# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. letter | To Roy Furman from Bill Clinton. (1 page) | 08/01/1995 | P5 | 6147 |
| 002. note | Clinton's comments. (~~1~~ 2 page) front & back | 08/01/1995 | P5 | 6148 |

**COLLECTION:**

Clinton Presidential Records
WHORM-Subject File-General
LE002
OA/Box Number: 23401

**FOLDER TITLE:**

124494

Van Zbinden
2007-0624-F
vz1191

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

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b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6147

124494

ME-

LE002

COPY

THE WHITE HOUSE

WASHINGTON

August 1, 1995

Roy L. Furman
Furman Selz Incorporated
230 Park Avenue
New York, New York 10169

Dear Roy:

Thanks for your thoughtful letter of July 26 and for sharing your perspective on the line item veto, the environment, and funding for the arts. I appreciate and agree with your suggestion that the Administration seek to more clearly highlight the differences in the positions of the parties.

Thanks for your insight and, as always, for your friendship. See you soon.

Sincerely,

Bill

I agree with you — we did a good line on the environment today — and I'll keep trying to push through on line item. I've done a couple of arts events that haven't broken through — We'll get a cut but probably can ~~save~~ save NEA.

6148

ME.

**COPY**

THE WHITE HOUSI

WASHINGTON

August 1, 1995

Roy L. Furman
Furman Selz Incorporated
230 Park Avenue
New York, New York 10169

Dear Roy:

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Thanks for your insight and, a
your friendship. See you soo

Sincerely,

Bill

I agree with
a good line o
today — and
[illegible]
from a congr
[illegible]
a lot [illegible]

cc NSC, A Stone

Should Furman be invited NH to a State Dinner?

Yes or to go spend the night if he hasn't —

**COPY**

RECEIVED
95 JUL 31 A9:47
HOUSE MAIL
OEOB

**TIME SENSITIVE**
**DO NOT DELAY**

**WHITE HOUSE**
**MAIL SECTION**

8/2

copies done

Sewagner

PHOTOCOPY
WJC HANDWRITING

# Withdrawal/Redaction Sheet
## Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. memo | For the President from Gene Sperling. Subject: Line Item Veto. (2 pages) | 08/07/1997 | P5 6149 |



**COLLECTION:**

Clinton Presidential Records
WHORM-Subject File-General
LE002
OA/Box Number: 23401

**FOLDER TITLE:**

230422SS

Van Zbinden
2007-0624-F
vz1193

### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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230422 SS

THE PRESIDENT HAS SEEN

8-8-97

THE WHITE HOUSE

WASHINGTON

COPY

6149

August 7, 1997

**MEMORANDUM FOR THE PRESIDENT**

**FROM:** **GENE SPERLING**

**RE:** **Line Item Veto**

Over the past several days, we have conducted a review of the line item veto process.

On the tax side, the Treasury Department started by weeding thru the 79 provisions to narrow the items that could be realistic candidates. We have attached six for discussion.

Excluded were a large number of equitable transition measures which are small measures designed to ensure certain taxpayers are not unfairly harmed by their reliance on a changing tax provision. Also excluded were provisions that are proper or good policy. Finally, other provisions excluded included those we disagreed with, but had agreed to as part of the balanced budget agreement.

On the spending side, Frank Raines and Jack Lew identified four issues that they thought were worthy of consideration. Two of which we are bringing to you for discussion.

In making a decision, there are differences in overall strategy approaches to take as well as differences as to which measures one would line item veto under a given strategy.

**Strategy Choice 1: Avoid any line item veto now and wait for the appropriations bills.** The strategy here is that there are no ideal tax measures to line item veto and any one we could select would be difficult to argue is worthy of a veto as compared to the other measures you didn't select. Thus, it is better to wait for a more favorable time. *This is Bob Rubin's and Larry Summers' preference although they would be willing to accept a minimal amount of line item veto.*

**Strategy Choice 2: Line item veto only one or two spending provisions but no tax provisions.** This argues that one should follow the advice of Senator McCain and others who argue one should first test provisions on the spending side, and that the tax provisions that are likely to be vetoed are supported by a strong number of Democrats and that would be damaging to our supporters by isolating their preferences. *John Hilley and Janet Yellen support this* *measure.*



**Strategy Choice 3: Choose to line item veto one spending and one tax provision as a test case and signal to show willingness to use veto for both spending and tax provisions.** This option would argue that it is hard to find a rationale for why certain items in the spending or tax sides remain standing and others are line item vetoed. Thus the best rationale is to choose one spending and one tax provision to signal your willingness to veto both spending and tax provisions. *Frank Raines and Jack Lew support this choice.*

**Strategy Choice 4: Look for several provisions to show seriousness in using the line item veto for government reform.** This choice argues that employing the line item veto on several provisions shows more seriousness to strike out unnecessary special interest provisions. Public opposition from our supporters, while painful, will illustrate it is real and significant and that it is best to show your willingness to exercise these options even if we don't have a perfect rationale for the items that were selected and the others that were left standing. *Variations of this option are supported by myself and Rahm Emanuel, while Erskine would look for two tax and two spending provisions.*

As you look at the provisions, I want to draw your attention to one specific area of significant debate among your advisors:

- **Farms Coops:** Several of your advisors see this as the best case for a line item veto. They argue that this provision is poor tax policy and that it is associated with helping Harold Simmons, a single sugar beet producer, and is therefore the closest to the ideal special interest provision worthy of a line item veto.

  On the other hand, others argue that it is widely supported by supporters, such as Daschle, Dorgan and Stenholm and will be portrayed as an anti-farm measure.

8/26/97

Phil – Is this a document that we can now send to RM?

Yes ✓

No ___

C.

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. memo | For Janet Reno from Walter Dellinger. Subject: The Line Item Veto Act. (11 pages) | 01/04/1995 | P5 |
| 002. memo | For Abner Mikva from Walter Dellinger. Subject: The Fiscal Reponsibility Act: The House Republicans Draft... (7 pages) | 12/21/1994 | P5 6150 |

**COLLECTION:**

Clinton Presidential Records
Domestic Policy Council
Paul Weinstein
OA/Box Number: 18471

**FOLDER TITLE:**

Line Item Veto [1]

Van Zbinden
2007-0624-F
vz1243

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

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6150

U. S. Department of Justice

Office of Legal Counsel

COPY

Office of the
Assistant Attorney General

Washington, D.C. 20530

December 21, 1994

**MEMORANDUM TO ABNER J. MIKVA**
**COUNSEL TO THE PRESIDENT**

From: Walter Dellinger WED
Assistant Attorney General

Re: The Fiscal Responsibility Act: The House Republicans' Draft Proposed Balanced Budget Amendment to the Constitution

This memorandum analyzes a proposed joint resolution included as part of the House Republicans' draft Fiscal Responsibility Act that would propose to the states a balanced budget amendment to the United States Constitution. The memorandum sets forth objections similar to those raised by the Department in February, 1994 in response to a similar proposal, S.J. Res. 41, and notes the differences between that resolution and this one.

I. The proposed amendment.

Section 1 of the proposed amendment would require Congress to "adopt a statement of receipts and outlays for [each] fiscal year in which total outlays are not greater than total receipts," unless three-fifths of the whole number of each House "provide in that statement for a specific excess of outlays over receipts by a vote directed solely to that subject." Both Congress and the President would be required to "ensure that actual outlays do not exceed the outlays set forth in such statement," which may be amended by law, "provided that revised outlays are not greater than revised receipts." Draft Resolution § 1. In addition, the amendment would require a three-fifths rollcall vote of the whole number of each House for any bill to increase receipts; id. § 2; would require the President to submit a budget prior to each fiscal year "consistent with the provisions of this Article," id. § 3 (arguably authorizing submission of an unbalanced budget, in contrast to earlier proposals); and would require a three-fifths rollcall vote of the whole number of each House for any increase on the public debt, id. § 4.

Congress would be allowed to waive these requirements "for any fiscal year in which a declaration of war is in effect" or "for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution adopted by the whole number of each House, which becomes law." Id. § 5 (emphasis added). Additional sections provide for implementing legislation; define receipts and outlays in broad general terms and provide that the amendment shall take effect no earlier than 2002.



## II. Comments

### A. Introduction

For the most part, these comments reflect the concerns raised by the Department before the Senate Appropriations Committee on February 16, 1994, shortly before the Senate voted on a similar proposal, S.J. Res. 41.[1] As we indicated at that time, the amendment could substantially alter the constitutional structure of our government and undermine the status of our Constitution as positive law. Should the measure be enforced by the Judiciary, it would restructure the balance of power between the branches of government. If it proves unenforceable, it would diminish respect for the Constitution of the United States and for the rule of law.

### B. Differences presented by the new proposed amendment

While the core structure of the House Republicans' proposed amendment is quite similar to that of the other recent leading proposals, it differs from S.J. Res. 41, to which the Administration objected earlier this year, in some significant respects:

(1) The new proposal seems in more explicit terms to contemplate granting impoundment authority to the President, as § 1 states that the President "shall ensure" that actual spending not exceed the outlays set forth in the budget.

(2) Even assuming that a balanced budget is passed, the proposal does not require the Government to spend no more than it takes in. Rather, it requires Congress and the President to ensure that actual outlays do not exceed projected outlays. Accordingly, a deficit that results from overly optimistic projections of revenues would not violate the amendment.

(3) A bill to raise receipts must be passed by three-fifths rollcall vote of the whole number of each House of Congress, rather than by majority rollcall vote of the whole number of each House of Congress.

[1] See Balanced Budget Amendment -- S.J. Res. 41: Hearings Before the Senate Comm. on Appropriations, 103d Cong., 2d Sess. 27-38 (1994) (testimony and prepared statement of Attorney General Janet Reno); id. at 131-48 (testimony and prepared statement of Assistant Attorney General Walter Dellinger).

(4) The bill slightly expands the class of situations in which the provisions of the amendment could be waived, authorizing waiver for "an imminent and serious military threat" even when no actual hostilities are taking place.

(5) The bill does not explicitly authorize Congress to rely on estimates in passing implementing legislation.

C. How Would the Amendment Be Enforced?

The one aspect of this proposal that should be of greatest concern to the United States Department of Justice is that the amendment provides no mechanism for its enforcement. The proposal simply declares that outlays shall not exceed expenditures without explaining how this state of affairs shall come about. Simply mandating that Congress "shall adopt" a balanced budget will not assist Members of Congress to reach an agreement on a particular balanced budget. While one Member of Congress might vote to cut military spending, another to reduce retirement or other entitlement benefits, and a third to raise taxes, each of these measures may fail to gain a majority in one or the other House of Congress. The result would be unworkable in a way that other supermajority requirements are not: while a failure to override a veto or ratify a treaty simply leaves the status quo in place, no governmental action would be authorized without a budget.

Even if Congress is able to agree on a balanced budget, or a sixty-percent-majority agrees to a particular unbalanced budget, the problems would not be over. If later in the year, expenditures turn out to be greater than expected (perhaps because a recession increases claims on unemployment insurance), sixty percent of at least one House of the Congress may fail to agree on a resolution to exceed the spending limit, or a majority may fail to approve a change in the budget to accommodate the increase. In that situation, all members of Congress might be acting in the utmost good faith, and yet Congress would have failed in its constitutional command to ensure that outlays not exceed those set forth in the earlier budget resolution. Nor is there any explicit instruction to the courts explaining how or whether they are to take action to prevent deficit spending not approved in the constitutionally required manner. Finally, although the President might well deem him or herself compelled to impound funds under the command of § 1 to "ensure" that outlays not exceed those set forth in the budget, nothing in the amendment guides the exercise of such power.

In the absence of any specific mechanism for achieving a balanced budget, this amendment, once part of the Constitution, may be read to authorize, or even to mandate, extensive judicial involvement in the budgeting process, a serious distortion of our constitutional system. If some enforcement mechanism is not inferred, then the amendment would constitute an empty promise in the very charter of our government. Either of these alternatives would fundamentally alter the nature of our constitutional system.

1. Judicial Enforcement.



The proposal appears to mandate an extraordinary expansion of judicial authority: state and federal judges may well be required to make fundamental decisions about taxing and spending, issues that judges lack the institutional capacity to decide in a satisfactory manner. Thus, Judge Robert Bork wrote of earlier versions of the proposal to adopt a balanced budget constitutional amendment that

> The result . . . would likely be hundreds, if not thousands, of lawsuits around the country, many of them on inconsistent theories and providing inconsistent results. By the time the Supreme Court straightened the whole matter out, the budget in question would be at least four years out of date and lawsuits involving the next three fiscal years would be slowly climbing toward the Supreme Court.[2]

Neither the political question doctrine nor limitations on standing[3] would necessarily preclude litigation that would ensnare the judiciary in the thicket of budgetary politics. In Baker v. Carr,[4] the Court identified the features that characterize a case raising a nonjusticiable political question.[5] As the Court explained in United States v. Munoz-Flores, "the political question doctrine . . . is designed to restrain the Judiciary from inappropriate interference in the business of the other branches of Government."[6]

On its face, such a statement would seem to constrain the courts' review of a balanced budget amendment. The most recent decisions of the Supreme Court, however, suggest that the Court is prepared to resolve questions that might once have been considered "political." For example, in United States v. Munoz-Flores,[7] the Court adjudicated a claim that an assessment was unconstitutional because Congress had failed to comply with the

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[2] Robert H. Bork, On Constitutional Economics, AEI J. on Gov't and Soc'y (Sept.-Oct. 1983), reprinted in 1987 House Hearings 645, 649.

[3] The Department's response to claims that no one would have standing to challenge a violation may be found at pages 131-48 of the 1994 Senate Hearings (testimony and prepared statement of Assistant Attorney General Walter Dellinger).

[4] 369 U.S. 186 (1962).

[5] "Prominent on the surface of any case held to involve a political question is . . . 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." Id. at 217.

[6] 495 U.S. 385, 394 (1990).

[7] 495 U.S. 385 (1990).

Origination Clause, which mandates that "all Bills for raising Revenue shall originate in the House of Representatives." The Court rejected the argument that this issue was a non-justiciable political question. And in 1992, the Court held that congressional selection of a method for apportionment of congressional elections is not a "political question" and is therefore subject to judicial review.[8] Indeed, at least some of the legislative history surrounding previous versions of the balanced budget amendment suggests that at least limited judicial review is contemplated.[9] Accordingly, we cannot be sure that courts would refuse to hear claims on political question grounds.

The courts likely would also be faced with difficult questions relating to the relative power of Congress, the President, and the judiciary to make budget decisions, including the nature and scope of the President's power and duty, under Section 1, to "ensure that actual outlays do not exceed those set forth in [the budget]." Assuming that a President concludes that his duty to comply with the constitutional amendment implicitly includes the impoundment power necessary to ensure that the budget is in fact balanced, and that the courts defer to that construction, nothing in the amendment directs whether the President should cut all programs by proportional amounts, or whether the President would have discretion to impound only those funds he or she deems least important to the national welfare. If it appeared during a fiscal year that federal outlays would exceed estimated receipts, could the President order the Social Security Administrator to reduce Social Security benefit payments by 9% below the amounts stated by the Social Security law? Or could the President unilaterally order the Department of Defense to cut military pay by 11%, even though a higher rate had been established by statute?

It would be a difficult question for a court to determine whether such a restructuring of our constitutional framework had been intended or executed by this amendment. Litigation over the validity of unilateral decisions by the President to withhold payment of benefits (such as Social Security) mandated by law could easily produce different results in different courts for months or years until each specific issue was resolved by the United States Supreme Court. If the courts disapproved the President's attempt to remedy the constitutional violation, they would then have to consider whether, and how, to resolve the problem themselves.

A particularly serious problem with the current balanced budget amendment proposal is its failure to state whether federal courts would or would not be empowered by the

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[8] Department of Commerce v. Montana, 112 S.Ct. 1415, 60 U.S.L.W. 1415 (1992).

[9] See, e.g., 138 Cong. Rec. S 9352 (July 1, 1992) (statement of Sen. Byrd, noting that "the sponsor of the leading proposal for a balanced budget amendment has said that if the President and the Congress could not agree on a balanced budget, a district court could enforce the amendment through a tax increase"); 1992 House Budget Comm. Hearings, supra note 3, at 461, 465-66 (statement of Rep. Stenholm, sponsor of a leading House proposal, to the effect that judicial review would be available should Congress and the President fail to meet their constitutional duties).

amendment to order tax increases in order to bring about compliance with the provisions of the amendment. See Missouri v. Jenkins.[10] In Jenkins, the Supreme Court held that while a federal district court had abused its discretion in imposing a tax increase to fund a school desegregation program, the modifications made by the Court of Appeals satisfied equitable and constitutional principles. Those modifications included leaving the details of the mandate to increase taxes to state authorities. Once the outcome of the budgeting process has been specified in a constitutional amendment, a plaintiff with standing might successfully argue that he or she had a right to have a court issue whatever relief is necessary to remedy the Constitutional violation. The failure of the amendment to preclude such powers might even be thought to suggest, in light of Jenkins, that the possibility deliberately was left open.

