty deprived them of an opportunity to vote on the matter, the same theory that had supported legislator standing in *Goldwater*. *See Kucinich v. Bush*, 236 F. Supp. 2d 1, 3–11 (D.D.C. 2002).

While I focus in the text on the lack of constitutional standing—which would be sufficient to doom a legislator's suit—it is at least worth asking whether a legislator requires a statutory right to sue. The cases, unfortunately, largely neglect this question. *See Edward A. Hartnett, The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2261 n.101 (1999) (noting this same omission).

134 *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 881 (D.C. Cir. 1981); *cf. Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977) (dismissing for lack of standing and noting that any restraints on legislators' activities came from House rules, not the Executive Branch).

135 *Riegle*, 656 F.2d at 881.

### 3. Executive Standing

If the majority leader of one house failed to introduce the President's rescission approval bill or Congress otherwise failed to hold a vote on it, could the President (or another executive official) sue to require Congress to consider the President's bill? Needless to say, Congress would certainly be wary of providing the President with a right to sue it for failing to follow certain procedures. But it is not at all clear that the executive needs statutory authority to sue in order to uphold federal law.<sup>136</sup> As for the constitutional requisites for standing, the President would seem to have a pretty good argument. Although we know that the mere fact of a failure to follow the law does not create a cognizable injury for purposes of ordinary litigants, that kind of abstract injury arguably *is* sufficient for the executive.<sup>137</sup> And, even apart from that general executive interest, certainly one could make a common-sense case that the President suffers an honest-to-goodness particularized injury when Congress refuses to vote on his rescission proposals.<sup>138</sup>

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<sup>136</sup> Several authors have written on the vexing question of the executive's ability to sue in the absence of statutory authorization. See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 789-93 (5th ed. 2003); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 65 (1993); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 570 (2005); Larry W. Yackle, *A Worthy Champion for Fourteenth Amendment Rights: The United States in Parens Patriae*, 92 NW. U. L. REV. 111, 127-48 (1997); Note, *Nonstatutory Executive Authority to Bring Suit*, 85 HARV. L. REV. 1566 (1972).

<sup>137</sup> See U.S. CONST. art. II, § 3 (stating that the President "shall take Care that the Laws be faithfully executed"); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000) (stating that a violation of federal law constitutes an injury in fact to the government, aside from any additional proprietary injury). That the executive does not need a concrete and particularized injury in fact in order to sue is evident from criminal prosecutions (among other things). See generally Hartnett, *supra* note 133.

<sup>138</sup> One might think that there would be a causation or redressability problem here, inasmuch as there is no guarantee that Congress would enact the approval bill even if Congress properly considered it. Indeed the failure to hold a vote tends to suggest, if anything, that it would not pass. This was a problem for a private litigant seeking "competitor standing," see *supra* note 121 and accompanying text, but it might not be a problem for the President. Whereas the private party's purported injury in fact was the disadvantage stemming from the competitor's tax break or earmark, the President might be able to characterize his injury as Congress's failure to consider his proposal as required by law. Cf. *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (explaining that persons who hold a procedural right that an agency engage in certain activity face lower hurdles of redressability and immediacy); *Clinton v. City of New York*, 524 U.S. 417, 433-34 n.22 (1998) ("[D]enial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result."); *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (holding that a contractor has standing to challenge a discriminatory bidding process without proving that it

Nonetheless, a suit by the President against the legislature presents a unique situation in which ordinary concepts of injury and standing seem misplaced. Notably, in denying legislators standing in *Raines v. Byrd*, the Court's opinion included a passage describing past incidents in which Presidents might have attempted to sue Congress to challenge enactments that allegedly interfered with executive prerogatives.<sup>139</sup> In none of those cases was suit actually brought, so of course none generated any holdings regarding standing, but the *Raines* Court strongly implied that the reason for the absence of suits was that those past Presidents would have lacked standing—which the Court used to bolster its conclusion that the legislators before it likewise lacked standing.<sup>140</sup> That discussion of presidential standing, though not strictly a holding, would no doubt be used to throw cold water on a presidential suit that would embroil the courts in a dispute between the branches over whether Congress was required to hold a vote.

The Court's skeptical comments in *Raines*, while coming in the context of a ruling denying standing, were obviously inspired by more general concerns of separation of powers and justiciability. We thus turn next to the somewhat amorphous political question doctrine, which incorporates such considerations more directly.

### B. Political Question

Any properly socialized lawyer will immediately recognize that a suit challenging Congress's failure to follow fast track procedures reeks of the type of political question that the courts are wary of deciding. One can easily imagine a court citing the Rules of Proceedings Clause—the mostly underappreciated bit of the Constitution providing that “[e]ach House may determine the Rules of its Proceedings”<sup>141</sup>—and deeming it the requisite “textually demonstrable constitutional commitment of the issue to a coordinate political department . . . .”<sup>142</sup> And one could likewise envision the court citing as

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otherwise would have won the contract, because equal protection guarantees a right to compete on equal terms).

