

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Memo for Erskine Bowles from Charles Ruff, William Marshall, and Lisa Hertzner. Subject: Line Item Veto Litigation. (3 pages)	11/03/1997	P5 1016
002. note	For Erskine Bowles from Beverly Barnes. [partial] (1 page)	10/22/1997	P6/b(6)
003. memo	Duplicate of 001. (3 pages)	10/22/1997	P5 Dup of 1016
004a. memo	Memo for the President from Charles Ruff. Subject: Line Item Veto Litigation (6 pages)	12/16/1997	P5 1018
004b. letter	Letter for the President from Janet Reno. Subject: Line Item Veto Litigation. (5 pages)	12/16/1997	P5 1019
004c. memo	Memo for the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages)	12/15/1997	P5 1020

COLLECTION:

Clinton Presidential Records
Chief of Staff
Erskine Bowles
OA/Box Number: 12886

FOLDER TITLE:

Line Item Veto--Budget

2007-0624-F

vz1196

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).

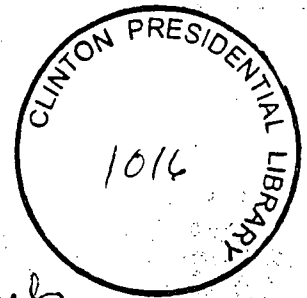
RR. Document will be reviewed upon request.

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]

THE WHITE HOUSE
WASHINGTON

November 3, 1997



*Carlo
Got up nicely
include
John P.
John H.*

MEMORANDUM FOR ERSKINE BOWLES

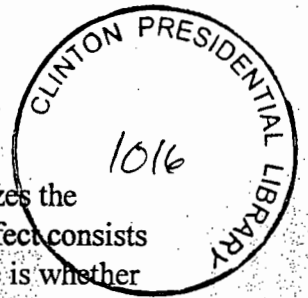
FROM: *CR* CHARLES F.C. RUFF
WILLIAM MARSHALL
LISA HERTZER

SUBJECT: LINE ITEM VETO LITIGATION

On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory question has been joined with the constitutional challenges to the line item veto that have been brought in the consolidated cases currently before Judge Hogan. OMB strongly asserts that the cancellation is permissible under the Act. The Department of Justice has serious reservations. Senate and House Counsel are also reviewing this issue and are considering whether to file on the side of the plaintiffs, contending that this particular cancellation exceeds the President's authority under the Act. This memorandum briefly outlines the issues involved.

A. BACKGROUND

Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS). OMB estimated that the budgetary effect of Section 642 would be a cost of \$854,000 thousand dollars (over five years) in lost federal receipts from employee contributions, and this figure was cited in the President's Special Message to Congress announcing the cancellation of this provision. Section 642 also would have increased federal outlays in future years based upon the need for added federal agency contributions to the federal employee trust funds. Significantly, on Friday the Congressional Budget Office relied on this fact (and not upon the reduction of employee receipts) in its report concluding that the cancellation of Section 642 would constitute a reduction in budget authority that would reduce the deficit as required by the Act. The cost in increased outlays, however, was not included in the President's Special Message to Congress.



The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation can be defended on the grounds that the effect of Section 642 would be to increase federal outlays even though that rationale was not presented to the Congress in the President's Special Message.

B. THE STATUTORY ISSUE

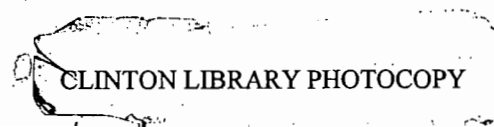
1. The Concerns Raised by DOJ

DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact that Congress was so specific and narrow in its explicit grant to the President of authority to cancel lost-receipt provisions would argue against the position that Congress, at the same time, implicitly intended to grant the President a broad authority to cancel such provisions outside the limited tax benefit context.

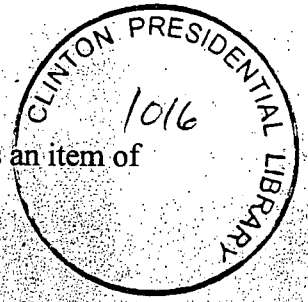
Second, and perhaps more significantly, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt-reducing provisions would weaken their constitutional defense of the Act. Throughout the line item veto litigation, DOJ has taken the position that the Act grants only very modest powers to the President and that the powers granted to him under the Act are within the range of actions that have historically been within the prerogative of the President. For example, DOJ's briefs are replete with examples of the President's historical right not to spend monies that have been allocated to the Executive. At the same time, DOJ has acknowledged in its briefs that the Act's allowance of cancellation of tax benefits is on less firm historical ground because the voiding of tax benefits is not the same as the simple refusal of the President to spend allocated funds. Accordingly, DOJ has attempted to defend the Act's provisions granting the President the power to cancel limited tax benefits as being very narrow and circumscribed. They are therefore concerned that reading the Act to authorize a broad power for the President to cancel receipt-reducing provisions would be inconsistent with their constitutional position.