2. Conclusion.

The failure to specify any enforcement mechanisms for the amendment could result in the transfer of power over fundamental political questions of taxing and spending to the courts. This would represent a fundamental and deeply problematic reordering of our basic constitutional structure. The placing of the "power of the purse" in the hands of the legislature -- and not in the hands of the executive or judicial branches -- was not a decision lightly made by the framers of the Constitution. James Madison wrote in the 58th Federalist that the "power of the purse may, in fact, be regarded as the most effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[11] The framers explicitly rejected the notion that such a crucial power should rest with either the executive[12] or with the judiciary.[13]

D. The Prospect of an Unenforceable Amendment.

In the absence of implied enforcement mechanisms such as presidential impoundment of funds or judicial involvement in the budgeting process, the amendment is unlikely to prove effective. Because it is highly likely that an amendment would not bring about a balanced budget, its adoption could be truly harmful to the Constitution. To have the Constitution declare that the budget shall be balanced, while providing no mechanism to make that happen, would place an empty promise in the fundamental charter of our government. To

[10] 495 U.S. 33 (1990).

[11] The Federalist No. 58, at 359 (James Madison) (Clinton Rossiter ed., 1961).

[12] See, e.g., 3 Annals of Cong. 938-39 (remarks of James Madison); see also 3 Joseph Story, Commentaries on the Constitution § 1342 (1833).

[13] The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (noting that the judicial branch did not pose as great a danger to liberty as opponents feared because it "has no influence over either the sword or the purse; no direction either of the strength or the wealth of society").

have a provision of the Constitution routinely violated would inevitably make all other provisions of the Constitution seem far less inviolable. As Alexander Hamilton noted,



> Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers toward the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.[14]

Some have suggested that even if the amendment failed to eliminate the deficit, it would nonetheless have the salutary effect of creating pressure to reduce the deficit. While this might be true, the effect would come at considerable cost. Even supposing that the amendment brought about a reduction in the size of the deficit, the remaining excess of expenditures over receipts would constitute a continuing multi-billion-dollar violation of the Constitution.

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[14] The Federalist No. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

# Withdrawal/Redaction Sheet
## Clinton Library



| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. email | Eric Berman to Rahm Emanuel at 11:13. Subject: Berm. (6 pages) | 07/13/1993 | P5 | 6151 |
| 002. email | Eric Berman to Barry Toiv at 14:49. Subject: Draft of Memo... (6 pages) | 07/13/1993 | P5 | 6152 |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[04/02/1993-12/22/1993]

Van Zbinden
2007-0624-F
vz1256

**RESTRICTION CODES**

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6151

RECORD TYPE: PRESIDENTIAL (RECONSTRUCTED EMAIL)

CREATOR: Eric Berman ( BERMAN_E ) (WHO)



CREATION DATE/TIME:13-JUL-1993 11:13:00.00

SUBJECT: Berm

TO: Rahm Emanuel ( EMANUEL_R ) (WHO)
READ: UNKNOWN

TEXT:

PRINTER FONT 12_POINT_ROMAN
JULY 13, 1993

INFORMATION
MEMORANDUM FOR THE PRESIDENT
FROM: RAHM EMMANUEL, ASSISTANT TO THE PRESIDENT
BARRY TOIV, OFFICE OF MANAGEMENT AND BUDGET
ERIC BERMAN, OFFICE OF COMMUNICATIONS/RESEARCH
SUBJECT: RECONCILIATION PROJECT'S RAPID RESPONSE/RESEARCH COMPONENT

I. SUMMARY
The Rapid Response/Research (RR/R) component of the Reconciliation Project will

II. RESPONSE PROCESS
RR/R can be divided into three areas of responsibility: Collection, Compilation, and Distribution.
Team members include: Rahm Emmanuel from Communications, Barry Toiv from OMB and Eric Berman from Communications/Research.
The coordinated response to this week's small business attack will act as a model for how the full Rapid Response Component will work during the next few weeks.

A. COLLECTION: MONITORING AND NOTIFICATION

All White House offices will track attacks against and support for the Reconciliation Package to determine both the substance and the source of the information.

Tracking will include monitoring: paid and free media, congressional statements, press releases, press conferences, phone bank campaigns, literature, etc.

Media Affairs will monitor local press from around the country. Public Liaison will track group activity. Legislative will monitor congressional floor statements, "one minute" speeches, press releases, policy reports, etc.

* Last week, Communications, Public Liaison, and the Small Business Administrator became aware of a possible attack by the Chamber against the Reconciliation Package's

provisions affecting small business. Those offices notified the National Economic Council, which in turn notified the Treasury Department.

B. COMPILATION: RESEARCH ASSEMBLY

As soon as an event is spotted, the RR/R Team will meet to determine both the strategic message response and the tactical who-what-how response.

Strategic: Coordinating with Assistant Secretary Altman and Ricki

Seidman, the RR/R Team will determine the "message" response and also the specific background facts, figures, charts, and anecdotes necessary for response. To the broadest extent possible, most of the responses should be drafted by RR/R in advance of the event.



Tactical: Coordinating with Political, Public Liaison, Legislative the Surrogate Operation, and the DNC, the RR/R Team will determine who actually delivers the response information (POTUS, Cabinet, Members of Congress, outside groups, DNC) and by what means (paid advertisement, press release, press conference, radio, satellite t.v., etc.)

Emmanuel, Toiv, and Berman will then coordinate with the National Economic Council, Treasury, other appropriate White House offices, and Executive Agencies to collect the response information and compile it into the appropriate format.

* Last week, the National Economic Council convened a meeting with the Small Business Administrator, Treasury representatives, and Communications staff. At that meeting, it was determined that the Treasury Department statistics would be the basis for Administration talking points. National Economic Council would re-write the points. The Small Business Administrator would brief Hill reporters on Monday in advance of the attack. Public Liaison and the Administrator would contact groups to determine the timing and substance of the attack and try to convince some groups to come out for the package now. Treasury would re-distribute their background packet to the Hill.

C. DISTRIBUTION: DELIVERING THE PRODUCT

□
HORIZONTAL_PITCH 9
PRINTER FONT 14_POINT_ROMAN
BOILER-
□
PLATE RESPONSES

HORIZONTAL_PITCH 10
PRINTER FONT 12_POINT_ROMAN
CRITICISMS OF THE PLAN AND RESPONSES

A. The plan is hard on small businesses.

In fact, the plan is very beneficial to small businesses. The income tax increases apply only to a relatively few businesses, while the benefits of lower interest rates and targeted small business tax incentives will be available to practically all small businesses.

1. The economic benefits of deficit reduction are already benefiting small businesses, reducing interest rates and producing lower borrowing costs. Long-term interest rates have dropped a whole point; mortgage rates are at a 20-year low.

2. The tax incentives in the plan will encourage investment and make it possible for small businesses to prosper, to grow, and to produce jobs. These include:

? increased expensing;

? a special capital gains cut for investments in small business;

? relief from the corporate minimum tax for capital investments;

? retroactive extension of the 25-percent deduction for health insurance premiums of the self-employed; and

? retroactive extension of the ability of State and local governments to issue tax-exempt bonds for small businesses.

3. The higher income taxes will not affect some 96 percent of small

businesses that file as proprietorships, partnerships or subchapter S corporations. They apply only to about 4 percent -- those with income of over $180,000 a year (equivalent of $140,000 of taxable income for joint filers). And we are, indeed, asking those in the highest income brackets to help us bring down the deficit. But they, too, will receive the benefits of this plan.



B. This plan is a job killer -
□
-
□
it will cost millions of jobs.

This plan means more jobs, and higher incomes, both now and in the future. Both the economic effects of deficit reduction and the tax incentives will produce jobs -- eight million permanent private-sector jobs over the next four years.

1. Since election day, long-term interest rates have declined by a full percentage point, cutting the cost of business investment, which means business expansion and

modernization, increased profits and productivity -- and jobs. Fulfillment of deficit reduction will have a continued beneficial impact on interest rates.

2. A million private sector jobs have already been created in the six months since President Clinton took office, as many as were created in the entire four years of the Bush Administration.

3. Reducing the deficit will free up capital for private investment that would otherwise be used to finance government debt. That investment will improve productivity, create jobs, and raise standards of living.

4. Reducing the deficit will make the U.S. a stronger competitor in world trade -- by reducing interest rates and by giving the President the ability to press other countries to stimulate their economies to increase demand for our products abroad.

5. The tax increases in the bill are modest; the proposed highest rate is well below the highest rate proposed by Ronald Reagan in 1981 as an inducement to increased work, saving, and investment -- and well below rates in the 1960's, when economic growth was far more rapid than in the 1980's.

C. We need to cut spending first, not raise taxes. This plan represents the same old Democratic tax-
□
and-
□
spend philosophy.

This plan does cut spending first. It contains a dollar of spending cuts for every dollar in tax increases. The President proposed 200 specific cuts which represented tough choices in virtually every area of spending, and the legislation contains $250 billion in cuts based on those savings.

1. The legislation makes cuts in every major area of spending -- discretionary and entitlements. Tough choices are made to produce cuts in virtually every entitlement program -- including farm programs, veterans' programs, Medicare, Medicaid, Social Security, and federal pay and retirement benefits for both civilian and military employees and retirees.

2. In the House bill, 75 percent of new revenues come from the six percent of taxpayers with more than $100,000 of income, and two-

thirds from those with over $200,000 of income. In the Senate bill, it's 85 percent over $100,000 and 79 percent over $200,000. There are no income tax increases for couples with under $140,000 in taxable income or single taxpayers with under $115,000 in taxable income.



3. The average family of four will pay $??-$??? annually. And for that $??-$???, that family's share of the national debt will be reduced by $18,000 from what it would otherwise be over the next five years.

4. The five-year deficit reduction total of some $500 billion makes this the largest deficit reduction package in U.S. history. In terms of debt, this means that the national debt over the next five years will be half a trillion dollars less than it would be if we did not act.

5. The plan reduces budget deficits as a share of GDP by nearly one-half by 1997.

6. The House bill contains the toughest enforcement mechanisms ever for controlling federal spending and deficits: a five-year freeze on discretionary spending; an entitlement budget which for the first time requires the President and the Congress to respond when entitlement spending exceeds projected costs; a deficit reduction trust fund to lock in deficit reduction savings and ensure that they are not used for other purposes; a pay-as-you-go requirement for any new spending or any tax cuts. In addition, in separate legislation, the House has adopted a modified line-item veto to help the President control spending.

7. And what is the alternative? A Republican plan offered by Senator Bob Dole that would reduce deficits -- and the debt -- by nearly $100 billion less than the reconciliation bill, threatens deep cuts in education, Medicare, and a host of programs affecting the most vulnerable in order to save the wealthy from participating in deficit reduction, yet does not propose one specific spending cut beyond those contained in the Senate bill.

E. This plan is unfair to the elderly.

The plan asks no more of the elderly than of other groups, while they -- and their children and grandchildren -- will share in the benefits of deficit reduction.

1. The taxation of Social Security benefits builds on the tax provision created by Ronald Reagan with bipartisan Congressional support in the 1980's. It increases the amount of benefits subject to taxation only for about one in five recipients -- those with the highest incomes.

2. The Social Security tax provision puts those benefits on a tax status more like that for other retirement programs -- although it is still somewhat more generous.

3. By making this contribution to deficit reduction, seniors are helping to slow down the growing national debt that is a burden not only to them but especially to their children and grandchildren. They are helping to raise their families' standards of living now and in the future.

3. Regarding Medicare savings, the cost of those savings is placed on providers, not beneficiaries. Indeed, by slowing the growth of Medicare provider fees, some of the reforms directly reduce the cost of co-payments and help to keep down Medicare premiums and the cost of Medigap insurance.

F. This plan breaks many of the promises made by candidate Clinton.

Quite the contrary, this plan fulfills a number of the most critical pledges made by the President during his campaign -- to reduce budget deficits, to take on tough problems and choices that have been avoided in the past, to break the gridlock in Washington, to create a more progressive tax



system, to reestablish the United States as a global economic leader, to improve the nation's trade status, and to increase investments in working families and in economic growth.

1. The President promised serious deficit reduction. This $500 billion plan is the biggest deficit reduction package in the nation's history.

2. The President promised to take on the tough choices. Never before has a President been willing, on his own, to go forward with the tough choices on both spending cuts and tax increases that are needed to reduce the deficit. Whether it's controlling entitlement spending, keeping the lid on discretionary spending, asking the wealthy to pay their fair share, or calling for a broad-based energy tax to encourage conservation, the President has taken on the tough choices. He is asking every American to pitch in for the good of our country today and of our children in the future. That's what leadership is all about, and it's the kind of leadership he promised.

3. The President promised to end the gridlock. Despite the self-proclaimed efforts of Republicans to perpetuate gridlock, the President and the Congress are working together to reduce deficits, increase economic growth, and create jobs. When Republicans are willing to help make those efforts bipartisan, the President is welcoming their support; when they are not, he is working with Democrats to get the job done. And that is exactly what is happening with the economic plan.

4. The President promised a more progressive tax system in which the wealthy pay their fair share and the middle class was not forced to carry an excessive burden, as they did in the 1980's. In the House bill, 75 percent of new revenues come from the six percent of taxpayers with more than $100,000 of income, and two-thirds from those with over $200,000 of income. In the Senate bill, it's 85 percent over $100,000 and 79 percent over $200,000. There are no income tax increases for couples with under $140,000 in taxable income or single taxpayers with under $115,000 in taxable income. For the average family of four, the increased taxes would amount to somewhere between $?? and $??? a year (or $? and $?? a month).

5. The President promised to make this nation once again the unquestioned leader of the global economy. His recent performance at the G-7 meeting in Tokyo, just like an earlier G-7 meeting this year attended by Treasury Secretary Bentsen, made it clear that the President, by fulfilling his pledge to get this nation's economic house in order, has restored the ability of the United States to persuade other nations to take actions that will create global economic growth and increase export markets for American goods.

6. The President promised to increase investments in areas critical to the well-being of working families and to fostering economic growth. This legislation fulfills many of those promises. The following -- all fully paid for -- are contained in one or both versions of the legislation:

? Immunization for the nation's children

? Expansion of the earned income tax credit to take working families out of poverty

? Mickey Leland hunger prevention legislation, providing needed food stamp benefits to families with children

? Empowerment zones, tax incentives to encourage investments

? Family preservation legislation to help keep our families together

? Direct lending for the nation's students to entirely or partially replace more costly guaranteed student loans

6152



RECORD TYPE: PRESIDENTIAL (RECONSTRUCTED EMAIL)

CREATOR: Eric Berman ( BERMAN_E ) (WHO)

CREATION DATE/TIME:13-JUL-1993 14:49:00.00

SUBJECT: Draft of Memo--I'm Going to Look at Boilerplates Right Now

TO: Barry J. Toiv ( TOIV_B ) (OMB)
READ: UNKNOWN

TEXT:

PRINTER FONT 12_POINT_COURIER
JULY 13, 1993

INFORMATION
MEMORANDUM FOR THE PRESIDENT
FROM: RAHM EMANUEL, ASSISTANT TO THE PRESIDENT
BARRY TOIV, OFFICE OF MANAGEMENT AND BUDGET
ERIC BERMAN, OFFICE OF COMMUNICATIONS/RESEARCH
SUBJECT: RECONCILIATION PROJECT'S RAPID RESPONSE/RESEARCH COMPONENT

I. SUMMARY

The Rapid Response/Research (RR/R) component of the Reconciliation Project has two main goals: 1) strategic planning and preparation; and 2) organization of available resources into a distributable product.

Rapid Response/Research will work to prepare responses in advance to likely attacks and to oversee the uniform Rapid Response process.

II. BOILER-
□
PLATE RESPONSES

By the end of the week, Rapid Response/Research (RR/R) will have a thematic and a boiler-plate response to every major anticipated attack.

We will model the Rapid Response effort on the coordinated response to this week's anticipated small business attack by the Chamber of Commerce.

Last week, we became aware of a possible attack by the Chamber against the Reconciliation Package's provisions affecting small business. The National Economic Council convened a meeting with the Small Business Administrator, Treasury representatives, and Communications staff to discuss a Response.

At that meeting, it was determined that the Small Business Administrator would brief Hill reporters and trade reporters on Monday in advance of the attack.

