

**NLWJC - Kagan**

**DPC - Box 035 - Folder 011**

**Line Item Veto - Litigation**

*Budget materials - line  
item veto*

## **PRESIDENT CLINTON ANNOUNCES LINE ITEM VETO OF SPENDING AND TAX PROVISIONS**

*August 11, 1997*

### **BACKGROUND ON THE LINE ITEM VETO ACT**

Today, President Clinton announced that he will line item veto two tax provisions and a spending provision under the authority of the Line Item Veto Act which was signed into law April 9, 1996. Under the Line Item Veto Act, the President is authorized to cancel tax and spending items if he determines that cancellation will:

- (i) reduce the Federal budget deficit;
- (ii) not impair any essential government functions; and
- (iii) not harm the national interest.

In addition to the above, the Act requires the President to transmit to Congress a "special message" explaining his decision to cancel any tax or spending item pursuant to the Act.

The items chosen for cancellation were carefully reviewed by experts at the Department of Treasury and other relevant agencies. The President believes canceling these items will not only achieve savings, but, even more importantly, serve as a deterrent to future attempts to include special interest or poorly drafted provisions that lead to abuse or serve to benefit only a select number of taxpayers or states as opposed to serving the broader public interest.

### **SPECIFIC ITEMS CANCELED BY THE LINE ITEM VETO**

#### **Tax**

- **Active Financing Income of Foreign Corporations:** U.S. corporations generally are required to pay current U.S. tax on easily movable income earned by their foreign subsidiaries. U.S. taxation of other income of a foreign subsidiary, such as income earned in a foreign manufacturing or service business, generally, may be deferred until the earnings are paid back to the U.S. Prior to 1987, income earned from an active foreign financial services business, including interest, dividends and certain gains, generally was eligible for deferral. However, in 1986 Congress curtailed deferral opportunities for this income based on concerns about financial services entities' ability to shift income to tax-haven jurisdictions. *The canceled item would have allowed a small number of major U.S. banks, financing companies, insurance*

*companies and securities firms to avoid current tax on their income from overseas operations. While the primary purpose of the provision was proper, it was drafted in a manner that would have permitted substantial abuse and created major tax loopholes for these companies.*

**Estimated Fiscal Effect of Cancellation: \$317 million over five years.** (Treasury Estimate)

- **Deferral of Gain on Certain Sales of Farm Product Refiners and Processors:** Under current law, an individual may defer recognition of gain on the sale of certain stock in a corporation to an employee stock ownership plan (ESOP) or an eligible worker-owned cooperative, provided the individual reinvests the proceeds in certain other property. Gain is recognized later, when the individual taxpayer disposes of the replacement property. To qualify for this treatment, a number of requirements must be met to safeguard against abuse. *While the President wants to encourage value-added farming through the purchase by cooperatives of refiners or processors of agricultural goods, he feels compelled to veto this provision based on two narrow, but important grounds:*
  - (1) *The canceled item would have extended the existing deferral for ESOPs to the sale of stock in a qualified refiner or processor of agricultural goods to a farmers' cooperative, but without the safeguards applicable to ESOPs to ensure that the deferred tax is eventually paid.*
  - (2) *This provision failed to target its benefits to small- and medium-size coops.*

The President will continue to support more targeted and efficient means of promoting value-added farming that are not susceptible to abuse.

**Estimated Fiscal Effect of Cancellation: \$98 million over five years.** (Treasury Estimate)

### **Spending**

- **New York Medicaid Provider Tax Exemption:** In the past, Federal Medicaid spending increased dramatically because some states used disproportionate share hospital payments and related special financing mechanisms such as levying taxes on health care providers to effectively lower their share of Medicaid spending. Some states have used the dollars intended for Medicaid for state projects such as buildings, roads and bridges. In 1991, Congress

limited the growth in Medicaid spending by enacting legislation to restrict the ability of states to use certain types of provider taxes as their share of Medicaid spending. Congress required that provider taxes be uniform and broad-based in order to qualify as a state's "matching" funds. *The canceled item would have given preferential treatment to only New York, by allowing that State to continue relying upon impermissible provider taxes to finance their Medicaid program. This preferential treatment would have increased Medicaid costs, would have treated New York differently from all other states, and would have established a costly precedent which would -- if extended to all other states -- cost taxpayers \$3.5 billion.*