2. The Position of OMB

OMB believes that the cancellation was on firm statutory footing. Under OMB's reading, the Act allows the President to cancel a dollar amount of discretionary budget authority -- defined in the Act as "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." "Budget authority," in turn, is defined in the Congressional Budget Act as including offsetting receipts as negative budget authority and the reduction of receipts as positive budget authority.



Accordingly, OMB concludes that the reduction of receipts created by Section 642 is an item of budget authority subject to cancellation.



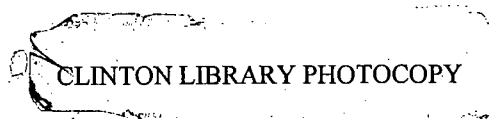
C. RE-CHARACTERIZING THE CANCELLATION

During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. As noted previously, allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years. Accordingly, both DOJ and OMB seem to agree that the cancellation could have been properly effectuated if the Special Message submitting the cancellation to the Congress set forth these estimated future outlays rather than the lost receipts as the items to be canceled. It is unclear, however, whether this theory could prevail in court. First, the Act does not provide for amending the Special Message and the five day time period for sending the message to Congress would appear to militate against any claim that a message could be changed, or re-characterized, substantively after its submission. Second, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000 thousand in lost receipts. Substituting a new dollar amount based upon amounts of future outlays, therefore, would not "amend" the previous cancellation; it would constitute an entirely new cancellation. OMB, on the other hand, argues that it is the item and not only the funds that are canceled by a line item veto. They also point out that the Congressional Budget Office, in concluding that the cancellation of Section 642 would reduce outlays, was not limited by the characterization contained in the Special Message.

D. RECOMMENDATION

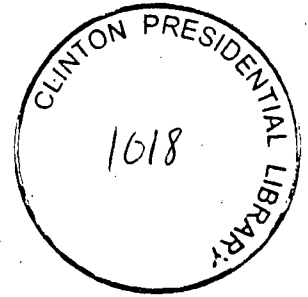
Seth Waxman feels strongly that our already delicate position on the line item veto will be weakened by having to defend the broader interpretation of the Act necessary to encompass the Section 642 cancellation. We are sensitive to the concerns of the Solicitor General as our expert on Supreme Court matters but are hesitant to put the President in the position of having to abandon a position he took on considered advice of OMB and his advisors. We are inclined to suggest that we defend the cancellation on the narrow grounds that the line item veto of Section 642 was permissible under the Act as a reduction in outlays and that if any error occurred, it was only in the form of the Special Message. We believe, however, that you should hear from Seth before making a decision.

Because DOJ attorneys will be meeting with Senate Counsel to discuss this issue in the next few days and because the line item veto cases are on an expedited briefing schedule, we will need to internally resolve this issue as soon as possible. We recommend meeting with you to discuss this issue at your earliest convenience.



THE WHITE HOUSE
WASHINGTON

December 16, 1997



MEMORANDUM FOR THE PRESIDENT

THROUGH: ERSKINE BOWLES

FROM: CHARLES F.C. RUTHERFORD 

SUBJECT: LINE ITEM VETO LITIGATION

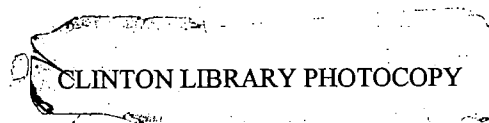
FILE

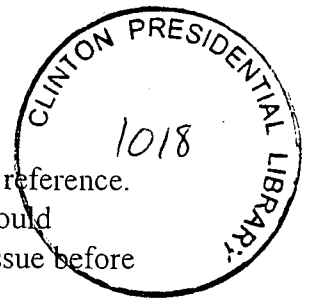
Litigation is pending in the federal district court relating to three instances in which you exercised your authority under the Line Item Veto Act (Act). The three cases have been consolidated before Judge Hogan. One of these cases involves a challenge by the National Treasury Employees Union (NTEU) to your use of the line item veto to cancel Section 642 of the "Treasury and General Appropriation Act, 1998." Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS).

In all three cases, the plaintiffs are challenging the constitutionality of the Act. The NTEU also contends, however, that the cancellation of Section 642 exceeded your statutory authority under Act because it canceled lost receipts (in the form of reduced employee contributions to federal trust funds caused by the provision) rather than appropriated funds. Senate Counsel, who supports our position on the constitutionality of the Act, has signaled that it is likely to file on the side of the NTEU on the statutory claim. The parties do not dispute that Section 642, if implemented, would have had negative budget consequences.