National Economic Council and Treasury rewrote talking points and drafted op-ed pieces to rebut the anticipated attack. Background packets were distributed to the Hill. Public Liaison and the Small Business Administrator contacted friendly groups encouraging them to actively and publicly support the package's small business provisions. The Small Business Administrator is also conducting Town Hall meetings across the country beginning

this week.
The group is now awaiting the attack and will perform a Rapid Response, if necessary..
Attached are draft boiler-plate responses on the small business attack and some of the other anticipated attacks.



III. RESPONSE PROCESS
Although each specific response may be different, there will be only one process by which all responses are developed and delivered.

A. ATTACK: SUBSTANCE AND PERSON

As soon as an attack is spotted, RR/R will note and report the substance and the source of the attack to the Reconciliation Team and appropriate others.

B. STRATEGIC DECISION ON RESPONSE

Coordinating with Assistant Secretary Altman and Ricki Seidman, the RR/R Team will determine the "message" response and also the specific background facts, figures, charts, and anecdotes necessary for response. To the broadest extent possible, most of the responses should be drafted by RR/R in advance of the event.

C. TACTICAL WHO-WHAT-HOW (SURROGATE, PAID, FREE, ORG, INDIV)

Coordinating with Political, Public Liaison, Legislative, the Surrogate Operation, and the DNC, the RR/R Team will determine:

i. Who delivers the response (Surrogate or Administration; Individual or Organization)

ii. What the Response is

iii. How the Response is Delivered (paid advertisement or free media; press release or press conference; radio or print or television; etc.)

D. ASSEMBLE RESEARCH

RR/R will then "personalize" the boiler-plate information for the specific attack and prepare a final product.

E. PACKAGE RESEARCH IN MOST MARKETABLE WAY

RR/R will draft the package in the most marketable format

IV. MONITORING ACTIVITY
In addition to regular monitoring of news and wire services, all White House offices will need to track attacks against and support for the Reconciliation Package to determine both the substance and the source of the information.
Tracking will include monitoring: paid and free media, congressional statements, press releases, press conferences, phone bank campaigns, literature, etc.
Media Affairs will monitor local press from around the country.
Public Liaison will track group activity. Legislative will monitor congressional floor statements, "one minute" speeches, press releases, policy reports, etc.
V. PRO-
□
ACTIVE RESEARCH
Because our message is more credible when it dovetails with research from outside the Administration, RR/R will work to encourage outside groups and individuals to act as independent or expert "validators" for our message.
We need validation now, not in three weeks.
Citizens for Tax Justice, for example, is drafting an op-ed piece

and could perform a study of the Bill's progressivity. The House Budget Committee could analyze the budgetary impact of the package. A group of economists can sign a letter of support for the package.



□
VI. BOILER-
□
PLATE RESPONSES
THE PLAN IS HARD ON SMALL BUSINESSES

In fact, the plan is very beneficial to small businesses. The income tax increases apply only to a relatively few businesses, while the benefits of lower interest rates and targeted small business tax incentives will be available to practically all small businesses.

1. The economic benefits of deficit reduction are already benefiting small businesses, reducing interest rates and producing lower borrowing costs. Long-term interest rates have dropped a whole point; mortgage rates are at a 20-year low.

2. The tax incentives in the plan will encourage investment and make it possible for small businesses to prosper, to grow, and to produce jobs. These include:

? increased expensing;

? a special capital gains cut for investments in small business;

? relief from the corporate minimum tax for capital investments;

? retroactive extension of the 25-percent deduction for health insurance premiums of the self-employed; and

? retroactive extension of the ability of State and local governments to issue tax-exempt bonds for small businesses.

3. The higher income taxes will not affect some 96 percent of small businesses that file as proprietorships, partnerships or subchapter S corporations. They apply only to about 4 percent -- those with income of over $180,000 a year (equivalent of $140,000 of taxable income for joint filers). And we are, indeed, asking those in the highest income brackets to help us bring down the deficit. But they, too, will receive the benefits of this plan.
□
THIS PLAN IS A JOB KILLER -
□
-
□
IT WILL COST MILLIONS OF JOBS.

This plan means more jobs, and higher incomes, both now and in the future. Both the economic effects of deficit reduction and the tax incentives will produce jobs -- eight million permanent private-sector jobs over the next four years.

1. Since election day, long-term interest rates have declined by a full percentage point, cutting the cost of business investment, which means business expansion and modernization, increased profits and productivity -- and jobs. Fulfillment of deficit reduction will have a continued beneficial impact on interest rates.

2. A million private sector jobs have already been created in the six months since President Clinton took office, as many as were created in the entire four years of the Bush

Administration.

3. Reducing the deficit will free up capital for private investment that would otherwise be used to finance government debt. That investment will improve productivity, create jobs, and raise standards of living.

4. Reducing the deficit will make the U.S. a stronger competitor in world trade -- by reducing interest rates and by giving the President the ability to press other countries to stimulate their economies to increase demand for our products abroad.

5. The tax increases in the bill are modest; the proposed highest rate is well below the highest rate proposed by Ronald Reagan in 1981 as an inducement to increased work, saving, and investment -- and well below rates in the 1960's, when economic growth was far more rapid than in the 1980's.

□
WE NEED TO CUT SPENDING FIRST, NOT RAISE TAXES.
THIS PLAN REPRESENTS THE SAME OLD
DEMOCRATIC TAX-
□
AND-
□
SPEND PHILOSOPHY.

This plan does cut spending first. It contains a dollar of spending cuts for every dollar in tax increases. The President proposed 200 specific cuts which represented tough choices in virtually every area of spending, and the legislation contains $250 billion in cuts based on those savings.

1. The legislation makes cuts in every major area of spending -- discretionary and entitlements. Tough choices are made to produce cuts in virtually every entitlement program -- including farm programs, veterans' programs, Medicare, Medicaid, Social Security, and federal pay and retirement benefits for both civilian and military employees and retirees.

2. In the House bill, 75 percent of new revenues come from the six percent of taxpayers with more than $100,000 of income, and two-thirds from those with over $200,000 of income. In the Senate bill, it's 85 percent over $100,000 and 79 percent over $200,000. There are no income tax increases for couples with under $140,000 in taxable income or single taxpayers with under $115,000 in taxable income.

3. The average family of four will pay $??-$??? annually. And for that $??-$???, that family's share of the national debt will be reduced by $18,000 from what it would otherwise be over the next five years.

4. The five-year deficit reduction total of some $500 billion makes this the largest deficit reduction package in U.S. history. In terms of debt, this means that the national debt over the next five years will be half a trillion dollars less than it would be if we did not act.

5. The plan reduces budget deficits as a share of GDP by nearly one-half by 1997.

6. The House bill contains the toughest enforcement mechanisms ever for controlling federal spending and deficits: a five-year freeze on discretionary spending; an entitlement budget which for the first time requires the President and the Congress to respond when entitlement

spending exceeds projected costs; a deficit reduction trust fund to lock in deficit reduction savings and ensure that they are not used for other purposes; a pay-as-you-go requirement for any new spending or any tax cuts. In addition, in separate legislation, the House has adopted a modified line-item veto to help the President control spending.

7. And what is the alternative? A Republican plan offered by Senator Bob Dole that would reduce deficits -- and the debt -- by nearly $100 billion less than the reconciliation bill, threatens deep cuts in education, Medicare, and a host of programs affecting the most vulnerable in order to save the wealthy from participating in deficit reduction, yet does not propose one specific spending cut beyond those contained in the Senate bill.

□
THIS PLAN IS UNFAIR TO THE ELDERLY

The plan asks no more of the elderly than of other groups, while they -- and their children and grandchildren -- will share in the benefits of deficit reduction.

1. The taxation of Social Security benefits builds on the tax provision created by Ronald Reagan with bipartisan Congressional support in the 1980's. It increases the amount of benefits subject to taxation only for about one in five recipients --those with the highest incomes.

2. The Social Security tax provision puts those benefits on a tax status more like that for other retirement programs -- although it is still somewhat more generous.

3. By making this contribution to deficit reduction, seniors are helping to slow down the growing national debt that is a burden not only to them but especially to their children and grandchildren. They are helping to raise their families' standards of living now and in the future.

3. Regarding Medicare savings, the cost of those savings is placed on providers, not beneficiaries. Indeed, by slowing the growth of Medicare provider fees, some of the reforms directly reduce the cost of co-payments and help to keep down Medicare premiums and the cost of Medigap insurance.

□
THIS PLAN BREAKS MANY OF THE PROMISES MADE BY CANDIDATE CLINTON

Quite the contrary, this plan fulfills a number of the most critical pledges made by the President during his campaign -- to reduce budget deficits, to take on tough problems and choices that have been avoided in the past, to break the gridlock in Washington, to create a more progressive tax system, to reestablish the United States as a global economic leader, to improve the nation's trade status, and to increase investments in working families and in economic growth.

1. The President promised serious deficit reduction. This $500 billion plan is the biggest deficit reduction package in the nation's history.
2. The President promised to take on the tough choices. Never before has a President been willing, on his own, to go forward with the tough choices on both spending cuts and tax increases

that are needed to reduce the deficit. Whether it's controlling entitlement spending, keeping the lid on discretionary spending, asking the wealthy to pay their fair share, or calling for a broad-based energy tax to encourage conservation, the President has taken on the tough choices. He is asking every American to pitch in for the good of our country today and of our children in the future. That's what leadership is all about, and it's the kind of leadership he promised.
3. The President promised to end the gridlock. Despite the self-proclaimed efforts of Republicans to perpetuate gridlock, the President and the Congress are working together to reduce deficits, increase economic growth, and create jobs. When Republicans are willing to help make those efforts bipartisan, the President is welcoming their support; when they are not, he is working with Democrats to get the job done. And that is exactly what is happening with the economic plan.
4. The President promised a more progressive tax system in which the wealthy pay their fair share and the middle class was not forced to carry an excessive burden, as they did in the 1980's. In the House bill, 75 percent of new revenues come from the six percent of taxpayers with more than $100,000 of income, and two-thirds from those with over $200,000 of income. In the Senate bill, it's 85 percent over $100,000 and 79 percent over $200,000. There are no income tax increases for couples with under $140,000 in taxable income or single taxpayers with under $115,000 in taxable income. For the average family of four, the increased taxes would amount to somewhere between $?? and $??? a year (or $? and $?? a month).
5. The President promised to make this nation once again the unquestioned leader of the global economy. His recent performance at the G-7 meeting in Tokyo, just like an earlier G-7 meeting this year attended by Treasury Secretary Bentsen, made it clear that the President, by fulfilling his pledge to get this nation's economic house in order, has restored the ability of the United States to persuade other nations to take actions that will create global economic growth and increase export markets for American goods.
6. The President promised to increase investments in areas critical to the well-being of working families and to fostering economic growth. This legislation fulfills many of those promises. The following -- all fully paid for -- are contained in one or both versions of the legislation:
? Immunization for the nation's children
? Expansion of the earned income tax credit to take working families out of poverty
? Mickey Leland hunger prevention legislation, providing needed food stamp benefits to families with children
? Empowerment zones, tax incentives to encourage investments
? Family preservation legislation to help keep our families together
? Direct lending for the nation's students to entirely or partially replace more costly guaranteed student loans

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. email | Douglas Letter to Susan Brophy at 15:54. Subject: Line Item Veto. (1 page) | 03/16/1995 | P5 | 6153 |
| 002. email | Douglas Letter to Martha Foley, Charles Konigsberg, and Robert Damus at 15:55. Duplicate of 001. (1 page) | 03/16/1995 | P5 | 6153 Dup. |
| 003. email | Joseph Minarik to Charles Konigsberg and Robert Damus at 11:35. Subject: Re: Item Veto - Tax Expenditure Definintion. (1 page) | 03/20/1995 | P5 | |
| 004. email | Douglas Letter to Robert Damus, Charles Konigsberg, and Martha Foley at 8:55. Subject: Line Item Veto. (1 page) | 03/23/1995 | P5 | 6154 |
| 005. email | Douglas Letter to Robert Damus, Charles Konigsberg, and Martha Foley at 13:19. Subject: RE: Line Item Veto. (1 page) | 03/23/1995 | P5 | 6155 |
| 006. email | Robert Damus to Martha Foley at 13:28. Subject: RE: Line Item Veto. (1 page) | 03/23/1995 | P5 | |
| 007. email | Douglas Letter to James Castello at 13:10. Subject: Line Item Veto. (1 page) | 03/24/1995 | P5 | 6156 |
| 008. email | Douglas Letter to Martha Foley and Patrick Griffin at 11:30. Subject: Line Item Veto. (1 page) | 03/24/1995 | P5 | 6157 |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[03/08/1995-03/27/1995]

Van Zbinden
2007-0624-F
vz1258

## RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6153

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:16-MAR-1995 15:54:28.12

SUBJECT: Line Item Veto

TO: Susan Brophy ( BROPHY_S ) Autoforward to: Ann M. Cattali
READ:16-MAR-1995 16:14:03.93

TEXT:
Susan: Ab Mikva wanted me to update you on line item veto events (although I gather he may have spoken to you already). He was on the Hill at lunch today, and Sen Daschle and other Dem Senators approached him, indicating that they were contemplating filibustering against the compromise plan. They wanted to know what the White House thinks, in order to try to hold other Dem Senators. Back here, Walter Dellinger from OLC has finalized his opinion that S.137 would be vulnerable to attack in court and thus is problematic. Walter was called by Daschle's office to find out what OLC's final view is. Ab had Walter call back and tell Daschle that S.137 is open to serious constitutional question.

6154

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:23-MAR-1995 08:55:57.37

SUBJECT: Line Item Veto

TO: Robert G. Damus ( DAMUS_R ) (OMB)
READ:23-MAR-1995 08:59:52.59

TO: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)
READ:23-MAR-1995 10:36:38.74

TO: Martha Foley ( FOLEY_M ) (OMB)
READ:23-MAR-1995 09:47:25.27

TEXT:
I talked to Judge Mikva and James Castelo (his new deputy) last night about our discussions. Both are quite comfortable with the notion that the President can sign bills en bloc. They agreed with my assessment that the courts were extremely unlikely to want to probe into what actually happens in the Oval Office as the President signs and vetoes legislation. As long as the result of what he has done is clear, they saw no problem. In addition, they did not share my fear that if we get too "cute" with overall procedures to implement the line item veto that the Supreme Court might not buy it. They felt that we and Congress can work out whatever arrangements are appropriate, and the Court will not second guess it because there is no clear standard as to what the Constitution requires the presentment process to look like. So, that is the real expert view.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

6155

COPY

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:23-MAR-1995 13:19:08.37

SUBJECT: RE: Line Item Veto

TO: Martha Foley ( FOLEY_M ) (OMB)
READ:23-MAR-1995 13:19:18.47

CC: Robert G. Damus ( DAMUS_R ) (OMB)
READ:23-MAR-1995 13:23:37.29

CC: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)
READ:23-MAR-1995 14:49:01.34

TEXT:
Martha: After our meeting yesterday, it was my understanding that the OMB folks would be doing any drafting regarding what was thought necessary to add to the bill to solve procedural problems. So, I was not planning on doing any drafting. Chuck and Bob, is my assumption accurate? Also, I am inclined against including any provision in the bill saying that in block signing by the President is okay (if that is what you had in mind). That would imply that there is something wrong with such signing and the President needs special permission from Congress to do it that way. Instead, I think we ought to simply assume that the President can himself decide how he wants to sign and veto bills. All agree?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

6156

COPY

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:24-MAR-1995 13:10:25.57

SUBJECT: Line Item Veto

TO: James Castello ( CASTELLO_J ) (WHO)
READ:24-MAR-1995 15:44:20.73

TEXT:
James: Here is the latest OMB line item veto compromise proposal. I have raised this with OLC and will be faxing this to them to try to get a definitive view from them. What do you think?
=================== ATTACHMENT 1 ===================
ATT CREATION TIME/DATE:24-MAR-1995 12:42:00.00

ATT BODYPART TYPE:B

ATT CREATOR: Charles S. Konigsberg

ATT SUBJECT: HERE IS THE ITEM VETO COMPROMISE WE DISCUSSED...