**Estimated Fiscal Effect of Cancellation: \$200 million over 5 years. (CBO Estimate)**

### **BACKGROUND ON 79 TAX AND SPENDING PROVISIONS SUBJECT TO LINE ITEM VETO**

Under the Line Item Veto Act, the Joint Committee on Taxation (JCT) is responsible for identifying "limited tax benefits". In general, the list of 79 items has been identified by JCT as "limited tax benefits" because JCT has determined either that (1) they are revenue-losing provisions that will have 100 or fewer beneficiaries in any fiscal year, or (2) they are transition rules that will benefit 10 or fewer taxpayers in any fiscal year.

Of the 79 provisions identified as limited tax benefits,

- approximately one-third represent Administration initiatives;
- approximately 40 percent represent provisions that have a basis in sound tax or social policy, or were important to certain members of Congress and were agreed to in the spirit of bipartisan cooperation; and
- approximately 25 percent represent reasonable transition relief--ensuring that new changes in law don't unfairly harm taxpayers who relied on prior law.

Budget materials - line  
item veto



STATE OF NEW YORK

GEORGE E. PATAKI  
GOVERNOR

August 18, 1997

*Emily  
Please work  
with Congress  
and OMB/OPC  
to craft  
appropriate  
response.  
Mickey  
cc. Easton*

Dear President Clinton:

I am deeply concerned about your decision to exercise the line item veto to cancel a provision of Federal legislation which helps New York provide health care to hundreds of thousands of New Yorkers. The provision of law that you vetoed would have deemed certain of New York's provider assessments to be in compliance with federal law on a retrospective basis. The provision would not have created any future Federal budget implications.

Based upon the comments made by members of your Administration at the time of your veto, I feel it is important to provide you with information regarding the assessments. New York's assessments result in real expenditures for health care. New York has always used these funds for general Medicaid purposes, to compensate hospitals for providing indigent care, and for public health initiatives such as the Child Health Plus program. Knowing your desire to extend health insurance to all Americans, particularly children, I am sure you would agree that New York's programs are commendable.

As the State implemented provider assessments over the years, access to health care has been expanded throughout the State. Just this year, we expanded the Child Health Plus program through provider assessments -- increasing the number of insured children in the program from 130,000 today to more than 251,000 by 1999.

To date, New York's assessments have not been approved, or disapproved, by the Health Care Financing Administration (HCFA). HCFA has not taken any action or provided any substantive guidance with respect to New York's provider tax waiver applications that were filed in 1995. Consequently, the New York Congressional delegation submitted legislation to address HCFA's failure to act in a timely manner.

Nonetheless, we strongly believe that our pending waivers satisfy the Congressional intent of the 1991 provider tax law. Moreover, on a prospective basis, we believe our provider tax system will maintain this commitment.

The veto will have a deleterious impact on New York's children and its poor. In fact, the consequences of the veto are more significant than either OMB or the Congressional Budget Office have recently stated. Up to \$2.6 billion is at risk. This sum represents one-half of the revenues received between October 1992 and June 1997. Since we have not yet been provided with an explanation for OMB's estimate of a \$200 million impact on New York, the validity of OMB's estimate remains questionable.



In conclusion, I recognize your interest in halting wasteful spending for narrowly defined special interests. I am sure you will agree, however, that providing a medical safety net in New York fails to constitute wasteful spending.

While New York continues to review all the options that may be available, I urge you to reevaluate your decision in light of its potentially devastating impact on the health care of hundreds of thousands of New Yorkers including children, the indigent and the poor elderly.