The Office of Management and Budget (OMB) strongly asserts that the cancellation is valid and wants to defend it. The Department of Justice (DOJ) has very serious reservations about the statutory issue and believes that the defense of this cancellation would harm its broader, constitutional defense of the Act. DOJ, therefore, proposes to enter into a consent judgment that the 642 cancellation falls outside the scope of the Act.

We have had extensive discussions with OMB and DOJ in an effort to develop an approach that would enable DOJ to defend your use of the line item veto in this case without endangering the defense of the Act's constitutionality. Justice must file its brief in response to plaintiff's motion for summary judgment by December 18. Memoranda of the Attorney General





and of the Solicitor General, setting out their recommendations, are attached for your reference. We believe that we should defer to DOJ's conclusion that defending this provision would undermine the constitutional defense of the Act, but want to make you aware of the issue before any formal action is taken.

A. BACKGROUND

The Act allows the President to cancel "any dollar amount of discretionary budget authority" but requires him to specify the dollar amount canceled in a Special Message to Congress. In this case, your Special Message specified \$854,000,000 (over five years) as the amount canceled. This figure was based on OMB's estimates of the amount of federal receipts from employee contributions that would be lost if employees were allowed to switch from CSRS to FERS. OMB's decision to treat these lost receipts as "discretionary budget authority" was in accord with its customary practice and was based on its understanding of the statutes and rules governing budget scoring.

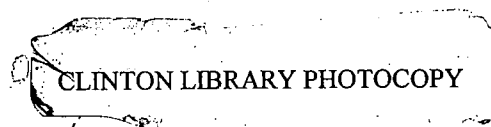
An alternative measure of Section 642's cost is the amount of additional federal outlays to employee trust funds that would have been required if employees were allowed to switch from CSRS to FERS. In accordance with its customary practice, OMB did not estimate the cost of increased outlays and your Special Message, therefore, did not directly reference such a cost. The Congressional Budget Office, however, relied upon this cost, and not upon the reduction of employee receipts, in its report concluding that the cancellation of Section 642 would constitute a reduction in budget authority that would reduce the deficit as required by the Act. (The difference in approach between OMB and CBO, in this respect, is attributable to differing understandings of budgetary scoring rules.)

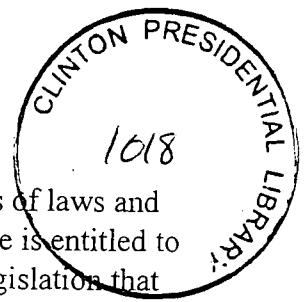
The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation can be defended on the grounds that the effect of Section 642 would be to increase federal outlays even though that rationale was not presented to the Congress in the Special Message.

B. ARE LOST RECEIPTS CANCELABLE UNDER THE ACT?

1. The Position of OMB

OMB argues that the Act must be interpreted, and was intended to be interpreted, in light of the Congressionally mandated rules governing budget scoring. Those rules, according to OMB, require that the lost employee contributions be scored as positive budget authority. Thus, even though the Act does not explicitly allow for the cancellation of lost receipts (other than in the context of a limited tax benefit), OMB's contention that the Act incorporates the budgetary scoring rules leads to the conclusion that the lost employee contributions at issue are cancelable.





OMB also asserts that, as the agency charged with estimating the budgetary effects of laws and applying budgetary scoring rules, its expertise in interpreting the statutory language is entitled to judicial deference. Finally, OMB contends that Section 642 is the exact type of legislation that should be subject to cancellation because it 1) was essentially a pay raise; 2) was added to the Appropriations Bill at Conference without debate by either the House or the Senate; and 3) would have a substantial budgetary effect.

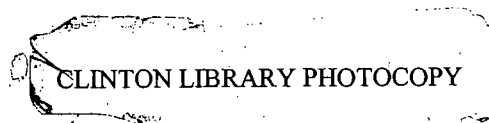
2. The Position of DOJ

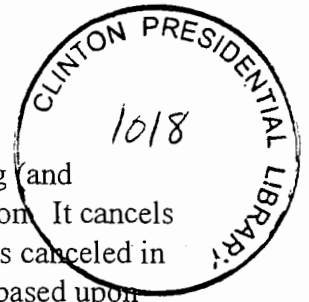
DOJ views the Act as an outgrowth of the President's limited power to impound appropriated funds and not as an extension of budgetary enforcement legislation. Accordingly, it does not read the Act as incorporating budgetary scoring rules. Rather, it contends that the Act must be strictly construed in light of its historical antecedents -- the President's historical power to impound funds. DOJ, therefore, stresses that because the Act does not contain explicit language authorizing cancellations of the kind at issue in this case, that power can not be inferred. Moreover, DOJ argues that because the Act explicitly allows cancellations based upon lost receipts only in very highly specified circumstances (limited tax benefits), Congress did not intend for the President to have a broad authority to cancel such lost receipt provisions outside the limited tax benefit context.