ATT TO: Robert G. Damus ( DAMUS_R )

ATT TO: Douglas N. Letter ( LETTER_D )

ATT CC: Jacob J. Lew ( LEW_J )

TEXT:
1. President may submit a package of proposed rescissions AT ANY TIME. (This flexibility on timing for presidential action is actually stronger than House- or Senate-passed and should appeal to those wanting a strong item veto).
2. BA is withheld for 45 days (as under current law).
3. Congress required to vote on the proposed rescission package WITHOUT ANY SUBSTANTIVE CHANGE OR DELETION during the 45 day period under expedited procedures. (The ability of one House, by majority vote, to reinstate the money will appeal to Domenici and Byrd; the prohibition on deletions from the President's proposal is stronger than S. 14).
4. If Congress fails to vote within 45 days on the President's proposed rescissions, specifically as submitted by the President, the President is delegated the authority to rescind the affected accounts. More specifically, if both Houses fail to vote, the President may rescind; but if only one House votes and rejects the rescission, action by the other House becomes irrelevant and the President could not rescind. (This contingent delegation of rescission authority is insurance to guarantee that Congress will act on the President's proposal and should appeal to those wanting a strong item veto while still preserving Congress' right to act on the rescissions. Moreover, by formulating this as a delegation, rather than an action triggered by one House, this would seem to avoid any Chadha problem).
================= END ATTACHMENT 1 =================

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

6157

COPY

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:24-MAR-1995 11:30:39.79

SUBJECT: Line Item Veto

TO: Martha Foley ( FOLEY_M ) (OMB)
READ:24-MAR-1995 13:07:00.24

TO: Patrick J. Griffin ( GRIFFIN_P ) Autoforward to: Erin A. O'Con
READ:24-MAR-1995 11:37:15.84

CC: Erin A. O'Connor ( OCONNOR_E ) (WHO)
READ:24-MAR-1995 11:37:15.84

TEXT:

James Castello asked me to let you both know as soon as possible that he misspoke when he talked to you this morning about the line item veto bill that passed the Senate. He thought the bill did not provide for passage, disaggregation, and then a second en bloc passage. Chuck Konigsberg says that there was an amendment by Abraham that provided for en block passage after disaggregation. So, what James told you this morning needs to be modified.

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. email | Douglas Letter to Jeffery Connaughton at 13:27. Subject: Statement. (1 page) | 04/11/1995 | P5 | 6158 |
| 002. email | Douglas Letter to James Castello at 17:57. Subject: Line Item Veto memo. (2 pages) | 05/02/1995 | P5 | 6159 |
| 003. email | Charles Konigsberg to Douglas Letter and Paul Weinstein, Jr. at 10:02. Subject: Revised Line Item Veto Analysis--any comments? (12 pages) | 05/02/1995 | P5 | 6160 |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[03/30/1995-05/17/1995]

Van Zbinden
2007-0624-F
vz1259

### RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6158



RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME:11-APR-1995 13:27:28.49

SUBJECT: RE: statement

TO: Jeffrey J. Connaughton ( CONNAUGHTO_J ) (WHO)
READ:11-APR-1995 13:30:36.51

TEXT:
Jeff: After I sent the first message, I had a further reaction based on the line itme veto point. Since it is gone, this is academic, but I will raise it anyway. I assume that the people who drafted the signing statement understand the line item veto mechanism better than I do. But I am puzzled. As I understand it (I have not seen the bill that this refers to), Sen Braun worked in a proposal to retain the tax benefit for some FCC license sales to minorities, but not others? That would mean that the bill is taking away a tax benefit to some people, but possibly preserving it for some still in the agency pipeline. I don't understand very well the precise coverage of the line item veto provisions for tax provisions, but I did not think that it would cover something like this, i.e., repeal of a tax benefit with a small carve out for certain special cases. Thus, is this truly a good example of when a line item veto would be useful (at least a line item veto as contemplated by the current House and Senate versions)?
cc: James, Michael

6159

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME: 2-MAY-1995 17:57:12.45

SUBJECT: Line Item veto memo

TO: James Castello ( CASTELLO_J ) (WHO)
READ: 3-MAY-1995 10:24:15.07

TEXT:
James: I will bring over to your office a hard copy of the memo to which my comments respond.
=================== ATTACHMENT 1 ===================
ATT CREATION TIME/DATE: 2-MAY-1995 17:45:00.00

ATT BODYPART TYPE:B

ATT CREATOR: Douglas N. Letter

ATT SUBJECT: RE: Revised item veto analysis--any comments?

ATT TO: Charles S. Konigsberg ( KONIGSBERG_C )

ATT CC: Paul J. Weinstein, Jr ( WEINSTEIN_P )

TEXT:
Chuck: I want to consult James Castello, the Dpty WH Counsel, before I give you a definitive response on this. A few comments I have now are:

What are the continuing doubts by OLC about the current Senate version? I had thought this version, while a practical nightmare, looked constitutional.

In the discussion almost at the end about the judicial review part, you note (or OLC does) that even if there is standing in an Article III sense, a court might refuse to hear the merits of the case on some discretionary ground, and you mention political question. In the DC Circuit, where almost all of these congressional suits arise, that court has declined to hear many such cases under a doctrine it calls equitable discretion or remedial discretion. So, those are the grounds on which it is most likely a court would decline to hear the case, rather than political question.

Do we think the judicial review mechanism makes sense? Given the growing complexity of this legislation, it may take several Presidential actions and thus several different cases before the various parts of the law are all scrutinized by the judiciary. It is not at all clear that the first case to arise will raise all of the key issues that Congress wants the Supreme Court to rule on. Do we really think each of those cases deserves Supreme Court review? I strongly think not.

It would make more sense to provide for expedited review in the DC dist ct, with appeal to the DC Circuit. Then, the Supreme Court could decide whether the particular case was worth its attention, or whether it should wait until a later case that better presents the most important line item vetoes arises. The three-judge court mechanism has turned out to be generally a litigation disaster, and that is why it was generally repealed a few years back. It is currently causing major problems in the litigation involving the validity of the Cable Act First Amendment issues. So, if Congress truly wants a fast test of the validity of the heart of this statute, it should provide for normal judicial review instead.

cc: James Castello



================== END ATTACHMENT 1 ==================

6160



RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)

CREATION DATE/TIME: 2-MAY-1995 10:02:42.69

SUBJECT: Revised item veto analysis--any comments?

TO: Douglas N. Letter ( LETTER_D ) (WHO)
READ: 2-MAY-1995 10:17:26.91

TO: Paul J. Weinstein, Jr ( WEINSTEIN_P ) (OPD)
READ: 2-MAY-1995 13:40:10.09

TEXT:
PRINTER FONT 12_POINT_COURIER
ITEM VETO ISSUES

I. THE MECHANISM
A. House-
□
passed bill (HR 2)

1. Inadequate time permitted by the House bill for rescission messages.-
□
-
□
The House-
□
passed bill requires that the special message notifying the Congress of rescissions be sent to the Congress within 10 calendar days (not including Sundays) after the date of enactment of an appropriations bill.

Comment--This time constraint would unnecessarily constrain the Administration's ability to careful review each appropriation and tax item. Appropriations bills are normally enacted within a short period of time at the end of a fiscal year. Ten calendar days would be an unnecessarily short period of time during which to fully vet as many as 13 appropriations bills and, possibly, a Reconciliation bill. The legislation would be more realistic and effective if the special message could be transmitted within 20 calendar days of enactment.

2. Contents of Presidential Special Message under House version.-
□
-
□
The House-
□
passed bill requires the special message rescinding budget authority to include, along with other specified information, a description of "all actions, circumstances, and considerations relating to or bearing upon the rescission or veto and the decision to effect the rescission or veto, and to the maximum extent practicable, the estimated effect of the rescission upon the objects, purposes, and programs for

which the budget authority is provided."

DOJ Comment--Taken literally, this provision could be understood to obligate the President to say more than was reasonably appropriate and necessary to explain a rescission/veto decision. If so, it could encroach on the President's deliberative process. To dispel that implication, the Department of Justice (DOJ) recommends that the section be amended to require the President to provide the information only "to the maximum extent practicable."

B. Senate-

passed bill (S. 4)

1. Constitutionality.-

-

Under Senator Abraham's amendment to the Senate version, after the clerk has disaggregated a bill into items that are to be considered separate bills, "[t]he new bills resulting from the disaggregation...shall be immediately placed on the appropriate calendar in the House of origination, and upon passage, placed on the appropriate calendar in the other House. They shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment." If passed by both Houses in this manner, the bills are then to be presented to the President.

DOJ Comment--DOJ has stated that the enrollment procedure envisaged in an earlier version of S. 4 -- which did not contemplate another vote by both Houses after the enrolling clerk had disaggregated the bill -- would raise very difficult questions under the Presentment Clause, U.S. Constitution art. I, ?7, cl. 2, and might well not be sustained. In particular, DOJ stated that the Presentment Clause contemplates that what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

Senator Abraham's amendment attempts to address this difficulty by requiring that, after the enrolling clerk of the originating House has disaggregated a covered bill, both Houses vote on the disaggregated bills en bloc. The evident purpose of the amendment is to ensure that both Houses have voted on the bills that are presented to the President in exactly the same form as they are presented to him. DOJ believes that the chances that the separate enrollment procedure will be sustained are somewhat improved as a result of this amendment.

Nevertheless, DOJ believes that there still is a risk that a separate enrollment procedure, even as amended in the current version of S. 4, would be held unconstitutional. [DOJ will supplement]

2. Effect of Senate version on coherence of legislation.-

□
-
□
□
□
The Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises very serious concerns about the coherence of legislation.

Appropriations Legislation--[OMB to bill in comment]

Tax Legislation--Comment from Treasury--Any special effective date or any different treatment provided to governmental retirement plans or multiemployer plans covering collectively bargained employees would apparently need to be enrolled separately. This separate enrollment provision also would appear to apply to special transition dates in legislation (i.e. transactions entered into before certain dates). Disaggregating all these provisions from the underlying legislation may make bills very confusing.

3. Effect of Senate version on agency flexibility.-

□
-
□
-
□
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□
The
Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises concerns about the flexibility available to agencies.

Comment (from DOD)--Under the provisions of the Senate bill, DOD appropriations would be broken into several thousand bills, each consisting of a separate item. Placing items in individual appropriations bills would produce an undesirable rigidity to DOD operations and legislative procedures. This would eliminate the Department's authority to make the many minor budget adjustments that are necessary to manage operations on a day-to-day basis. For example, the inability of DOD to make quick realignments in certain programs could lead to: the shutdown of production lines and the dismissal of employees; the disruption of flying hours and degradation of pilot proficiency; the cancellation of contracts; and a failure to address urgent communication and electronic equipment deficiencies in times of emergency.

The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram funds to provide for emergencies or to pay for other unforeseen requirements such as fact of life changes in day-to-day operations, there could be a lengthy process made up of a four committee review of minor funding sources. It is not possible to maintain a ready military force under those conditions.

4. Separate enrollment under the Senate version of items which are classified or incorporated by reference.

[Damus to fill in]

5. Administrative implications (appropriations). -
□
-
□
The
Senate-
□
passed bill calls for the separate enrollment of each item with respect to appropriations measure, posing significant administrative and other practical problems for both the Congress and the Executive Branch.

Preliminary estimates of the number of "items" in most appropriations bills are in the thousands. Each such bill would need to be included in the computer tracking system before delivery to the West Wing -- a potentially severe problem near the end of a fiscal year or the expiration of a continuing resolution. If not vetoed, each signed bill would then be delivered by the Clerk's office to the Archives which would, presumably, assign unique public law numbers to each bill. (Note: Presently, there are five employees in the White House Clerk's office with one assigned as the primary bill clerk.) In addition, the time required to prepare Presidential decision memoranda (i.e., enrolled bill memoranda and veto messages) would significantly increase.

6. Potential political manipulation. -
□
-
□
The Senate bill's
definition of "item" as it relates to appropriations bills could result in political manipulation.

February 1, 1985 Memorandum Opinion for the Attorney General prepared by Acting Assistant Attorney General Ralph Tarr: "In addition to our constitutional concern, we have a concern with respect to the definition of the term 'item.' Both the old and new bills define an item as 'any numbered section and any unnumbered paragraph' of an appropriations bill. The failure of the bill to define the term 'item' other than by reference to the form in which an appropriations bill is organized could prove to be terribly cumbersome and might eventually lead to legislative manipulation and drafting techniques designed to subvert the purpose of the item veto legislation. For example, this proposal might well lead to the drafting of statutes without paragraphs or section numbers in order to prevent division of the bill into separate enrolled bills. As we previously noted, however foolish this may sound, we do not doubt that enterprising legislators would resort to any lawful drafting technique to avoid the Presidential authority created by these statutes. In addition, the Congress could dilute the effectiveness of the item veto power granted by the proposal by combining, in a single section, appropriations the President is known to favor with those to which he is opposed. As a practical matter, this type of problem will inhere in any legislation that seeks to require separate enrollment of individual appropriations."



II. TARGETED TAX BENEFITS

A. House-
□
passed bill (HR 2)

1. Constitutionality-
□
-
□
"repeal" of targeted tax benefits.-
□
-
□
□
□
The House bill authorizes the President to "veto" targeted tax benefits, thus resulting in the "repeal" of such benefits.

DOJ Comment--DOJ firmly believes that the use of the terms "veto" and "repeal" raises serious constitutional concerns that are not posed by the budget authority provisions of the House bill. In particular, U.S. Const. art. I, ? 7, cl. 2 provides that the President can exercise his "veto" power only before a provision becomes law, i.e., when a bill is presented to him for his approval or disapproval. But as drafted, H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law. As for the use of the word "repeal," DOJ suggests that the President is being given the unilateral power to change existing law. A court might well conclude that this would amount to an unconstitutional delegation of authority to the President, and a violation of the plain textual provisions of aft. I, ? 7, cl. w of the Constitution governing the manner in which laws are to be changed (specifically, through passage of amending legislation by both Houses of Congress and presentment to the President for his approval).

To avoid this significant constitutional problem, DOJ urges the following reformulation of the targeted tax benefit provisions of the House bill: (1) substitute "rescind" for "veto"; (2) substitute "indefinite suspension" for "repeal"; and (3) add a provision authorizing IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when the benefit is suspended. These changes would align the targeted tax benefits provisions of the House bill with the provisions regarding rescission of discretionary budget authority. Moreover, the change would place the targeted tax benefit provisions of the Act on far more secure constitutional footing. The Supreme Court long ago ruled that Congress may authorize the President to suspend the operation of a statute. See Field v. Clark, 143 U.S. 649 (1892).

2. House definition of targeted tax benefits.-
□
-
□

"Any
provision of a revenue or reconciliation Act determined by the President to provide a Federal tax deduction, credit, exclusion, preference, or other concession to 100 or fewer beneficiaries. Any partnership, limited partnership, trust, or S corporation, and any subsidiary or affiliate of the same parent corporation,

shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."
[Comment--to be filled in by Minarik and Treasury]

B. Senate-
□
passed bill (S 4)

1. Senate definition of targeted tax benefits-
□
-
□
"Any
provision:
(A) estimated by the Joint Committee on Taxation as losing revenue for any one of the three following periods-
□
-
□

(1) the first fiscal year covered by the most recently adopted concurrent resolution on the budget; or
(2) the period of 5 fiscal years covered by the most recently adopted concurrent resolution on the budget; or
(3) the period of 5 fiscal years following the first 5 years covered by the most recently adopted concurrent resolution on the budget; and
(B) having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

Comment (from Treasury)--[Treasury to expand their analysis]
The parameters of what would be defined as a targeted tax benefit under this legislation is very open-ended. In the pension area, for example, special effective dates and other rules are sometimes provided in legislation for multiemployer plans covering collectively bargained employees and also for governmental plans. The legislation would seem to allow for a line item veto of such provisions although one could make the argument that they are not similarly situated. What is intended here?

Moreover, determining whether something is "providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared to similarly situated taxpayers" also seems to allow for hair splitting in determining whether taxpayers are similarly situated. This could effectively gut the rule because there is probably always one distinguishing characteristic that can separate different taxpayers. This could result in a great deal of contention between proponents and opponents of a particular provision over determining whether the provision covers a subgroup of similarly situated taxpayers. Giving an expansive reading to similarly situated, on the other hand, could result in legislation for charitable organizations being classified as targeted tax benefits because in certain cases charitable organizations provide

similar services to that performed by for-profit organizations.

OMB Comment--The definition of "targeted tax benefit" should be amended to clarify that a rifle shot which causes a revenue raising provision to raise less revenue would be considered a separate item. Without such an amendment, it is unclear whether provisions such as the special preference in H.R. 831 -- given to certain applicants for section 1071 benefits -- would be subject to the item veto.

2. Evaluation and Sunset of Tax Expenditures.-

□

-

□

Section 9 of
the Senate-

□

passed bill requires the President: (1) to "submit legislation for the periodic review, reauthorization, and sunset of tax expenditures with his fiscal year 1997 budget"; and (2) to include in the budget, beginning with FY 1999, "a Federal Government performance plan for measuring the overall effectiveness of tax expenditures, including a schedule for periodically assessing the effects of specific tax expenditures in achieving performance goals."