Very truly yours,

*My E. Patani*

Honorable William J. Clinton  
President of the United States  
The White House  
1600 Pennsylvania Avenue N.W.  
Washington, D.C. 20500



U.S. Department of Justice

Civil Division

Deputy Assistant Attorney General

Washington, D.C. 20530

January 2, 1997

*To: Tray / Elena*

**BY HAND DELIVERY**

Kathleen Wallman, Esq.  
Deputy Counsel to the President  
The White House  
West Wing, Second Floor  
Washington, D.C. 20500

Re: Senator Robert C. Byrd, et al. v.  
Franklin D. Raines, et al. (D. DC)

Dear Kathy:

This is to advise you that today six Members of the Senate and House of Representatives filed a complaint in federal district court challenging the constitutionality of the Line Item Veto Act of 1996. For your information, enclosed is a copy of the complaint.

Please let me know if you have any questions about this litigation.

Sincerely,

Gary G. Grindler  
Deputy Assistant Attorney General

Enclosure

# United States District Court

DISTRICT OF DISTRICT OF COLUMBIA

SEN. ROBERT C. BYRD,  
SEN. MARK O. HATFIELD,  
SEN. CARL LEVIN,  
SEN. DANIEL PATRICK MOYNIHAN,  
REP. DAVID E. SKAGGS,  
REP. HENRY A. WAXMAN

v.

FRANKLIN D. RAINES,  
ROBERT E. RUBIN

## SUMMONS IN A CIVIL ACTION

CASE NUMBER 1:97CV00001

JUDGE: Thomas Penfield Jackson

DECK TYPE: Civil General

DATE STAMP: 01/02/97

TO: (Name and Address of Defendant)

Robert E. Rubin  
Secretary of the Treasury  
15th Street and Pennsylvania Avenue  
Washington, DC 20220

**YOU ARE HEREBY SUMMONED** and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (Name and address)

Lloyd N. Cutler  
Louis R. Cohen  
Lawrence A. Kasten  
WILMER, CUTLER & PICKERING  
2445 M Street, N.W.  
Washington, D.C. 20037

Alan B. Morrison  
Colette G. Matzzie  
PUBLIC CITIZEN LITIGATION GROUP  
1600 20th Street, N.W.  
Washington, D.C. 20009

an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

NANCY MAYER WASHINGTON

CLERK

JAN - 2 1998

DATE

BY DEPUTY CLERK



United States District Court  
for the District of Columbia  
Office of the Clerk  
333 Constitution Avenue, NW  
Washington, DC 20001

Nancy M. Mayer-Whittington  
Clerk

**NOTICE OF RIGHT TO CONSENT TO TRIAL  
BEFORE A UNITED STATES MAGISTRATE JUDGE**

The substantial criminal caseload in this Court and the requirements of the criminal Speedy Trial Act frequently result in a delay in the trial of civil cases. Aware of the hardship and expense to the parties, counsel, and witnesses caused by the delays which are beyond the control of the Court, this notice is to advise you of your right to a trial of your case by a United States Magistrate Judge. By statute, 28 U.S.C. § 636(c), Fed.R.Civ.P. 73, and Local Rule 502, the parties, by consent, can try their case by means of a jury trial or bench trial before a United States Magistrate Judge. Appeals from judgments and final orders are taken directly to the United States Court of Appeals for the District of Columbia Circuit, in the same manner as an appeal from a judgment of a District Judge in a civil case.

**WHAT IS THE PROCEDURE?**

One of the matters you are required to discuss at the meet-and-confer conference mandated by Local Rule 206 is whether the case should be assigned to a United States Magistrate Judge for all purposes, including trial.

All parties must consent before the case is assigned to a Magistrate Judge for trial. You may consent at any time prior to trial. If you expressly decline to consent or simply fail to consent early in the case, you are not foreclosed from consenting later in the case. However, a prompt election to proceed before a Magistrate Judge is encouraged because it will facilitate a more orderly scheduling of the case.

Attached is a copy of the "Consent to Proceed Before a United States Magistrate Judge for All Purposes" form. Your response should be made to the Clerk of the United States District Court only.

**WHAT IS THE ADVANTAGE?**

The case will be resolved sooner and less expensively. The earlier the parties consent to assigning the case to a Magistrate Judge the earlier a firm and certain trial date can be established, even if the case is to be tried to a jury.

Upon the filing of the consent form and with the approval of the District Judge, the case will be assigned for all purposes to a Magistrate Judge.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
Plaintiff(s)  
  
v.  
  