Finally, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt-reducing provisions would be inconsistent with the position it has taken in its constitutional defense of the Act. Throughout the line item veto litigation, DOJ has argued that the Act grants only very modest, and clearly defined, powers to the President. Arguing that the line item veto power extends beyond the express wording of the statute would undercut its previous position.

C. RE-CHARACTERIZING THE CANCELLATION

OMB and DOJ also disagree as to whether the cancellation of Section 642 could be defended as a cancellation of future outlays in order to avoid, or to supplement, the argument that the Act allows for the cancellation of lost receipts. As noted previously, allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years and the Congressional Budget Office (CBO) relied on this fact in its review of the budgetary effect of the cancellation. Arguably, therefore, the cancellation would have been proper if the Special Message set forth these estimated future outlays rather than the lost receipts as the items to be canceled. OMB asserts that the cancellation could also be justified on this ground. OMB submits that, if the Court rejects its scoring as the appropriate standard for evaluating what is cancelable under the Act, the CBO position (and the common sense position) that increased outlays are cancelable items should provide the governing standard.





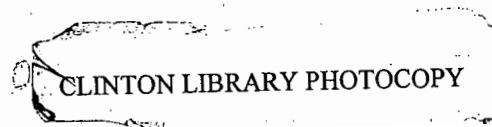
DOJ raises several objections. First, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000,000 in lost receipts. Substituting a new dollar amount based upon amounts of future outlays, therefore, would not simply "amend" the previous cancellation; but would instead constitute an entirely new cancellation. Second, DOJ is troubled by an argument that would suggest you made specific determinations (as the Act requires) about the effects of canceling one item (future outlays) when in fact you specified another (lost receipts). Although a "functional" argument can be made suggesting that the two items (future outlays and lost receipts) are equivalents, DOJ is concerned that such an argument would appear disingenuous. Finally, DOJ is uncomfortable with relying on the future outlay theory when OMB did not rely upon that theory in the first instance.

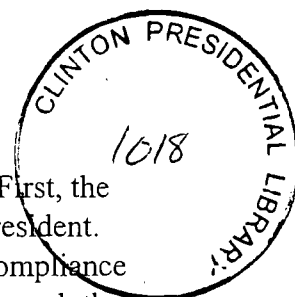
D. WOULD DEFENSE OF THIS PROVISION HARM THE BROADER, CONSTITUTIONAL ARGUMENT?

DOJ rightly asserts that, even in the best case scenario, the constitutionality of the line item veto is precarious. DOJ is, therefore, understandably wary about any statutory construction that would appear to stretch the President's powers under the Act beyond a narrowly confined authority analogous to impoundment. DOJ has acknowledged to the Supreme Court, for example, that the provision authorizing the President to cancel limited tax benefits is on less firm historical footing than is the cancellation of a typical appropriation, and is constitutionally sustainable only because that power is carefully limited under the statute. Supporting the cancellation of the lost receipts in this case, DOJ fears, would not only be viewed by the Court as an expansion of the President's power beyond traditional boundaries, but also as an expansion that would occur in a seemingly boundless manner. (In this respect, DOJ is also concerned that the cancellation of Section 642 is particularly problematic because it encompasses a cancellation of a non-budgetary provision of law -- the right of employees to switch pension programs.)

DOJ also believes that its constitutional case would be harmed if the Senate Counsel files on the side of the NTEU on the statutory issue. It is concerned that if the President and the Congress do not agree on the powers the Act gives to the President, the Court might void the legislation entirely in order to avoid a series of inter-branch disputes raising intractable separation of powers issues.

Finally, DOJ is concerned that the secondary argument (that the cancellation could be recharacterized as a line item veto of future outlays rather than lost receipts) could harm the constitutional defense by suggesting that the provisions of the Act directing the President to make specific findings about the nature and impact of the cancellation are not mandatory. DOJ has argued that the findings provisions confine the power of the President and, therefore, serve to refute the plaintiffs' contention that the Act improperly delegates broad and unchecked powers to the Executive. Accordingly, DOJ believes that if it now asserts that the findings provisions are not mandatory, its position on the improper delegation claim will be weakened.