In addition, section 9 would create a new parliamentary point of order in the House and Senate against "any bill, joint resolution, amendment, motion, or conference report that contains a tax expenditure unless the bill, joint resolution, amendment, motion, or conference report provides that the tax expenditure will terminate not later than 10 years after the date of enactment of the tax expenditure."

Comment (from Treasury): This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section 61 may be affected and subject to review. This would appear to be a massive undertaking requiring significant government resources.

It is unclear form the bill who is responsible for establishing the performance goals, how detailed they are intended to be, and what criteria should be used in determining effectiveness.

The point of order could have the effect of amendments to a particular section of the Code (enacted before this legislation) having a sunsetting provision when the rest of the provision does not.

□

III. DEFICIT LOCK-

□

BOX; SUPPLEMENTALS

The House bill provides that the President may "propose" reduction in the discretionary caps up to the amount of the rescissions. The Senate-
□
passed bill would require reduction of the caps or reduction of PAYGO balances by the amount of the vetoed items.

The Senate bill's requirement to reduce the discretionary caps leaves no opportunity to use the new item veto authority to pay for supplementals, thereby creating an incentive to continue using the current authority to request rescissions, in lieu of the new item veto authority.

In addition, the requirement to reduce PAYGO balances appears to have significant technical problems. (Damus?)

IV. APPLICATION TO DIRECT SPENDING (ENTITLEMENTS)

A. House-
□
passed bill (HR 2)

1. Coverage of direct spending.-
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-
□
The House-
□
passed bill applies enhanced rescission authority to "discretionary budget authority," but not to "direct spending."

Comment--The Administration supports the broad application of item veto authority to direct, as well as discretionary spending. The President's objective of curbing wasteful spending provisions would be furthered by extending the rescission authority in the House bill to authorizing legislation which contains new direct spending. This extension of rescission authority to direct spending would not cover appropriations which merely fund previously enacted entitlement legislation.

B. Senate-
□
passed bill (S. 4)

1. Definition of direct spending.-
□
-
□
The Senate-
□
passed bill would require the separate enrollment of "any numbered section or unnumbered paragraph, that contains new direct spending...."

Comment--The Senate-passed definition of "items of direct spending" is very unclear. Is a paragraph creating the government's obligation to pay an "item?" Are paragraphs setting forth beneficiaries, or conditions of payment, separate items? Is legislation changing an existing

entitlement program (by changing the beneficiary class or changing the conditions of entitlement) "new direct spending"?

2. Annually appropriated entitlements.-

□
-
□
The Senate bill
would apparently require that each item of appropriation -
□
-
□
□
□
including appropriations which fund underlying entitlement obligations -
□
-
□
be separately enrolled.

DOJ Comment--Section 5(1) of the Senate bill defines the term "appropriation measure" to mean "any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations." See also Bengzon v. Secretary of Justice, 299 U.S. 410, 413 (1937) "[a]n appropriation bill is one, the primary and specific aim of which, is to make appropriations of money from the public treasury."). It is assumed that certain entitlement and "quasi"-entitlement programs, such as food stamps, are not permanently funded, and so require appropriations from time to time. See Staff of House Comm. on the Budget, 99th Cong., 2d Sess., The Congressional Budget Process: A General Explanation 163-64, 171-72 (Comm. Print (1986): Charles Tiefer, Congressional Practice and Procedure 850 n. 3 (1989). The definition in section 5(1) is broad enough to encompass appropriations measures that fund such programs. Consequently, such measures would have to be separately enrolled, see sec. 4(a)(1), and if passed by both Houses thereafter would be subject to a Presidential veto, exactly as other enrolled bills are. DOJ therefore sees no constitutional obstacle to permitting the President to veto an appropriation that funds underlying entitlement obligations.

[Additional DOJ analysis required: is the entitlement thereby effectively repealed, or does the statutory obligation to pay still exist?]

□
V. JUDICIAL REVIEW
A. Expedited Review -
□
-
□
Both House-
□
and Senate-

□
passed bills
provide that "[a]ny Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that a provision of this Act violates the Constitution." H.R. 2, ?7(a)(1); S. 4, ?6(a)(1). The action is to be heard by a three-
□
□
□
judge court, with a direct appeal to the Supreme Court. Each House of Congress has the right to intervene in such an action. The district court and the Supreme Court have the duty to expedite the disposition of such actions to the greatest extent possible.

DOJ Comment -- Although it has been argued that judicial intervention in disputes between Congress and the President threatens to disrupt the constitutional separation of powers, and thus that members of Congress lack standing to challenge Presidential action, see, e.g., Moore v. U.S. House of Representatives, 733 F. 2d 946, 957-61 (D.C. Cir. 1984) (Scalia, J. concurring), cert. denied, 469 U.S. 1106 (1985); Barnes v. Kline, 759 F. 2d 21, 50, 62-63 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987), DOJ believes that this statutory provision would be sustained.

In general, a plaintiff has standing if he or she can show an injury, traceable to the challenged action, that can be redressed by the courts. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992). In a challenge by members of Congress to a line item veto statute, the critical standing element would be "injury". "Causation" and "redressibility" could presumably be established if "injury" were found. The injury asserted in the challenge would presumably be that the plaintiff's vote for an appropriations measure (or for a targeted tax benefit) was unconstitutionally denied effect by a Presidential line item veto. While the Supreme Court has never directly decided the issue of challenges by federal legislators to Presidential decisions, it has held that State legislators had standing to challenge the "nullification" of their votes against ratifying the proposed Child Labor Amendment, see Coleman v. Miller, 307 U.S. 433, 438 (1939). Lower Federal courts have relied on similar reasoning to sustain the standing of members of Congress challenging the President, see, e.g., Goldwater v. Carter, 617 F.2d 697 (D.C. Cir) (en banc), judgment vacated, 444 U.S. 996 (1979); see generally Risser v. Thompson, 930 F.2d 549, 550-551 (7th Cir.), cert. denied, 502 U.S. 860 (1991). The question cannot be considered free from doubt, but DOJ thinks that the statutory right to challenge a line item veto would be upheld. (It should be noted that even if the courts upheld the standing provision, they might still decline to reach the merits, e.g. on political question grounds. Such a non-merits decision would leave the statute in effect.)

DOJ does not think, however, that Congress can authorize actions by its members to challenge the line item statute before the President has actually exercised his veto authority under it. Any such suit would be, in effect, a request for a merely advisory opinion. Cf. Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring in the judgment).



B. Severability.-
□
-
□
The Senate-
□
passed bill, see S. 4, ?6(d),
includes a "severability" provision. The House-
□
passed bill does
not.

DOJ Comment--DOJ recommends inclusion of a severability provision in the final bill. The basic tenet of severability is whether Congress would have enacted the constitutionally valid sections of the challenged legislation even without the invalid ones. See, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). The presence of an explicit severability clause is, in itself, evidence tending to show that Congress would have enacted the valid sections even if they had stood alone; the Court has "held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Id. at 686. However, "the absence of a severability clause...does not raise a presumption against severability." Id. The question of severability could arise if, e.g., the Court held that the authority to "veto" or "rescind" a targeted tax benefit -- as in the House-passed bill -- was unconstitutional, without ruling specifically on the authority to rescind spending. To reduce the chances that the court would strike down the entire statute in such a case, a severability clause should therefore be included.

VI. EMERGENCY SPENDING.-
□
-
□
The Senate-
□
passed bill would provide
that any appropriations statute designated as "emergency" may not
contain any non-
□
emergency provisions; similarly, would provide
that any direct spending statute designated "emergency" may not
contain any non-
□
emergency provisions; and creates a point of
order against such legislation in the House and Senate.

The provision would apply to bills with emergency designations that also have any nonemergency discretionary or direct spending proposals, regardless of the merits of the proposals. For example, it would apply to bills with emergency designations that also have supplemental appropriations for certain mandatory programs that could run out of money, such as unemployment or veterans benefits. This would force separate legislation to provide necessary funding for those programs.

The provision would therefore reduce flexibility in responding to emergencies by eliminating regular appropriations bills as vehicles for enacting emergency funding. Regular appropriations bills have included necessary emergency appropriations in the past, such as $50 million for Rwanda in the FY 1995 Foreign Operations bill. The provision would result in additional, unnecessary supplemental appropriations bills to respond to an emergency requirement that could be more readily addressed through a regular appropriations bill.

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. email | Charles Konigsberg to Douglas Letter at 12:13. Subject: Item Veto Analysis. (11 pages) | 05/25/1995 | P5 | 6161 |
| 002. email | Douglas Letter to Charles Konigsberg at 16:15. Subject: Line Item Veto. (1 page) | 06/02/1995 | P5 | 6162 |
| 003. email | Douglas Letter to Charles Konigsberg at 18:48. Subject: RE: Attached is a revised AMR letter on item veto. (1 page) | 06/05/1995 | P5 | 6163 |
| 004. email | Douglas Letter to Charles Konigsberg at 16:09. Subject: Line Item Veto Letter. (1 page) | 06/06/1995 | P5 | 6164 |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[05/21/1995-06/08/1995]

Van Zbinden
2007-0624-F
vz1260

## RESTRICTION CODES

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6161

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)

CREATION DATE/TIME:25-MAY-1995 12:13:36.67

SUBJECT: ITEM VETO ANALYSIS

TO: Douglas N. Letter ( LETTER_D ) (WHO)
READ:25-MAY-1995 14:44:57.35

TEXT:
DOUG-
□
-Please review the following revised analysis on item veto. This should be the final circulation of the document. In particular, need an insert from you, in consultation with DOJ, on the issue of 3
□
-judge court and direct appeal to the Supreme Court. Need this by end of next week. Thanks.

TOP ALL
STAFF DRAFT--TECHNICAL ANALYSIS FOR ADMINISTRATION USE ONLY
HORIZONTAL_PITCH 10
PRINTER FONT 12_POINT_COURIER
DOUG-
□
-Please review the following revised analysis of item veto. This should be the final circulation of the document. In particular, need an insert from you, in consultation with DOJ, on the issue of 3
□
-judge court and direct appeal to the Supreme Court. Need this by end of next week. Thanks.
ITEM VETO ISSUES

I. THE MECHANISM
A. House-passed bill (HR 2)
1. Inadequate time permitted by the House bill for rescission messages.--The House-passed bill requires that the special message notifying the Congress of rescissions be sent to the Congress within 10 calendar days (not including Sundays) after the date of enactment of an appropriations bill.

OMB Comment--The legislation would be more realistic and effective if the special message could be transmitted within 20 calendar days of enactment. Ten calendar days would not allow the Administration sufficient time to review each appropriation and tax item carefully. Appropriations bills are normally enacted within a short period of time at the end of a fiscal year (or later) and contain thousands of line items. Ten calendar days would allow too little time for the affected agencies, OMB, and the White House to fully vet all of the items in as many as 13 appropriations bills and, often, a Budget Reconciliation bill. The review certainly could not be accomplished with the care and thoroughness that it would deserve.

□
I. THE MECHANISM (continued)
B. Senate-passed bill (S. 4)

1. Constitutionality.--Under Senator Abraham's amendment to the Senate version, after the clerk has disaggregated a bill's items into separate bills, "[t]he new bills resulting from the disaggregation...shall be immediately placed on the appropriate calendar in the House of origination, and upon passage, placed on the appropriate calendar in the other House. They shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment." If passed by both Houses in this manner, the bills are then to be presented to the President.

DOJ Comment--The enrollment procedure envisaged in an earlier version of S. 4 -- which did not contemplate another vote by both Houses after the enrolling clerk had disaggregated the bill -- would raise very serious questions under the Presentment Clause, U.S. Constitution Art. I, ?7, cl. 2, and might well not be sustained. In particular, DOJ stated that the Presentment Clause contemplates that what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

Senator Abraham's amendment attempts to address this problem by requiring that, after the enrolling clerk of the originating House has disaggregated a covered bill, both Houses vote on the disaggregated bills en bloc. The evident purpose of the amendment is to ensure that both Houses have voted on the bills that are presented to the President in exactly the same form as they are presented to him. DOJ believes that the chances that the separate enrollment procedure will be sustained are somewhat improved as a result of this amendment.

Nevertheless, DOJ believes that it remains uncertain whether a separate enrollment procedure, even as amended in the current version of S. 4, would be upheld. As DOJ understands it, the en bloc mechanism contemplated by Senator Abraham's amendment is a significant departure from traditional en bloc voting procedures -- a critical factor in the analysis, given that courts tend to ascribe considerable weight to past practice when deciding what the Constitution permits or mandates. See, e.g., The Pocket Veto Case, 279 U.S. 655, 688-90 (1929). Under traditional

en bloc voting procedures, unanimous consent is required (i.e., Members of Congress must consent to en bloc consideration of the particular measures).

By contrast, under Senator Abraham's amendment, the President would be given authority to veto individual measures on which members of Congress had no opportunity to exercise a vote, i.e. the en bloc procedure is automatic and does not require unanimous consent. In DOJ's view, a court might conclude that the Abraham amendment violates the Presentment Clause on these grounds.

2. Effect of Senate version on coherence of legislation.--

The Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises serious concerns about the coherence of legislation.

OMB Comment--The Senate bill defines "item of appropriation" as "any numbered section" or "unnumbered paragraph," or "allocation or suballocation of an appropriation." This would result in thousands of appropriations bills which --of necessity -- would have to reference many other related bills in order to have the intended effect. The result could be thousands of appropriations bills containing endless and confusing cross-references.

Treasury Comment--Separate enrollment would make it difficult to determine whether a particular provision in the tax code had been changed and would, in general, make the codification of tax laws less reliable. It would require multiple separate effective dates and transition rules -- making the tax laws more difficult to understand.

3. Effect of Senate version on agency flexibility.----The Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises concerns about the flexibility available to agencies.

An example of the difficulties confronting agencies is reflected in the following comments from DOD--

Under the provisions of the Senate bill, DOD appropriations would be broken into several thousand bills, each consisting of a separate item. Placing items in individual appropriations bills would produce an undesirable rigidity to DOD operations and legislative procedures. This would eliminate the Department's authority to make the many minor budget adjustments that are necessary to manage operations on a day-to-day basis. For example, the inability of DOD to

make quick realignments in certain programs could lead to: the shutdown of production lines and the dismissal of employees; the disruption of flying hours and degradation of pilot proficiency; the cancellation of contracts; and a failure to address urgent communication and electronic equipment deficiencies in times of emergency.

The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram funds to provide for emergencies or to pay for other unforeseen requirements such as fact of life changes in day-to-day operations, there could be a lengthy process made up of a four committee review of minor funding sources. This would interfere with DOD's responsibility to maintain a ready military force.

4. Separate enrollment under the Senate version of items which are classified or incorporated by reference.

OMB Comment--It is unclear how or whether separate enrollment would apply to classified material. Where a classified report or annex is incorporated by reference or otherwise included in a bill as if it were law, the separate enrollment procedure may not apply or might not allow the President to separately consider the items in the annex. The application of the separate enrollment procedure in these circumstances should be clarified.

5. Administrative implications. -- The Senate-passed bill

calls for the separate enrollment of each item with respect to appropriations measure, posing significant administrative and other practical problems for both the Congress and the Executive Branch.

OMB Comment-- Preliminary estimates of the number of "items" in most appropriations bills are in the thousands. Each item/bill would need to be included in the computer tracking system maintained by the White House Clerk's office before delivery to the West Wing -- a potentially severe problem near the end of a fiscal year or the expiration of a continuing resolution. If not vetoed, each signed bill would then be delivered by the Clerk's office to the Archives which would, presumably, assign unique public law numbers to each bill. In addition, the time required to prepare Presidential decision memoranda (i.e., enrolled bill

memoranda and veto messages) would significantly increase. Present equipment and staffing are inadequate to handle such volume.

Similar procedural issues could arise in the case of large tax and reconciliation measures. In addition, to the extent that multiple direct spending and revenue provisions in a large bill interact with each other for purposes of the "pay-as-you-go" estimates that must be issued by OMB 5 days after enactment of such legislation, special procedures might be needed for adjustments to these estimates.

6. Potential political manipulation. -- The Senate bill's definition of "item" as it relates to appropriations bills could result in political manipulation.

Commenting on a 1985 proposal for separate enrollment, Acting Asst Attorney General Ralph Tarr raised the following concerns: "In addition to our constitutional concern, we have a concern with respect to the definition of the term 'item.' Both the old and new bills define an item as 'any numbered section and any unnumbered paragraph' of an appropriations bill. The failure of the bill to define the term 'item' other than by reference to the form in which an appropriations bill is organized could prove to be terribly cumbersome and might eventually lead to legislative manipulation and drafting techniques designed to subvert the purpose of the item veto legislation. For example, this proposal might well lead to the drafting of statutes without paragraphs or section numbers in order to prevent division of the bill into separate enrolled bills. As we previously noted, however foolish this may sound, we do not doubt that enterprising legislators would resort to any lawful drafting technique to avoid the Presidential authority created by these statutes. In addition, the Congress could dilute the effectiveness of the item veto power granted by the proposal by combining, in a single section, appropriations the President is known to favor with those to which he is opposed. As a practical matter, this type of problem will inhere in any legislation that seeks to require separate enrollment of individual appropriations." February 1, 1985 Memorandum Opinion for the Attorney General prepared by Acting Assistant Attorney General Ralph Tarr.