139 See *Raines v. Byrd*, 521 U.S. 811, 826–28 (1997).

140 See *id.* at 828 (observing that “[t]here would be nothing irrational about a system that granted standing . . . . But it is obviously not the regime that has obtained under our Constitution to date.”).

141 U.S. CONST. art. I, § 5, cl. 2.

142 The “textually demonstrable constitutional commitment” is, of course, one of the indicia of a political question famously listed in *Baker v. Carr*:

a leading authority *Nixon v. United States*, which involved an impeached judge's complaint that the Senate had failed to follow correct impeachment procedures because it tasked a committee with the job of inquiring into the judge's crimes, leaving to the full Senate only the role of reviewing and voting to accept the committee's recommendation.<sup>143</sup> The impeached judge argued that this was improper because the Constitution directs that "[t]he Senate shall have the sole Power to try all Impeachments,"<sup>144</sup> but the Supreme Court instead cited that very language as evidence that the case presented a political question textually committed to the Senate's judgment.<sup>145</sup>

Yet while the intuition that this is a political question is strong and in all likelihood predictively sound, it is harder than one might have thought to explain just why that result is correct. The reasoning in the preceding paragraph is far too quick, on several counts.

To begin, while the power to establish and apply parliamentary rules is textually committed to each chamber and is largely immune from judicial second-guessing,<sup>146</sup> that does not necessarily mean that the political question doctrine always bars courts from passing upon whether Congress has followed its parliamentary rules. As the Supreme Court said in *United States v. Smith*, "[when] the construction to be given to the [Senate] rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."<sup>147</sup> *Smith*

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Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. 186, 217 (1962).

143 506 U.S. 224, 228–38 (1993).

144 U.S. CONST. art. I, § 3, cl. 6 (emphases added).

145 See *Nixon*, 506 U.S. at 229–35.

146 See *United States v. Ballin*, 144 U.S. 1, 5 (1892).

147 286 U.S. 6, 33 (1932) (emphasis added); see also *Yellin v. United States*, 374 U.S. 109, 114 (1963) ("It has been long settled, of course, that rules of Congress and its committees are judicially cognizable."). For discussions of the justiciability of legislative rules, see generally JOSH CHAFETZ, *DEMOCRACY'S PRIVILEGED FEW: LEGISLATIVE PRIVILEGE AND DEMOCRATIC NORMS IN THE BRITISH AND AMERICAN CONSTITUTIONS* 49–67 (2007), John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 530–42 (2001), Michael B. Miller, Comment, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341 (1990), and Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987).

involved a situation in which the Senate purported to withdraw its consent to a presidential appointment, which withdrawal arguably violated the Senate's internal rules governing the appointments process. In that dispute, there were obvious outsiders in the person of the nominee/appointee Mr. Smith as well as the President (an outsider vis-à-vis the Senate, though not a mere private party).<sup>148</sup> In our hypothetical lawsuit, the President or another litigant could argue that the case is justiciable because a chamber's internal procedures negatively "affect" them as outsiders.<sup>149</sup>

As further support for an argument in favor of justiciability, we should keep in mind that it may be a mistake to consider this situation only in terms of the justiciability of disputes over parliamentary rules. Here we are confronted with a *statute* that governs the proceedings. Thus, to return to the *Nixon* case discussed above, the proper analogy would be a case where Congress had passed a statute regulating impeachment procedures and mandating trial by the full Senate. If the Senate then nonetheless permitted a committee to conduct the inquiry, leaving the full body only to vote on the committee's recommendation, would the nonjusticiability holding in *Nixon* still follow? The statute's requirements are certainly "judicially discoverable and manageable standards,"<sup>150</sup> and there seems to be a clear violation of them. Though there may be (again using *Baker's* terminology) a "textually demonstrable constitutional commitment" of impeachment to the Senate,<sup>151</sup> does the Senate's nonjusticiable discretion become the stuff of judicial judgment when it is cabined and crystallized into the form of a statute in the *United States Code*? Where is there any problematic "lack of respect"<sup>152</sup> shown to Congress when a court just requires Congress (like everyone else) to follow statutory law?

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148 See *Smith*, 286 U.S. at 7–9.

149 In *Smith*, the Senate's attempt to reconsider its consent to Smith's nomination would have required *action by outsiders* (such as the President's rescission of Smith's commission or Smith's resignation). See CHAFETZ, *supra* note 147, at 58 (reading *Smith* narrowly and relying on this feature). Here, in contrast, an outsider is trying to require *action by the houses* based on their rules. This difference may weaken the case for justiciability. As my aim here is not to establish justiciability, there is no need to pin down the precise scope of cases such as *Smith* and *Yellin*.