While DOJ's position has force, there are some competing considerations. First, the scoring rules OMB employed in this case do not give unlicensed authority to the President. Rather those rules are Congressionally mandated provisions designed to measure compliance with the Congressional Budget Act and constrain budgetary scoring decisions. Although the power conferred to the President, under OMB's approach, is broader than the statutory construction offered by DOJ, that power is not unlimited. For example, the scoring rules would not authorize the President to cancel a broad tax benefit. Additionally, while the power to cancel lost receipts is broader than the President's historical impoundment prerogative, it is not considerably greater than that granted to the President in the Act's provision that allows for the cancellation of limited tax benefits.

Second, OMB argues that if the Act were not construed to allow the cancellation of provisions such as 642, its value as a budget enforcement tool would be seriously diminished because so few provisions worth canceling fit the model of a simple dollar appropriation.

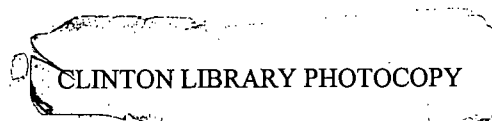
Third, in its response to the findings-recharacterization issue, OMB would contend that requiring strict adherence to the findings requirements of the Act is also problematic. The Act provides only five days in which to cancel an item, and demanding precision in the findings would be both impractical and unrealistic. Indeed, even DOJ concedes that the Act would not require that the exact dollar amount of a cancellation be established in order for a cancellation to be upheld. Accordingly, OMB argues, if the Act does not require an exact dollar determination, there is no reason to concede that the Act does require an exact determination as to the specific source of the cancelable budget authority.

Finally, OMB notes that DOJ's constitutional concerns would be triggered only if the district court upheld your statutory authority to effect this cancellation. If the lower court invalidated the cancellation on statutory grounds, that decision would strengthen, rather than weaken, the constitutional case. OMB, therefore, concludes that the risk in litigating the statutory issue in district court is not as substantial as DOJ would suggest.

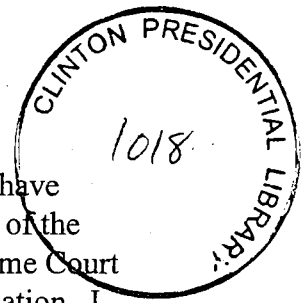
E. RECOMMENDATION

In my judgment, the arguments advanced in support of your statutory authority to cancel Section 642 are stronger than DOJ believes them to be, and the legitimacy of the cancellation could be appropriately defended in district court, albeit with no guaranty of success. In addition, Frank Raines strongly believes that the cancellation was valid under the Act and that it furthered important budgetary and policy interests. He also disagrees with the Solicitor General's position that defending the cancellation would undermine the broader, constitutional defense of the Act; and he would, therefore, request that you direct DOJ to defend the cancellation in district court..

I believe, however, that we must give great weight to the Solicitor General's fear that to defend the cancellation in the case that will trigger the Supreme Court's first ruling on the

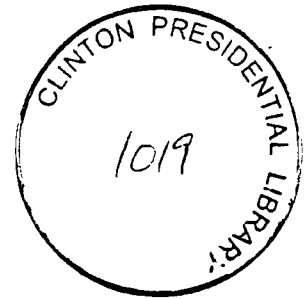


I am reluctant to acquiesce in a decision to assert error in the exercise of the veto, I have concluded that we should, in the final analysis, give dispositive weight to the views of the Solicitor General. I respect his assessment of the litigation risks posed in the Supreme Court even though I disagree with DOJ's position on the merits of the Section 642 cancellation. I recommend, therefore, that we allow DOJ to consent to judgment in this case.





Office of the Attorney General
Washington, D.C. 20530



December 16, 1997

The President
The White House
Washington, DC 20500

Dear Mr. President:

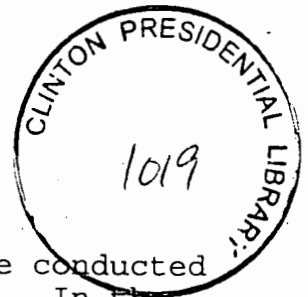
This letter outlines the issues related to the defense of your exercise of the Line Item Veto Act to cancel the budget authority contained in Section 642 of the Treasury and General Government Appropriations Act of 1998, enacted October 10, 1997. The Department of Justice believes that defense of this cancellation would be a mistake for several reasons, including the following:

- The Solicitor General has advised me that defense of this cancellation would severely undermine our constitutional defense of the Act.
- The defense of this cancellation will require us to advance an extremely broad interpretation of the Line Item Veto Act, which finds very little support in the statutory text.
- Defense of this cancellation will undermine the inter-branch unity we have enjoyed with the Congress on issues concerning the Act because the Senate will file a brief against us.