☐
II. TARGETED TAX BENEFITS

A. House-passed bill (HR 2)

1. Constitutionality--"repeal" of targeted tax benefits.--

□

The House bill authorizes the President to "veto" targeted tax benefits, thus resulting in the "repeal" of such benefits.

DOJ Comment--The use of the terms "veto" and "repeal" raises serious constitutional concerns that are not posed by the budget authority provisions of the House bill. In particular, U.S. Const. Art. I, ? 7, cl. 2 provides that the President can exercise his "veto" power only before a provision becomes law, i.e., when a bill is presented to him for his approval or disapproval. But as drafted, H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law (i.e. veto items within a bill that has already been signed). As for the use of the word "repeal," DOJ is concerned that this implies that the President is being given the unilateral power to change existing law. A court might well conclude that this would amount to an unconstitutional delegation of authority to the President, and a violation of the plain textual provisions of Art. I, ? 7, cl. 2 of the Constitution governing the manner in which laws are to be changed (specifically, through passage of amending legislation by both Houses of Congress and presentment to the President for his approval).

To avoid this significant constitutional problem, DOJ urges the following reformulation of the targeted tax benefit provisions of the House bill: (1) substitute "rescind" for "veto"; (2) substitute "indefinite suspension" for "repeal" (the Supreme Court long ago ruled that Congress may authorize the President to suspend the operation of a statute, see Field v. Clark, 143 U.S. 649 (1892); and

(3) add a provision authorizing IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when the benefit is suspended. These changes would align the targeted tax benefits provisions of the House bill with the provisions regarding rescission of discretionary budget authority. Moreover, the change would place the targeted tax benefit provisions of the Act on far more secure constitutional footing.

2. House definition of targeted tax benefits.--"Any provision of a revenue or reconciliation Act determined by the President to provide a Federal tax deduction, credit, exclusion, preference, or other concession to 100 or fewer beneficiaries.

Any partnership, limited partnership, trust, or S corporation, and any subsidiary or affiliate of the same parent corporation, shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."

OMB Comment--In general, while the House bill has a strong rescission mechanism, its ability to save money could be further enhanced by adopting a more workable definition of targeted tax benefit, along the lines of the Senate version.

Treasury Comment--It would be difficult, if not impossible to determine the number of persons affected by any particular tax provision. The "100 or fewer beneficiaries" test requires too much precision and is too easy to avoid or manipulate in the drafting process. It creates an incentive for tax benefit provisions to be drafted too broadly. In addition, it provides no time limit within which the "100 or fewer" standard must be met.

The provision treating many persons as a single beneficiary is not properly drafted. For example, the language applying the rule to the subsidiaries of a corporation could treat each subsidiary as a separate beneficiary for purposes of the 100 or fewer test. It would be preferable to treat all "related persons" as a single beneficiary for purposes of the test and use a definition from the tax code, such as the one used in section 267(d), of related persons. This would prevent an individual from avoiding the 100 or fewer test by, for example, arranging for a business to be operated through 101 separate corporations.

□

II. TARGETED TAX BENEFITS (continued)

B. Senate-passed bill (S 4)

1. Senate definition of targeted tax benefits--"Any provision:

(A) estimated by the Joint Committee on Taxation as losing revenue for any one of the three following periods--

□

(1) the first fiscal year covered by the most recently adopted concurrent resolution on the budget; or

(2) the period of the 5 fiscal years covered by the most recently adopted concurrent resolution on the budget; or

(3) the period of the 5 fiscal years following the first 5 years covered by the most recently adopted concurrent resolution on the budget; and

(B) having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

OMB Comment--The definition of "targeted tax benefit" should be amended to clarify that a rifle shot that causes a revenue raising provision to raise less revenue would be considered a separate item. Without such an amendment, it is unclear whether provisions such as the special preference in H.R. 831 -- given to certain applicants for section 1071 benefits -- would be subject to the item veto.

2. Evaluation and Sunset of Tax Expenditures.--Section 9 of the Senate-passed bill requires the President: (1) to "submit legislation for the periodic review, reauthorization, and sunset of tax expenditures with his fiscal year 1997 budget"; and (2) to include in the budget, beginning with FY 1999, "a Federal Government performance plan for measuring the overall effectiveness of tax expenditures, including a schedule for periodically assessing the effects of specific tax expenditures in achieving performance goals."

In addition, section 9 would require that "No later than May 1, 1997, the Director of the OMB shall submit a report to the President and to the Congress which shall...describe the framework to be utilized by the Director of the OMB, after consultation with the Secretary of the Treasury, the Comptroller General of the United States, and the Joint Committed on Taxation, for undertaking periodic analyses of the effects of tax expenditures in achieving performance goals and the relationship between tax expenditures and spending programs."

Finally, section 9 would create a new point of order in the House and Senate against "any bill, joint resolution, amendment, motion, or conference report that contains a tax expenditure unless the bill, joint resolution, amendment, motion, or conference report provides that the tax expenditure will terminate not later than 10 years after the date of enactment of the tax expenditure."

OMB Comment--It should be noted that requirements that the President submit legislation have generally been viewed as precatory.

Treasury Comment: This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section 61 may be affected and subject to review. This would appear to be a massive undertaking requiring significant government resources.

It is unclear from the bill who is responsible for establishing the performance goals, how detailed they are intended to be, and what criteria should be used in determining effectiveness.

The point of order could cause amendments to particular sections of the Code (enacted before this legislation) to have sunsetting provision when the rest of such provisions do not.

"Tax expenditure" is not defined for purposes of the bill. Presumably, it is intended to have the same meaning as in section 3 of the Congressional Budget Act.

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III. DEFICIT LOCK-BOX; SUPPLEMENTALS

The House bill provides that the President may "propose" reduction in the discretionary caps up to the amount of the rescissions. The Senate-passed bill would require reduction of the caps or reduction of PAYGO balances by the amount of the vetoed items.

OMB Comment--The Senate bill's requirement to reduce the discretionary caps leaves no opportunity to use the new item veto authority to pay for supplementals, thereby arguably creating an incentive -- in some cases -- to continue using the current authority to request rescissions, in lieu of the new item veto authority.

In addition, the requirement to reduce the discretionary caps or paygo balances appears to have significant technical problems: (1) the discretionary cap reduction language assumes that appropriations are within the caps; and (2) the paygo language, i.e. reduction of "balances," could lead to negative balances and cause a sequester.

□
IV. APPLICATION TO DIRECT SPENDING

A. House-passed bill (HR 2)

1. Coverage of direct spending.--The House-passed bill applies enhanced rescission authority to "discretionary budget authority," but not to "direct spending."

OMB Comment--The Administration supports the broad application of item veto authority to direct, as well as discretionary spending. The President's objective of curbing wasteful spending provisions would be furthered by extending the rescission authority in the House bill to new direct spending -- i.e., legislation which authorizes new direct spending programs or increases existing programs. (This extension of rescission authority to direct spending would not cover appropriations which merely fund previously enacted entitlement legislation).

□

IV. APPLICATION TO DIRECT SPENDING (continued)

B. Senate-passed bill (S. 4)

1. Definition of direct spending.--The Senate-passed bill would require the separate enrollment of "any numbered section or unnumbered paragraph, that contains new direct spending...."

OMB Comment--The Senate-passed definition of "items of direct spending" is very unclear. Is a paragraph creating the government's obligation to pay an "item?" Are paragraphs setting forth beneficiaries, or conditions of payment, separate items? Is legislation changing an existing entitlement program (by changing the beneficiary class or changing the conditions of entitlement) "new direct spending"?

2. Annually appropriated entitlements.--The Senate bill would apparently require that each item of appropriation --

□

including appropriations which fund underlying entitlement obligations -- be separately enrolled.

DOJ Comment--Section 5(1) of the Senate bill defines the term "appropriation measure" to mean "any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations." See also Bengzon v. Secretary of Justice, 299 U.S. 410, 413 (1937) "[a]n appropriation bill is one, the primary and specific aim of which, is to make appropriations of money from the public treasury."). Certain entitlement and "quasi"-entitlement programs, such as food stamps, are not permanently funded, and so require appropriations from time to time. See Staff of House Comm. on the Budget, 99th Cong., 2d Sess., The Congressional Budget Process: A General Explanation 163-64, 171-72 (Comm. Print (1986): Charles Tiefer, Congressional Practice and Procedure 850 n. 3 (1989). The definition in section 5(1) is broad enough to encompass appropriations measures that fund such programs. Such measures would presumably have to be separately enrolled, see sec. 4(a)(1), and if passed by both Houses thereafter would be subject to a Presidential veto, exactly as other enrolled bills are.

DOJ sees no constitutional obstacle to permitting the President to veto an appropriation that funds underlying entitlement obligations. It is also DOJ's view that if the President vetoes such an appropriation, and that veto is not overridden, the underlying entitlement statute would not be repealed.

However, in the absence of an appropriation, no money may be withdrawn from the Treasury to make the payment. See U.S. Const. Art. I, ?9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of an Appropriation made by

Law."); OPM v. Richmond, 496, U.S. 414, 424 (1990) (Appropriations Clause requires that money may be paid from Treasury only pursuant to duly enacted appropriations measures). In resolving this conflict, a court would have to determine whether, given the underlying entitlement statute, payment is owed. This would be a matter of statutory interpretation.

V. JUDICIAL REVIEW

A. Expedited Review.-- Both House- and Senate-passed bills provide that "[a]ny Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that a provision of this Act violates the Constitution." H.R. 2, ?7(a)(1); S. 4, ?6(a)(1). The action is to be heard by a three-judge court, with a direct appeal to the Supreme Court. Each House of Congress has the right to intervene in such an action. The district court and the Supreme Court have the duty to expedite the disposition of such actions to the greatest extent possible.

DOJ Comment -- Although it has been argued that judicial intervention in disputes between Congress and the President threatens to disrupt the constitutional separation of powers, and thus that members of Congress lack standing to challenge Presidential action, see, e.g., Moore v. U.S. House of Representatives, 733 F. 2d 946, 957-61 (D.C. Cir. 1984) (Scalia, J. concurring), cert. denied, 469 U.S. 1106 (1985); Barnes v. Kline, 759 F. 2d 21, 50, 62-63 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987), DOJ believes that this statutory provision would be sustained.

In general, a plaintiff has standing if he or she can show an injury, traceable to the challenged action, that can be redressed by the courts. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992). In a challenge by members of Congress to a line item veto statute, the critical standing element would be "injury". "Causation" and "redressibility" could presumably be established if "injury" were found. The injury asserted in the challenge would presumably be that the plaintiff's vote for an appropriations measure (or for a targeted tax benefit) was unconstitutionally denied effect by a Presidential line item veto. While the Supreme Court has never directly decided the issue of challenges by federal legislators to Presidential decisions, it has held that State legislators had standing to challenge the "nullification" of their votes against ratifying the proposed Child Labor Amendment, see Coleman v. Miller, 307 U.S. 433, 438 (1939). Lower Federal courts have relied on similar reasoning to sustain the standing of members of Congress challenging the President, see, e.g., Goldwater v. Carter, 617 F.2d 697 (D.C. Cir) (en banc), judgment vacated, 444 U.S. 996 (1979); see generally Risser v. Thompson, 930 F.2d 549, 550-551 (7th Cir.), cert. denied, 502 U.S. 860 (1991). The question cannot be considered free from doubt, but DOJ believes that the statutory right to challenge a line item veto would be upheld. (It should be noted that even if the courts upheld the standing provision, they might still decline to reach the merits, e.g. on political question grounds. Such a non-merits decision would leave the statute in effect.)

DOJ does not believe, however, that Congress can authorize actions by its members to challenge the line item statute before the President has actually exercised his veto authority under it. Any such suit would be, in effect, a request for a merely advisory opinion. Cf. Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring in the judgment).

[Insert paragraph to be worked out by DOJ/OLC and WH/Counsel regarding 3-judge court and supreme court review]

B. Severability.--The Senate-passed bill, see S. 4, ?6(d), includes a "severability" provision. The House-passed bill does not.

DOJ Comment--DOJ recommends inclusion of a severability provision in the final bill. The basic tenet of severability is whether Congress would have enacted the constitutionally valid sections of the challenged legislation even without the invalid ones. See, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). The presence of an explicit severability clause is, in itself, evidence tending to show that Congress would have enacted the valid sections even if they had stood alone; the Court has "held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Id. at 686. However, "the absence of a severability clause...does not raise a presumption against severability." Id. The question of severability could arise if, e.g., the Court held that the authority to "veto" or "rescind" a targeted tax benefit -- as in the House-passed bill -- was unconstitutional, without ruling specifically on the authority to rescind spending. To reduce the chances that the court would strike down the entire statute in such a case, a severability clause should therefore be included.

□

VI. EMERGENCY SPENDING.--The Senate-passed bill would provide that any appropriations statute designated as "emergency" may not contain any non-emergency provisions; similarly, it would provide that any direct spending statute designated "emergency" may not contain any non-emergency provisions; and it creates a point of order against such legislation in the House and Senate.

OMB Comment--The provision would apply to bills with emergency designations that also include nonemergency discretionary or direct spending proposals. For example, it would apply to bills with emergency designations that also have supplemental appropriations for certain mandatory programs that are running out of money, such as unemployment or veterans benefits. Conversely, it would also apply to regular appropriations bills and supplementals, which include some emergency spending.

The Senate item veto bill would therefore eliminate regular and supplemental appropriations bills as vehicles for enacting emergency funding. Regular appropriations bills have included necessary emergency appropriations in the past, such as $50 million for Rwanda in the FY 1995 Foreign Operations bill. Rescission bills, such as the FY

95 rescission bill, have likewise included emergency funding (FEMA funding in the case of the '95 rescission bill).

6162

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME: 2-JUN-1995 16:15:15.13

SUBJECT: Line Item Veto

TO: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)
READ: 2-JUN-1995 17:49:04.80

TEXT:
Chuck: Here is an insert for your line item veto memo. This has been cleared with Dawn Johnsen and Mike Small at OLC.
==================== ATTACHMENT 1 ====================
ATT CREATION TIME/DATE: 2-JUN-1995 16:14:00.00

ATT BODYPART TYPE:p

ATT CREATOR: Douglas N. Letter

TEXT:

PRINTER FONT 12_POINT_COURIER

June 1, 1995

Insert into OMB technical analysis of line item veto authority

For insertion onto page 15:

The three-judge court judicial review mechanism should be deleted. Considerable litigation experience with three-judge courts has shown that they are often inefficient and cumbersome, and can actually cause considerable delay in obtaining judicial review of key issues. When Congress deleted a three-judge court provision in 1976 (the former 28 U.S.C. ? 2281), it found that such courts often raise myriad procedural problems -- which are difficult to predict in advance -- hindering speedy judicial resolution. For example, in this matter, it is possible that the first case or cases brought raising issues under the line item veto statutory scheme will not properly or cleanly present the actual issue of the validity of the veto mechanism. Yet, such a case would have to be heard by a three-judge court, followed by expedited Supreme Court review, which might be totally unnecessary.

The desired expedited judicial review can be accomplished through a mechanism providing for suits challenging the statutory scheme to be filed in the federal district court for the District of Columbia; a single district judge can act faster and more efficiently than a three-judge court in readying a case involving important issues for review by the higher courts. Review would then be through the D.C. Circuit and the Supreme Court, if warranted. The legislation can provide for highly expedited treatment by these courts, all of which can act very quickly when called upon to do so. Thus, no time should be lost through this judicial review path, and the likelihood of time and judicial resources being wasted through a three-judge court scheme will be minimized.
================== END ATTACHMENT 1 ==================

6163

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME: 5-JUN-1995 18:48:30.27

SUBJECT: RE: Attached is a revised AMR letter on item veto

TO: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)
READ: 5-JUN-1995 19:01:11.59

CC: Robert G. Damus ( DAMUS_R ) (OMB)
READ: 6-JUN-1995 11:28:27.17

TEXT:
Chuck: I had raised this point some time ago with Ab, along with others concerning the line item veto. I remember clearly that he and I shared the view that the 3-judge mechanism was a bad idea that should be changed if possible. I have not mentioned the point to him since then. Is it necessary to go back to him on this? If so, I will, but I have no reason to think his view has changed on this, or that he thinks it is a particularly important point. Also, as far as OLC is concerned, I have discussed the point with Michael Small, and showed Dawn and Michael the draft of what I sent to you; I have no idea if they have discussed this specific point with Walter personally.