\_\_\_\_\_  
Defendant(s)

Civil Action Number: 97-0001

CONSENT TO PROCEED BEFORE  
A UNITED STATES MAGISTRATE JUDGE FOR ALL PURPOSES

In accordance with the provisions of 28 U.S.C. § 636(c)(3), the parties to the above-captioned civil matter by and with the advice of their counsel hereby voluntarily waive their rights to proceed before a District Judge of the United States District Court and consent to have a United States Magistrate Judge conduct any and all further proceedings in the case, including trial.

\_\_\_\_\_  
Attorney for the Plaintiff(s)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Attorney for the Defendant(s)

\_\_\_\_\_  
Date

NOTICE: The foregoing Consent by Counsel shall be accepted upon the understanding that all counsel have secured the consent of their respective clients to the Consent and Referral to a United States Magistrate Judge for all purposes.

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to a United States Magistrate Judge for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c)(3) and the foregoing consent of the parties.

\_\_\_\_\_  
United States District Judge

\_\_\_\_\_  
Date

NOTE: RETURN THIS FORM TO THE CLERK OF THE COURT ONLY IF ALL PARTIES HAVE CONSENTED TO PROCEED BEFORE A UNITED STATES MAGISTRATE JUDGE.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SEN. ROBERT C. BYRD  
311 Hart Senate Office Building  
Washington, DC 20510

CASE NUMBER 1:97CV00001

JUDGE: Thomas Penfield Jackson

SEN. MARK O. HATFIELD  
711 Hart Senate Office Building  
Washington, DC 20510

DECK TYPE: Civil General

DATE STAMP: 01/02/97

SEN. CARL LEVIN  
459 Russell Senate Office Building )  
Washington, DC 20510 )

SEN. DANIEL PATRICK MOYNIHAN )  
464 Russell Senate Office Building )  
Washington, DC 20510 )

REP. DAVID E. SKAGGS )  
1124 Longworth House )  
Office Building )  
Washington, DC 20510 )

REP. HENRY A. WAXMAN )  
2204 Rayburn House Office Building )  
Washington, DC 20510 )

Plaintiffs, )

v. )

FRANKLIN D. RAINES, )  
Director of the Office of )  
Management and Budget )  
Room 252 )  
Old Executive Office Building )  
Washington, DC 20503 )

ROBERT E. RUBIN, )  
Secretary of the Treasury )  
15th Street and Pennsylvania )  
Avenue )  
Washington, DC 20220 )

Defendants. )

COMPLAINT FOR DECLARATORY RELIEF

1. On April 9, 1996, President Clinton signed into law Pub. L. No. 104-130, 110 Stat. 1200 ("the Act"). The Act, which refers to itself as the Line Item Veto Act, became effective on January 1, 1997. The Act gives the President the authority to "cancel in whole," at any time up to five days (excluding Sundays) after signing a bill into law, any dollar amount of appropriation, any item of new direct spending, or any limited tax benefit contained in the bill. In this action, plaintiffs, who are six Members of Congress, assert that the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution.

#### Jurisdiction and Venue

2. This Court has subject matter jurisdiction pursuant to 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 1331.

3. This Court may enter a declaratory judgment under 2 U.S.C. § 692(a)(1) and 28 U.S.C. § 2201.

4. Venue in this Court is proper pursuant to 2 U.S.C. § 692(a)(1).

#### Parties

5. Plaintiff Robert C. Byrd is a Senator from the State of West Virginia and a duly elected member of the 105th Congress. Senator Byrd's current term of service will expire on January 3, 2001.

6. Plaintiff Mark O. Hatfield is a Senator from the State of Oregon. Senator Hatfield has represented the State of

Oregon for five consecutive terms, beginning in 1967. His term of service will expire, and he will retire from the Senate, at noon, January 3, 1997.

7. Plaintiff Carl Levin is a Senator from the State of Michigan and a duly elected member of the 105th Congress. Senator Levin's current term of service will expire on January 3, 2003.

8. Plaintiff Daniel Patrick Moynihan is a Senator from the State of New York and a duly elected member of the 105th Congress. Senator Moynihan's current term of service will expire on January 3, 2001.