150 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

151 *Id.*

152 *Id.*

Maybe the best support for the intuition of nonjusticiability stems from the difficulty of fashioning a proper remedy.<sup>153</sup> If congressional leaders refuse to introduce the President's bill or schedule it for debate, how can the courts make them do so? Surely federal marshals will not commandeer the Speaker's chair and force members to vote. But once again the reality is somewhat more complicated. In *Powell v. McCormack*, which concerned a congressman's challenge to the House's refusal to seat him, the Supreme Court noted an argument that federal courts could not issue injunctions compelling House members to perform specific official acts.<sup>154</sup> But as the Court pointed out, the difficulties inherent in injunctive relief did not bar a declaratory judgment, which Powell had also sought and to which the Court deemed him entitled.<sup>155</sup> So, too, here one could argue that a court could issue a declaratory judgment stating that (assuming the challenge succeeded on the merits) Congress was required to hold a vote.<sup>156</sup> One would have to confront the risk that Congress would simply ignore such a judgment, regarding as audacious the judiciary's attempt to meddle with its parliamentary processes. If the legislature remained unmoved, the courts would likely be unwilling to go further. The risk of such disharmony might provide a basis for deeming the matter a political question.<sup>157</sup>

As in at least one other area of the law, it may be that the best that can be said of why the suit we are contemplating would be a political question is that one knows it when one sees it.<sup>158</sup> While the doctrinal

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153 See *Nixon v. United States*, 506 U.S. 224, 236 (1992) (citing "the difficulty of fashioning relief" as a factor supporting the conclusion of nonjusticiability).

154 395 U.S. 486, 517 (1969).

155 *Id.* at 517–18, 550.

156 In a notable state decision, the Supreme Judicial Court of Massachusetts recently held that it lacked authority to enter injunctive or declaratory relief requiring the state legislature to vote on a proposed constitutional amendment banning gay marriage. *Doyle v. Sec'y of the Commonwealth*, 858 N.E.2d 1090, 1095 (Mass. 2006). The court nonetheless strongly expressed its view that the legislators had a constitutional duty to vote on the measure before the end of the legislature's term. *Id.* at 1093. The legislature later voted on the proposal on the last day of its term, with some people on both sides citing the court's strongly worded exhortation as a decisive factor. See Frank Phillips & Lisa Wangness, *Same-Sex Marriage Ban Advances: Lawmakers OK Item for Ballot, But Hurdle Remains*, BOSTON GLOBE, Jan. 3, 2007, at A1.

157 If it were thought necessary to put this concern into the *Baker* language, it might be expressed as "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. But see ERWIN CHEMERINSKY, FEDERAL JURISDICTION 146 (4th ed. 2003) (observing that the *Baker* criteria "seem useless in identifying what constitutes a political question").

158 *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be [hard-core por-

analysis is less certain than one might expect, this situation has political question written all over it. In my view, Congress would be well advised to consider itself immune from judicial correction if it failed to follow the statutory fast track procedures.<sup>159</sup>

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nography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”).

<sup>159</sup> There has been at least one case in which a plaintiff sued over Congress's alleged failure to follow a framework law. The case involved the Alaskan Natural Gas Transportation Act (ANGTA). That statute provided that Congress could, upon the President's recommendation, pass a resolution waiving certain regulatory requirements governing pipeline construction, but it also dictated that neither house could consider such a waiver resolution within sixty days of considering any other resolution concerning the same waiver recommendation. See *Metzenbaum v. FERC*, 675 F.2d 1282, 1284-87 (D.C. Cir. 1982). The House of Representatives nonetheless considered two such waiver resolutions on successive days, and then several congressmen, state officials, and consumer advocates sued, contending, inter alia, that the waiver was enacted in violation of ANGTA's sixty-day rule. *Id.* The D.C. Circuit held this challenge nonjusticiable, but that ruling is limited in several important respects. First, as the D.C. Circuit opinion recognized, the case really involved an application of the rule that courts will not look behind the procedures by which a statute is enacted in order to try to "undo" a statute, so long as the statute complies with the constitutional requirements of bicameralism and presentment. See *id.* at 1287 ("[M]ost questions involving the processes by which statutes . . . are adopted [are] [p]olitical in nature . . ." (third brackets in original) (internal quotation marks omitted)); see also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892) (holding that the courts could not question whether the enrolled bill signed by the President was the same text on which each chamber had actually voted). A suit challenging the failure to hold a vote would not run afoul of that rule. Second, the D.C. Circuit's decision was also driven by the fact that ANGTA itself contained disclaimer language stating that "either House [may] change the rules (so far as those rules relate to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of such House." *Metzenbaum*, 675 F.2d at 1286-87. Before voting on the second resolution, the House first passed a special rule temporarily amending ANGTA's special procedures. *Id.* at 1286. Thus, while the court justified its holding in terms of its reluctance to judge compliance with the House's internal rules, the decision would make just as much sense as a holding that Congress had in fact *complied* with the statute by taking advantage of this loophole.