We have had extensive consultations with the Office of Management and Budget ("OMB") concerning this cancellation. As a result of those discussions, we have formulated an argument that comports with OMB's theory. If directed, we will defend the cancellation on this basis in the district court. We believe, however, that such a defense is not legally correct, and is not in the best interests of the Executive Branch, and thus we believe that the United States should accept a consent judgment that the cancellation was invalid.

Overview of the Case

Section 642 allows individuals subject to the Civil Service Retirement System ("CSRS") to switch to the Federal Employee



Retirement System ("FERS") during an open season to be conducted by the Office of Personnel Management ("OPM") in 1998. In the cancellation message transmitted to Congress pursuant to the Line Item Veto Act, you specified you were cancelling \$854 million of "discretionary budget authority" contained in that provision "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund" over the next five years. The message also explained that you had made the findings required by the Line Item Veto Act. The report attached to the special message explained how the \$854 million in reduced employee contributions was calculated.

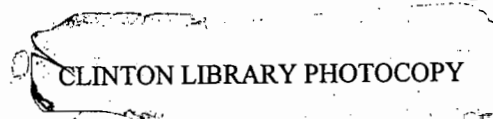
The National Treasury Employees Union ("NTEU") and two of its members have challenged the cancellation. National Treasury Employees Union v. United States, Civ. Act. No. 1:97CV02399 (D.D.C.). They claim that reduced employee contributions are not "discretionary budget authority" under the Line Item Veto Act, or, in the alternative, that the Line Item Veto Act is unconstitutional.

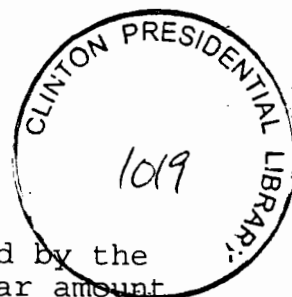
Overview of the Line Item Veto Act

The Line Item Veto Act authorizes the President to "cancel," as prescribed by the Act, "any dollar amount of discretionary budget authority," "any item of new direct spending," or "any limited tax benefit." 2 U.S.C. § 691(a). Each of those terms has a distinct meaning. The term "dollar amount of discretionary budget authority" is defined, among other things, to include "the entire dollar amount of budget authority . . . specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. § 691e(7)(A)(i).

In making a cancellation under the Act, the President must make express findings that the cancellation will reduce the federal deficit, not impair any essential government functions, and not harm the national interest. The President must, within five days of signing the law, transmit a "special message" to Congress that specifies, among other things, the "dollar amount of discretionary budget authority, . . . which has been canceled," the "account, department, or establishment of the Government for which such budget authority was to have been available for obligation and the specific project or governmental functions involved," and adjustments to be made to the federal government's discretionary spending limits. 2 U.S.C. § 691a.

Cancellation of a dollar amount of discretionary budget authority acts to "rescind" that authority. 2 U.S.C.





§ 691e(4)(A). Pursuant to the Act, the caps established by the Budget Enforcement Act are reduced by the canceled dollar amount so that the funds may not be spent on other projects. 2 U.S.C. § 691c(a)(1)(B).

Defending the Cancellation

If so directed, we propose to defend the cancellation on two grounds. First, applying OMB's interpretation of the scoring rules that Congress has adopted for purposes of the Budget Enforcement Act, we will argue that reductions in governmental receipts, such as the lost employee contributions to the retirement fund in this case, are "discretionary budget authority" within the meaning of the Line Item Veto Act if the reductions are the result of substantive provisions of law inserted into an appropriations law. We will argue that OMB's interpretation of the Act is entitled to deference, and that OMB properly followed the scoring rules.

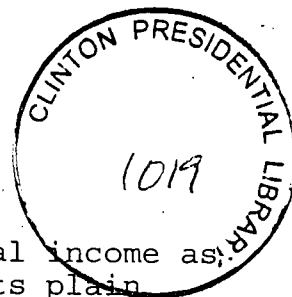
Second, we will argue that, irrespective of what the cancellation did or what OMB did, Section 642 does contain budget authority because employees who switch retirement programs trigger a series of government outlays, including permanent appropriations to cover the fund's unfunded liability and additional agency contributions to the CSRS/FERS fund. Moreover, both NTEU and the Congressional Budget Office ("CBO") have admitted that there is budget authority triggered by Section 642. Although CBO's estimate of the financial impact of the cancellation is different from the figure given in your cancellation message to Congress, we will argue that this discrepancy does not invalidate the cancellation.

Reasons Why This Cancellation Is Unlikely to Stand

Although we believe that this argument is not altogether unreasonable -- and that it is the best that can be made under the statute -- we believe that it is legally incorrect and has little chance of ultimate success. To defend this cancellation, we must argue either that reductions in income are "budget authority" or that the cancellation should be upheld even if the special message identified the wrong "budget authority" and the wrong "dollar amount." Neither approach is promising.