9. Plaintiff David E. Skaggs is a Representative from the Second Congressional District of Colorado and a duly elected member of the 105th Congress.

10. Plaintiff Henry A. Waxman is a Representative from the Twenty-Ninth Congressional District of California and a duly elected member of the 105th Congress.

11. Defendant Franklin D. Raines is the Director of the Office of Management and Budget, sued in his official capacity. In his official capacity, defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act.

12. Defendant Robert E. Rubin is the Secretary of the Treasury, sued in his official capacity. In his official capacity, defendant Rubin is responsible for executing the President's cancellations of "limited tax benefits" under the Act

and for executing and enforcing the tax laws of the United States.

The Line Item Veto Act

13. The Act provides that the President may, immediately, or within five calendar days (excluding Sundays), after signing a bill into law pursuant to Article I, section 7, of the Constitution, "cancel" any dollar amount of "discretionary budget authority" (i.e., appropriations), any item of new direct spending, or any "limited tax benefit" contained in that law. The Act defines "cancel" to mean "rescind" in the case of an appropriation, and "prevent . . . from having legal force or effect" in all other cases. With respect to appropriations, the Act permits the President to cancel any amount stated in the law itself and also any amount separately stated in any table, chart, or explanatory text in the statement of managers or in any governing committee report accompanying the law. The Act requires that the President determine that the cancellation will reduce the Federal budget deficit, will not impair government functions he deems "essential," and will not "harm the national interest," but the Act does not require any other determination.

Injuries

14. The Act directly and concretely injures the plaintiffs, in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the plaintiffs of their constitutional role in the repeal of

legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

#### Claim for Relief

15. The Act grants the President the power to cause some parts of a bill that has passed both Houses of Congress and been signed by him to be law, while canceling other parts of the bill and returning them to Congress. The Act grants this authority by permitting the President to sign a bill and then instantly (or within 5 days) and unilaterally negate the legal effect of his signature with respect to some parts of the bill by signing and transmitting a message to the Congress canceling those parts. Whether the Act is viewed as granting the President a unilateral power of line-item revision of bills that have been presented for his signature, or as granting him a unilateral power to repeal portions of duly enacted laws, the Act grants powers to the President that contravene the constitutional process for making federal law.

16. Article I of the Constitution provides a "single, finely wrought and exhaustively considered procedure," Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 951 (1983), for making or changing federal law. It vests all federal legislative powers in a Congress comprised of two Houses. It requires that any bill must pass by majority vote in both the House and the Senate before it may become a law. The Presentment

Clause (Art. I, sec. 7, cl. 2) then requires that a bill, before it becomes a law, shall be presented to the President, and it gives the President only three choices with respect to a bill presented to him: to "approve" the whole bill and sign it; to "return" (i.e., veto) the whole bill; or to allow the whole bill to become law without his signature. The requirement of bicameral passage and presentment to the President applies to the repeal, as well as enactment or amendment, of provisions of law.

17. The Act violates Article I. The Act unconstitutionally expands the President's power, with respect to certain bills presented to him, by authorizing him to "approve" a bill and sign it into law and, from an instant up to five days later, disapprove and "return" parts of the bill, so that the parts of the bill disapproved by the President do not have the force and effect of law. The Act also violates the requirements of bicameral passage and presentment by granting to the President, acting alone, the authority to "cancel" and thus repeal provisions of federal law.

Prayer for Relief

Wherefore plaintiffs pray

(1) For a declaratory judgment that the Act is unconstitutional and that any cancellations under the Act are invalid.

(2) For reimbursement of their costs in this action, and for such other relief as the Court may deem appropriate.

Respectfully submitted,

Charles J. Cooper *cc*  
Charles J. Cooper *cc*  
(DC Bar No. 248070)  
Michael A. Carvin  
(DC Bar No. 366784)  
David Thompson  
(DC Bar No. 450503)  
COOPER AND CARVIN  
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Michael Davidson *cc*  
Michael Davidson *cc*  
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Washington, DC 20015  
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Lloyd N. Cutler *cc*  
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Counsel for Plaintiffs

Date: January 2, 1997