6164

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Douglas N. Letter ( LETTER_D ) (WHO)

CREATION DATE/TIME: 6-JUN-1995 16:09:15.66

SUBJECT: Line Item Veto letter

TO: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)
READ: 6-JUN-1995 16:36:40.91

TEXT:
Chuck: I faxed to Dawn Johnsen and Mike Small just the paragraph from the draft letter dealing with the three technical points. I said that OMB wanted to know if this language was okay with Walter. Mike called me to say that Walter is on his way to New Orleans to argue a Brady Act case. However, the language looked fine; specifically on the 3-judge point, he said OLC did not care, and what I had done looked fine.

# Withdrawal/Redaction Sheet
## Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. email | Charles Konigsberg to Douglas Letter and Paul Weinstein, Jr. at 10:02. Subject: Line Item Veto Analysis--Any comments? (12 pages) | 05/02/1995 | P5 6165 |



**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Line Item Veto])
OA/Box Number: 250000

**FOLDER TITLE:**

[03/28/1995-05/21/1995]

Van Zbinden
2007-0624-F
vz1261

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6165

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)

CREATION DATE/TIME: 2-MAY-1995 10:02:42.69

SUBJECT: Revised item veto analysis--any comments?

TO: Douglas N. Letter ( LETTER_D ) (WHO)
READ: 2-MAY-1995 10:17:26.91

TO: Paul J. Weinstein, Jr ( WEINSTEIN_P ) (OPD)
READ: 2-MAY-1995 13:40:10.09

TEXT:
PRINTER FONT 12_POINT_COURIER
ITEM VETO ISSUES

I. THE MECHANISM
A. House-
□
passed bill (HR 2)

1. Inadequate time permitted by the House bill for rescission messages.-
□
-
□
The House-
□
passed bill requires that the special message notifying the Congress of rescissions be sent to the Congress within 10 calendar days (not including Sundays) after the date of enactment of an appropriations bill.

Comment--This time constraint would unnecessarily constrain the Administration's ability to careful review each appropriation and tax item. Appropriations bills are normally enacted within a short period of time at the end of a fiscal year. Ten calendar days would be an unnecessarily short period of time during which to fully vet as many as 13 appropriations bills and, possibly, a Reconciliation bill. The legislation would be more realistic and effective if the special message could be transmitted within 20 calendar days of enactment.

2. Contents of Presidential Special Message under House version.-
□
-
□
The House-
□
passed bill requires the special message rescinding budget authority to include, along with other specified information, a description of "all actions, circumstances, and considerations relating to or bearing upon the rescission or veto and the decision to effect the rescission or veto, and to the maximum extent practicable, the estimated effect of the rescission upon the objects, purposes, and programs for

which the budget authority is provided."



DOJ Comment--Taken literally, this provision could be understood to obligate the President to say more than was reasonably appropriate and necessary to explain a rescission/veto decision. If so, it could encroach on the President's deliberative process. To dispel that implication, the Department of Justice (DOJ) recommends that the section be amended to require the President to provide the information only "to the maximum extent practicable."

B. Senate-

passed bill (S. 4)

1. Constitutionality.-

-

Under Senator Abraham's amendment to the Senate version, after the clerk has disaggregated a bill into items that are to be considered separate bills, "[t]he new bills resulting from the disaggregation...shall be immediately placed on the appropriate calendar in the House of origination, and upon passage, placed on the appropriate calendar in the other House. They shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment." If passed by both Houses in this manner, the bills are then to be presented to the President.

DOJ Comment--DOJ has stated that the enrollment procedure envisaged in an earlier version of S. 4 -- which did not contemplate another vote by both Houses after the enrolling clerk had disaggregated the bill -- would raise very difficult questions under the Presentment Clause, U.S. Constitution art. I, ?7, cl. 2, and might well not be sustained. In particular, DOJ stated that the Presentment Clause contemplates that what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

Senator Abraham's amendment attempts to address this difficulty by requiring that, after the enrolling clerk of the originating House has disaggregated a covered bill, both Houses vote on the disaggregated bills en bloc. The evident purpose of the amendment is to ensure that both Houses have voted on the bills that are presented to the President in exactly the same form as they are presented to him. DOJ believes that the chances that the separate enrollment procedure will be sustained are somewhat improved as a result of this amendment.

Nevertheless, DOJ believes that there still is a risk that a separate enrollment procedure, even as amended in the current version of S. 4, would be held unconstitutional. [DOJ will supplement]

2. Effect of Senate version on coherence of legislation.-

□
-
□
□
□
The Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises very serious concerns about the coherence of legislation.

Appropriations Legislation--[OMB to bill in comment]

Tax Legislation--Comment from Treasury--Any special effective date or any different treatment provided to governmental retirement plans or multiemployer plans covering collectively bargained employees would apparently need to be enrolled separately. This separate enrollment provision also would appear to apply to special transition dates in legislation (i.e. transactions entered into before certain dates). Disaggregating all these provisions from the underlying legislation may make bills very confusing.

3. Effect of Senate version on agency flexibility.-

□
-
□
-
□
-
□
The
Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises concerns about the flexibility available to agencies.

Comment (from DOD)--Under the provisions of the Senate bill, DOD appropriations would be broken into several thousand bills, each consisting of a separate item. Placing items in individual appropriations bills would produce an undesirable rigidity to DOD operations and legislative procedures. This would eliminate the Department's authority to make the many minor budget adjustments that are necessary to manage operations on a day-to-day basis. For example, the inability of DOD to make quick realignments in certain programs could lead to: the shutdown of production lines and the dismissal of employees; the disruption of flying hours and degradation of pilot proficiency; the cancellation of contracts; and a failure to address urgent communication and electronic equipment deficiencies in times of emergency.

The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram funds to provide for emergencies or to pay for other unforeseen requirements such as fact of life changes in day-to-day operations, there could be a lengthy process made up of a four committee review of minor funding sources. It is not possible to maintain a ready military force under those conditions.

4. Separate enrollment under the Senate version of items which are classified or incorporated by reference.

[Damus to fill in]

5. Administrative implications (appropriations). -
□
-
□
The
Senate-
□
passed bill calls for the separate enrollment of each item with respect to appropriations measure, posing significant administrative and other practical problems for both the Congress and the Executive Branch.

Preliminary estimates of the number of "items" in most appropriations bills are in the thousands. Each such bill would need to be included in the computer tracking system before delivery to the West Wing -- a potentially severe problem near the end of a fiscal year or the expiration of a continuing resolution. If not vetoed, each signed bill would then be delivered by the Clerk's office to the Archives which would, presumably, assign unique public law numbers to each bill. (Note: Presently, there are five employees in the White House Clerk's office with one assigned as the primary bill clerk.) In addition, the time required to prepare Presidential decision memoranda (i.e., enrolled bill memoranda and veto messages) would significantly increase.

6. Potential political manipulation. -
□
-
□
The Senate bill's
definition of "item" as it relates to appropriations bills could result in political manipulation.

February 1, 1985 Memorandum Opinion for the Attorney General prepared by Acting Assistant Attorney General Ralph Tarr: "In addition to our constitutional concern, we have a concern with respect to the definition of the term 'item.' Both the old and new bills define an item as 'any numbered section and any unnumbered paragraph' of an appropriations bill. The failure of the bill to define the term 'item' other than by reference to the form in which an appropriations bill is organized could prove to be terribly cumbersome and might eventually lead to legislative manipulation and drafting techniques designed to subvert the purpose of the item veto legislation. For example, this proposal might well lead to the drafting of statutes without paragraphs or section numbers in order to prevent division of the bill into separate enrolled bills. As we previously noted, however foolish this may sound, we do not doubt that enterprising legislators would resort to any lawful drafting technique to avoid the Presidential authority created by these statutes. In addition, the Congress could dilute the effectiveness of the item veto power granted by the proposal by combining, in a single section, appropriations the President is known to favor with those to which he is opposed. As a practical matter, this type of problem will inhere in any legislation that seeks to require separate enrollment of individual appropriations."



II. TARGETED TAX BENEFITS

A. House-
□
passed bill (HR 2)

1. Constitutionality-
□
-
□
"repeal" of targeted tax benefits.-
□
-
□
□
□
The House bill authorizes the President to "veto" targeted tax benefits, thus resulting in the "repeal" of such benefits.

DOJ Comment--DOJ firmly believes that the use of the terms "veto" and "repeal" raises serious constitutional concerns that are not posed by the budget authority provisions of the House bill. In particular, U.S. Const. art. I, ? 7, cl. 2 provides that the President can exercise his "veto" power only before a provision becomes law, i.e., when a bill is presented to him for his approval or disapproval. But as drafted, H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law. As for the use of the word "repeal," DOJ suggests that the President is being given the unilateral power to change existing law. A court might well conclude that this would amount to an unconstitutional delegation of authority to the President, and a violation of the plain textual provisions of aft. I, ? 7, cl. w of the Constitution governing the manner in which laws are to be changed (specifically, through passage of amending legislation by both Houses of Congress and presentment to the President for his approval).

To avoid this significant constitutional problem, DOJ urges the following reformulation of the targeted tax benefit provisions of the House bill: (1) substitute "rescind" for "veto"; (2) substitute "indefinite suspension" for "repeal"; and (3) add a provision authorizing IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when the benefit is suspended. These changes would align the targeted tax benefits provisions of the House bill with the provisions regarding rescission of discretionary budget authority. Moreover, the change would place the targeted tax benefit provisions of the Act on far more secure constitutional footing. The Supreme Court long ago ruled that Congress may authorize the President to suspend the operation of a statute. See Field v. Clark, 143 U.S. 649 (1892).

2. House definition of targeted tax benefits.-
□
-
□

"Any
provision of a revenue or reconciliation Act determined by the President to provide a Federal tax deduction, credit, exclusion, preference, or other concession to 100 or fewer beneficiaries. Any partnership, limited partnership, trust, or S corporation, and any subsidiary or affiliate of the same parent corporation,

shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."
[Comment--to be filled in by Minarik and Treasury]

B. Senate-
□
passed bill (S 4)

1. Senate definition of targeted tax benefits-
□
-
□
"Any
provision:
(A) estimated by the Joint Committee on Taxation as losing revenue for any one of the three following periods-
□
-
□

(1) the first fiscal year covered by the most recently adopted concurrent resolution on the budget; or
(2) the period of 5 fiscal years covered by the most recently adopted concurrent resolution on the budget; or
(3) the period of 5 fiscal years following the first 5 years covered by the most recently adopted concurrent resolution on the budget; and
(B) having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

Comment (from Treasury)--[Treasury to expand their analysis]
The parameters of what would be defined as a targeted tax benefit under this legislation is very open-ended. In the pension area, for example, special effective dates and other rules are sometimes provided in legislation for multiemployer plans covering collectively bargained employees and also for governmental plans. The legislation would seem to allow for a line item veto of such provisions although one could make the argument that they are not similarly situated. What is intended here?

Moreover, determining whether something is "providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared to similarly situated taxpayers" also seems to allow for hair splitting in determining whether taxpayers are similarly situated. This could effectively gut the rule because there is probably always one distinguishing characteristic that can separate different taxpayers. This could result in a great deal of contention between proponents and opponents of a particular provision over determining whether the provision covers a subgroup of similarly situated taxpayers. Giving an expansive reading to similarly situated, on the other hand, could result in legislation for charitable organizations being classified as targeted tax benefits because in certain cases charitable organizations provide



similar services to that performed by for-profit organizations.

OMB Comment--The definition of "targeted tax benefit" should be amended to clarify that a rifle shot which causes a revenue raising provision to raise less revenue would be considered a separate item. Without such an amendment, it is unclear whether provisions such as the special preference in H.R. 831 -- given to certain applicants for section 1071 benefits -- would be subject to the item veto.

2. Evaluation and Sunset of Tax Expenditures.-

-

Section 9 of the Senate-passed bill requires the President: (1) to "submit legislation for the periodic review, reauthorization, and sunset of tax expenditures with his fiscal year 1997 budget"; and (2) to include in the budget, beginning with FY 1999, "a Federal Government performance plan for measuring the overall effectiveness of tax expenditures, including a schedule for periodically assessing the effects of specific tax expenditures in achieving performance goals."

In addition, section 9 would create a new parliamentary point of order in the House and Senate against "any bill, joint resolution, amendment, motion, or conference report that contains a tax expenditure unless the bill, joint resolution, amendment, motion, or conference report provides that the tax expenditure will terminate not later than 10 years after the date of enactment of the tax expenditure."

Comment (from Treasury): This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section 61 may be affected and subject to review. This would appear to be a massive undertaking requiring significant government resources.

It is unclear form the bill who is responsible for establishing the performance goals, how detailed they are intended to be, and what criteria should be used in determining effectiveness.

The point of order could have the effect of amendments to a particular section of the Code (enacted before this legislation) having a sunsetting provision when the rest of the provision does not.

III. DEFICIT LOCK-

BOX; SUPPLEMENTALS



The House bill provides that the President may "propose" reduction in the discretionary caps up to the amount of the rescissions. The Senate-
□
passed bill would require reduction of the caps or reduction of PAYGO balances by the amount of the vetoed items.

The Senate bill's requirement to reduce the discretionary caps leaves no opportunity to use the new item veto authority to pay for supplementals, thereby creating an incentive to continue using the current authority to request rescissions, in lieu of the new item veto authority.

In addition, the requirement to reduce PAYGO balances appears to have significant technical problems. (Damus?)

IV. APPLICATION TO DIRECT SPENDING (ENTITLEMENTS)

A. House-
□
passed bill (HR 2)

1. Coverage of direct spending.-
□
-
□
The House-
□
passed bill
applies enhanced rescission authority to "discretionary budget authority," but not to "direct spending."

Comment--The Administration supports the broad application of item veto authority to direct, as well as discretionary spending. The President's objective of curbing wasteful spending provisions would be furthered by extending the rescission authority in the House bill to authorizing legislation which contains new direct spending. This extension of rescission authority to direct spending would not cover appropriations which merely fund previously enacted entitlement legislation.

B. Senate-
□
passed bill (S. 4)

1. Definition of direct spending.-
□
-
□
The Senate-
□
passed bill
would require the separate enrollment of "any numbered section or unnumbered paragraph, that contains new direct spending...."

Comment--The Senate-passed definition of "items of direct spending" is very unclear. Is a paragraph creating the government's obligation to pay an "item?" Are paragraphs setting forth beneficiaries, or conditions of payment, separate items? Is legislation changing an existing

entitlement program (by changing the beneficiary class or changing the conditions of entitlement) "new direct spending"?



2. Annually appropriated entitlements.-

□
-
□
The Senate bill
would apparently require that each item of appropriation -
□
-
□
□
□
including appropriations which fund underlying entitlement obligations -
□
-
□
be separately enrolled.

DOJ Comment--Section 5(1) of the Senate bill defines the term "appropriation measure" to mean "any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations." See also Bengzon v. Secretary of Justice, 299 U.S. 410, 413 (1937) "[a]n appropriation bill is one, the primary and specific aim of which, is to make appropriations of money from the public treasury."). It is assumed that certain entitlement and "quasi"-entitlement programs, such as food stamps, are not permanently funded, and so require appropriations from time to time. See Staff of House Comm. on the Budget, 99th Cong., 2d Sess., The Congressional Budget Process: A General Explanation 163-64, 171-72 (Comm. Print (1986): Charles Tiefer, Congressional Practice and Procedure 850 n. 3 (1989). The definition in section 5(1) is broad enough to encompass appropriations measures that fund such programs. Consequently, such measures would have to be separately enrolled, see sec. 4(a)(1), and if passed by both Houses thereafter would be subject to a Presidential veto, exactly as other enrolled bills are. DOJ therefore sees no constitutional obstacle to permitting the President to veto an appropriation that funds underlying entitlement obligations.

[Additional DOJ analysis required: is the entitlement thereby effectively repealed, or does the statutory obligation to pay still exist?]

□
V. JUDICIAL REVIEW
A. Expedited Review -
□
-
□
Both House-
□
and Senate-

□
passed bills
provide that "[a]ny Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that a provision of this Act violates the Constitution." H.R. 2, ?7(a)(1); S. 4, ?6(a)(1). The action is to be heard by a three-
□
□
□
judge court, with a direct appeal to the Supreme Court. Each House of Congress has the right to intervene in such an action. The district court and the Supreme Court have the duty to expedite the disposition of such actions to the greatest extent possible.