With respect to the first argument, the statute was plainly designed to apply to legislated spending (and "limited tax benefits"). To argue that it permits cancellation of a reduction in income gives every appearance of unjustifiably expanding the President's powers under the Act. The plain language of the Act

The President
Page 4



appears to preclude treating reductions in governmental income as "budget authority," and Scoring Rule 3 does not, by its plain terms, support the broader construction of "budget authority" that OMB favors. Moreover, Section 642 is significantly different from the examples of cancelable provisions discussed in the legislative history of the Act.

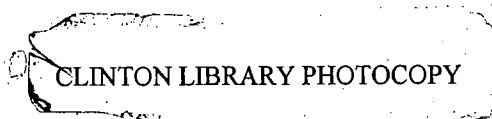
It would also be problematic to rely on scoring rules developed under the Budget Enforcement Act to control interpretation of the Line Item Veto Act. The scoring rules are subject to frequent change and are interpreted differently by OMB and CBO; in this situation, one would not expect the Line Item Veto to be subject to such variations. Significantly, any argument relying on OMB's interpretation of the scoring rules will provoke a sharp response from Congress; the Senate Legal Counsel has informed us that he will file a brief against us if we pursue this argument.

The second possible argument -- that Section 642 contains budget authority because it triggers additional government payments -- is flawed because such payments are not directly mentioned in your special message to Congress concerning the cancellation. There is no evidence to indicate that the findings required by the Line Item Veto Act were made with respect to those payments, and it is clear that the \$854 million identified in the message does not correlate with those payments.

Cancellation of Section 642 raises other, very thorny problems. For example, under the Act, cancellation of discretionary budget authority operates to "rescind" the funds allocated; it does not repeal the provision of law. This cancellation, however, does not purport to rescind any funds allocated; it effectively seeks to repeal the provision of law. Nevertheless, there is a strong argument that, even though the lost employee contributions were "canceled," OPM will still have to run the open season because some employees may want to switch programs.

Defense of This Lawsuit Will Jeopardize Our Defense of the
Constitutionality of the Line Item Veto Act

The single most important reason not to defend this cancellation is the impact that it is likely to have on a defense of the constitutionality of the Line Item Veto Act. As the Solicitor General explains in the enclosed memorandum to me, defense of this cancellation will jeopardize our constitutional arguments in several ways:



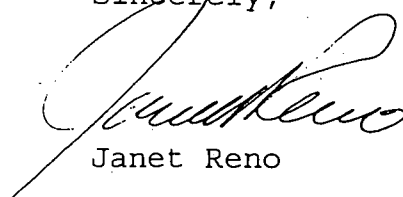


- Our best chance to defend the constitutionality of the Act is by arguing that the President's cancellation authority is narrow and closely analogous to his historic discretion to decline to spend appropriated funds. This cancellation cannot be defended on that narrow basis, because it involves reductions in receipts.
- Our best chance to defend the constitutionality of the Act depends on the support of the Congress, who can argue to the Court that their power is not infringed by the Act. They will oppose the lawfulness of this cancellation.
- Defense of this cancellation will leave us susceptible to the argument that the President's cancellation authority is being exercised without consideration of all of the effects of the canceled provisions. This will undermine our central argument that the Act's requirements of formal presidential findings and a special message place meaningful constraints on the President's discretion.

Conclusion

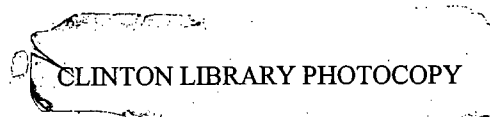
In sum, we believe that the chances of winning this lawsuit are slim because the Line Item Veto Act should not be read to extend to cancellation of provisions such as Section 642. Moreover, the expansive reading that we will be forced to give the Act in defense of this cancellation will make the Solicitor General's efforts to defend the constitutionality of the Act dramatically more difficult, and could cost us critical votes in the Supreme Court. For these reasons, we strongly urge that the United States not defend the cancellation of Section 642, and instead submit to a consent judgment in the district court.