DOJ Comment -- Although it has been argued that judicial intervention in disputes between Congress and the President threatens to disrupt the constitutional separation of powers, and thus that members of Congress lack standing to challenge Presidential action, see, e.g., Moore v. U.S. House of Representatives, 733 F. 2d 946, 957-61 (D.C. Cir. 1984) (Scalia, J. concurring), cert. denied, 469 U.S. 1106 (1985); Barnes v. Kline, 759 F. 2d 21, 50, 62-63 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot sub nom. Burke v. Barnes, 479 U.S. 361 (1987), DOJ believes that this statutory provision would be sustained.

In general, a plaintiff has standing if he or she can show an injury, traceable to the challenged action, that can be redressed by the courts. Lujan v. Defenders of Wildlife, 112 S.Ct. 2130 (1992). In a challenge by members of Congress to a line item veto statute, the critical standing element would be "injury". "Causation" and "redressibility" could presumably be established if "injury" were found. The injury asserted in the challenge would presumably be that the plaintiff's vote for an appropriations measure (or for a targeted tax benefit) was unconstitutionally denied effect by a Presidential line item veto. While the Supreme Court has never directly decided the issue of challenges by federal legislators to Presidential decisions, it has held that State legislators had standing to challenge the "nullification" of their votes against ratifying the proposed Child Labor Amendment, see Coleman v. Miller, 307 U.S. 433, 438 (1939). Lower Federal courts have relied on similar reasoning to sustain the standing of members of Congress challenging the President, see, e.g., Goldwater v. Carter, 617 F.2d 697 (D.C. Cir) (en banc), judgment vacated, 444 U.S. 996 (1979); see generally Risser v. Thompson, 930 F.2d 549, 550-551 (7th Cir.), cert. denied, 502 U.S. 860 (1991). The question cannot be considered free from doubt, but DOJ thinks that the statutory right to challenge a line item veto would be upheld. (It should be noted that even if the courts upheld the standing provision, they might still

decline to reach the merits, e.g. on political question grounds. Such a non-merits decision would leave the statute in effect.)

DOJ does not think, however, that Congress can authorize actions by its members to challenge the line item statute before the President has actually exercised his veto authority under it. Any such suit would be, in effect, a request for a merely advisory opinion. Cf. Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring in the judgment).



B. Severability.-
□
-
□
The Senate-
□
passed bill, see S. 4, ?6(d),
includes a "severability" provision. The House-
□
passed bill does
not.

DOJ Comment--DOJ recommends inclusion of a severability provision in the final bill. The basic tenet of severability is whether Congress would have enacted the constitutionally valid sections of the challenged legislation even without the invalid ones. See, e.g., Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). The presence of an explicit severability clause is, in itself, evidence tending to show that Congress would have enacted the valid sections even if they had stood alone; the Court has "held that the inclusion of such a clause creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." Id. at 686. However, "the absence of a severability clause...does not raise a presumption against severability." Id. The question of severability could arise if, e.g., the Court held that the authority to "veto" or "rescind" a targeted tax benefit -- as in the House-passed bill -- was unconstitutional, without ruling specifically on the authority to rescind spending. To reduce the chances that the court would strike down the entire statute in such a case, a severability clause should therefore be included.

VI. EMERGENCY SPENDING.-
□
-
□
The Senate-
□
passed bill would provide
that any appropriations statute designated as "emergency" may not contain any non-
□
emergency provisions; similarly, would provide
that any direct spending statute designated "emergency" may not contain any non-
□
emergency provisions; and creates a point of
order against such legislation in the House and Senate.

The provision would apply to bills with emergency designations that also have any nonemergency discretionary or direct spending proposals, regardless of the merits of the proposals. For example, it would apply to bills with emergency designations that also have supplemental appropriations for certain mandatory programs that could run out of money, such as unemployment or veterans benefits. This would force separate legislation to provide necessary funding for those programs.

The provision would therefore reduce flexibility in responding to emergencies by eliminating regular appropriations bills as vehicles for enacting emergency funding. Regular appropriations bills have included necessary emergency appropriations in the past, such as $50 million for Rwanda in the FY 1995 Foreign Operations bill. The provision would result in additional, unnecessary supplemental appropriations bills to respond to an emergency requirement that could be more readily addressed through a regular appropriations bill.

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION | |
|---|---|---|---|---|
| 001. email | Charles Konigsberg to James Castello at 16:03. Subject: Doug Letter's Comments Follow. (1 page) | 09/11/1995 | P5 | 6166 |
| 002. email | Charles Konigsberg to James Castello at 16:03. Subject: Revised Line Item Veto Letter Follows. (2 pages) | 09/11/1995 | P5 | 6167 |
| 003. email | Martha Foley to Gordon Adams at 14:06. Subject: Re: Mil Con. (1 page) | 09/21/1995 | P5 | |
| 004. email | Paul Weinstein, Jr. to Lawrence Haas at 10:41. Subject: Line Item Veto Lines. (1 page) | 09/28/1995 | P5 | |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[09/07/1995-12/20/1995]

Van Zbinden
2007-0624-F
vz1263

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6166

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)

CREATION DATE/TIME:11-SEP-1995 16:03:13.63

SUBJECT: Doug Letter's comments follow

TO: James Castello ( CASTELLO_J ) (WHO)
READ:11-SEP-1995 16:19:08.22

TEXT:

PRINTER FONT 12_POINT_COURIER
WH/Counsel Comment (coordinated w/ DOJ/OLC): The three
□
-judge
court judicial review mechanism should be deleted. Considerable
litigation experience with three
□
-judge courts has shown that they
are often inefficient and cumbersome, and can actually cause
considerable delay in obtaining judicial review of key issues.
When Congress deleted a three
□
-judge court provision in 1976 (the
former 28 U.S.C. ? 2281), it found that such courts often raise
myriad procedural problems -- which are difficult to predict in
advance -- hindering speedy judicial resolution. For example, in
this matter, it is possible that the first case or cases brought
raising issues under the line item veto statutory scheme will not
properly or cleanly present the actual issue of the validity of
the veto mechanism. Yet, such a case would have to be heard by a
three
□
-judge court, followed by expedited Supreme Court review,
which might be totally unnecessary.

The desired expedited judicial review can be
accomplished through a mechanism providing for suits
challenging the statutory scheme to be filed in the federal
district court for the District of Columbia; a single
district judge can act faster and more efficiently than a
three
□
-judge court in readying a case involving important
issues for review by the higher courts. Review would then
be through the D.C. Circuit and the Supreme Court, if
warranted. The legislation can provide for highly expedited
treatment by these courts, all of which can act very quickly
when called upon to do so. Thus, no time should be lost
through this judicial review path, and the likelihood of
time and judicial resources being wasted through a
three
□
-judge court scheme will be minimized.

6167

COPY

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Charles S. Konigsberg ( KONIGSBERG_C ) (OMB)

CREATION DATE/TIME:11-SEP-1995 16:09:55.55

SUBJECT: REVISED ITEM VETO LETTER FOLLOWS; SEE 3-JUDGE COURT

TO: James Castello ( CASTELLO_J ) (WHO)
READ:11-SEP-1995 16:23:05.63

CC: FAX (9-514-0563,MIKE SMALL/OLC) ( TLXA1MAIL_\F:9-514-0563\C:MIKE SMALL/OLCR

TEXT:
PRINTER FONT 12_POINT_COURIER
September 11, 1995

Honorable XXXXXXXXXXX
U.S. House of Representatives (or Senate)
Washington DC 20515 (or 20510)

Dear _______________,

Now that the House has finally appointed conferees, I am writing to urge Congress to complete action on line
□
-item veto
legislation by the beginning of FY 1996 and to make the authority applicable to all spending bills for that year.

Since House and Senate passage of line
□
-item veto legislation
more than 5 months ago, the President has repeatedly urged Congress to complete work quickly, so he can use item veto authority -- this year -- to curb wasteful spending.

We are, of course, pleased that the House appointed conferees last week and voted to instruct conferees to make the authority applicable to FY 1996 appropriations measures. But Congress must act quickly to make this authority effective. We must not let another year go by without giving the President authority to eliminate special interest provisions which waste increasingly scarce public resources.

In his May 8 letter to Majority Leader Dole and Speaker Gingrich, the President stated that "the House
□
-passed bill is
much stronger -- and more workable." To expedite completion of this important legislation, the President asked that I provide you with our recommendations for a few technical improvements to the House bill.

First, while the House bill has a strong rescission mechanism, its ability to save money could be further enhanced by: (i) adopting a more workable definition of targeted tax benefit, along the lines of the Senate version; and (ii) adopting the Senate position on extending rescission authority to new direct spending.

Second, with regard to targeted tax benefits -- the Justice Department strongly urges that the House bill use the terms "deny the availability of" and "suspend," in lieu of "veto" and "repeal"; and the Treasury Department urges that a provision be added to authorize the IRS to take enforcement action against individuals or entities seeking to use a targeted tax benefit when that benefit has been suspended.

□

Three additional technical recommendations are:
(i) enhance the ability of the Administration to review carefully all tax and spending provisions by increasing the window for transmittal of special messages from 10 days to 20 days;
(ii) include a severability provision in the legislation; and
(iii) delete the 3
□
-judge court judicial review mechanism but
retain the requirement for expedited consideration (considerable litigation experience has shown that 3
□
-judge courts are often
inefficient and cumbersome and can actually cause considerable delay).

Whatever version of the bill the conference committee chooses to report, I offer the technical assistance of OMB staff to help iron out issues which arise as you move ahead with such legislation.

Again, the Administration urges you to complete action quickly on this important authority to help the President hold the line against wasteful spending.

Sincerely,

Alice M. Rivlin
Director

# Withdrawal/Redaction Sheet
## Clinton Library

COPY

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. email | Lawrence Haas to Barry Toiv at 20:37. Subject: Line-Item Veto. (1 page) | 07/16/1997 | P5 |
| 002. email | Alphonse Maldon to John Hilley at 15:53. Subject: POTUS Comments Regarding MILCON Appropriations... (1 page) | 07/16/1997 | P5 |
| 003. email | William Marshall to Lisa Hertzer and Charles Ruff at 14:48. Subject: Line Item Veto. (1 page) | 08/01/1997 | P5 6168 |
| 004. email | Robert Weiner to William Marshall at 15:17. Subject: Re: Line Item Veto. (1 page) | 08/01/1997 | P5 6169 |
| 005. email | William Marshall to Robert Weiner at 15:50. Subject: Re: Line Item Veto. (1 page) | 08/01/1997 | P5 6170 |
| 006. email | Robert Weiner to William Marshall at 16:04. Subject: Re: Line Item Veto. (1 page) | 08/01/1997 | P5 6171 |
| 007. email | William Marshall to Charles Ruff at 11:16. Subject: Line Item. (1 page) | 08/07/1997 | P5 6172 |
| 008. email | Barry Toiv to Michael McCurry at 14:46. Subject: LIV (1 page) | 08/08/1997 | P5 |

**COLLECTION:**

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Line Item Veto])
OA/Box Number: 500000

**FOLDER TITLE:**

[06/19/1997-08/08/1997]

Van Zbinden
2007-0624-F
vz1266

**RESTRICTION CODES**

**Presidential Records Act - [44 U.S.C. 2204(a)]**

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

**Freedom of Information Act - [5 U.S.C. 552(b)]**

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6168

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP [ WHO ] )



CREATION DATE/TIME: 1-AUG-1997 14:48:41.00

SUBJECT: line item veto

TO: Lisa A. Hertzer ( CN=Lisa A. Hertzer/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TO: Charles F. Ruff ( CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Robert N. Weiner ( CN=Robert N. Weiner/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Robert W. Schroeder ( CN=Robert W. Schroeder/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TEXT:
The meeting that may take place either on Monday or Tuesday involves whether the line item veto should be applied to any of the special tax breaks enacted as part of the budget bill. (There is a NY Times story on this subject in today's clips.) The meeting will be with Erskine and Treasury representatives who are monitoring the tax issues. OMB may be present but is not directly involved because the issue concerns taxing and not spending.

If the Times story is accurate, there may be the type of special tax breaks in the current budget agreement that a line item veto could be suitably used to address. On the other hand, we should be wary about allowing a veto of a tax measure to serve as a test case for the constitutionality of the line item veto because the use of the veto in this circumstance is more constitutionally suspect than it would be in spending cases. First, while history (and a supporting line of cases) supports the proposition that the Executive has the leeway not to expend all appropriated funds, there is no comparable tradition allowing the Executive to refuse to honor tax breaks. Second, the cancellation of a tax break is more conceptually similar to a true veto than is the mere failure to spend funds. This is particularly apparent when enforcement issues are considered. In a spending case, the Executive simply refuses to spend funds -- the provision authorizing the expenditure of those funds accordingly need not be viewed as having been voided but only as not being exercised. In a tax case, however, in order for the Executive to collect the taxes that had originally been exempted, he must take the position that the tax break provided in the line item is void. For these reasons, a tax break case would provide a plaintiff with a much stronger vehicle than would a spending case to argue that the line item veto violates the Presentment Clause and effectuates a substantial alteration of powers. Accordingly, other things being equal, we should want to reserve the first exercise of the line item veto for a spending measure.

Please let me know if you have any questions. Jason Goldberg has assured me that Lisa and I will be notified of any meeting.

6169



RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Robert N. Weiner ( CN=Robert N. Weiner/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME: 1-AUG-1997 15:17:06.00

SUBJECT: Re: line item veto

TO: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Lisa A. Hertzer ( CN=Lisa A. Hertzer/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Robert W. Schroeder ( CN=Robert W. Schroeder/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Charles F. Ruff ( CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TEXT:
It might be useful to know for these purposes:

1. Whether there are any spending measures as to which the President may use the line item veto.

2. Whether someone challenging the exercise of the line item veto for a tax measure would, as a matter of ripeness doctrine, have to refuse to pay the tax, have the IRS claim that the tax was due, and go through the administrative process, tax court, etc., to establish whether there is any liability in order to present the constitutional issue.

The answers to these questions could affect which type of case is the first to be adjudicated, even if the President does exercise the veto now as to these tax measures.

6170

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP [ WHO ] )



CREATION DATE/TIME: 1-AUG-1997 15:50:37.00

SUBJECT: Re: line item veto

TO: Robert N. Weiner ( CN=Robert N. Weiner/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Lisa A. Hertzer ( CN=Lisa A. Hertzer/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Robert W. Schroeder ( CN=Robert W. Schroeder/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Charles F. Ruff ( CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TEXT:
Thanks for the suggestions.

We won't know on spending until after the recess because line item spending provisions will not be enacted until then. Meanwhile, we only have 5 days to decide whether to exercise the veto on the tax breaks.

The ripeness issue is a good one and if your suggestion is that even a later exercise of the veto on a spending provision may reach the courts before a suit on the tax break, that certainly is possible -- particularly in light of the restricitons against taxpayers gaining declaratory or injuctive relief against taxes. On the other hand, given the high probability that spending provision vetoes will also have serious justiciability obstacles, it is probably realistic to assume that the first line item veto exercised will be the first heard in court.

6171

COPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Robert N. Weiner ( CN=Robert N. Weiner/OU=WHO/O=EOP [ WHO

CREATION DATE/TIME: 1-AUG-1997 16:04:29.00

SUBJECT: Re: line item veto

TO: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Lisa A. Hertzer ( CN=Lisa A. Hertzer/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Robert W. Schroeder ( CN=Robert W. Schroeder/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Charles F. Ruff ( CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TEXT:
I guess the issue is not just one of timing, though, but whether IRS and later DOJ have discretion at each stage of the proceedings to determine not to go forward in an individual tax case, moreso than in a case involving expenditures.

6172

COPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME: 7-AUG-1997 11:11:16.00

SUBJECT: line item

TO: Charles F. Ruff ( CN=Charles F. Ruff/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

CC: Lisa A. Hertzer ( CN=Lisa A. Hertzer/OU=WHO/O=EOP @ EOP [ WHO ] )
READ:UNKNOWN

TEXT:
Lisa and I had some final thoughts about the line item veto that we thought we would send along to you. Assuming that we exercise the veto at this time, we would suggest the following:

We agree that the Simmons and Sub-part F provisions are appropriate candidates.

We also think that the Above-the-Line Deduction for State and Local Officials (the Sheriffs' provision) should be included. This is the one that had originally been taken off the table because of Sen. Lott.

We also like the remainder provision because it singles out a favored group for special treatment. We understand that this provision may raise special litigation concerns; but those concerns are only statutory, and not constitutional, and would probably not weaken our primary case.

Finally, on the tax side, the Oklahoma provision should be included because it only protects a limited class.

On the spending side, we like New York and Alaska as starters. Hopefully they will be supplemented by items in the Appropriations Bill.