Sincerely,



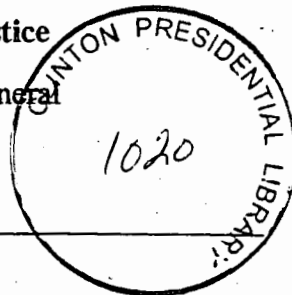
Janet Reno

Enclosure





U. S. Department of Justice
Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL *sw*

Re: NTEU Line Item Veto Case

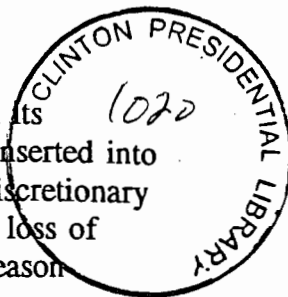
I understand that the Civil Division and OMB have concluded that a statutory defense in the NTEU line item veto case is at least theoretically possible. For the reasons that follow, however, I urge you and the President not to defend this cancellation -- even in the district court -- but, instead, to accept a consent judgment. I firmly believe that attempting to justify the NTEU cancellation as a proper exercise of the President's authority would seriously undermine our ability to defend the Line Item Veto Act against constitutional challenge.

The Theory of Defense

This case involves the President's effort, pursuant to his authority under the Line Item Veto Act, to cancel a provision of law that would have established an "open season" during which certain federal employees could have switched their retirement coverage from CSRS to FERS. The President's special message stated that he was cancelling a "dollar amount of discretionary budget authority" totalling \$854 million. That amount represented the reduction in employee contributions to the retirement fund that was expected to occur during the five-year period following the cancellation if the option to switch from CSRS to FERS became available. The cancellation message itself did not make clear whether the President intended to cancel the entire open season provision or only the reduction in employee contributions. We know from OMB, however, that the intent was to prevent the open season from going forward.

To understand the theory of defense, it is necessary to understand something about "scoring rules" OMB uses to carry out its responsibilities under a different statute, the Budget Enforcement Act (BEA). Under that Act, OMB is required to provide an "estimate of the amount of discretionary new budget authority and outlays" contained in an

appropriations law. 2 U.S.C. 901(a)(7).¹ OMB's established practice (based on its interpretation of "Scoring Rule 3") is that a substantive provision of law that is inserted into an appropriations law to reduce the government's income will be "scored" as "discretionary new budget authority."² Consistent with its general practice, OMB "scored" the loss of employee contributions that was expected to result from the CSRS/FERS open season provision as "discretionary new budget authority."



The Civil Division has prepared a draft brief that attempts to defend the cancellation at issue on two alternative theories. The draft argues, first, that because Congress was aware of OMB's scoring practices when it enacted the Line Item Veto Act, therefore since OMB "scored" the reduced employee contributions as "discretionary new budget authority" for BEA purposes, the reduced contributions should likewise be regarded as "discretionary budget authority" subject to cancellation under the Line Item Veto Act. Significantly, the draft brief does not argue that the reduced contributions satisfy the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i) -- a provision that expressly applies to the Line Item Veto Act. The draft brief does contend, however, as an alternative theory, that because certain outlays that would result from the open season provision do fall within the Section 622 definition, the cancellation may be upheld on that basis if the court concludes that the Section 622 definition of "budget authority" is controlling.

Reasons Not To Defend the CSRS/FERS Cancellation

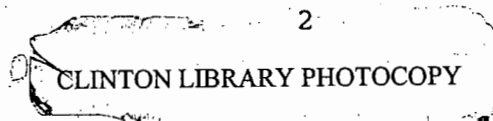
The theory of defense reflected in the draft brief is extremely weak, even as a statutory matter. What is more, the defense rests upon an expansive interpretation of presidential power under the Line Item Veto Act that is inconsistent with the arguments we have made in favor of the Act's constitutionality. At this critical stage, establishing the constitutionality of the President's cancellation authority under the Line Item Veto Act is simply too important a goal to jeopardize with a dubious and immoderate assertion of statutory authority.

1. **Cancellation of the CSRS/FERS provision cannot credibly be analogized to any power the President has historically exercised.**

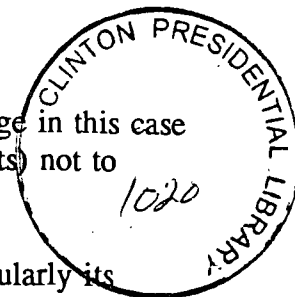
Opponents of the Line Item Veto Act have contended, *inter alia*, that it results in an unconstitutional delegation by Congress to the President of legislative power because the President's cancellation authority is broad and standardless. Our brief in Raines v. Byrd responded to that constitutional attack by arguing that the President's authority under the Act (at least as applied to spending items) is closely analogous to the discretion Executive Branch officials have historically possessed with respect to the decision whether or not to spend appropriated sums. Indeed, our brief essentially equated the cancellation of "discretionary

¹ Such estimates might ultimately trigger a "sequestration" under the BEA if discretionary spending caps for the fiscal year are exceeded.

² The Congressional Budget Office does not agree with that interpretation of Scoring Rule 3.



budget authority" -- the category invoked by the President's cancellation message in this case -- with decisions historically made by Presidents (in the nature of impoundments) not to spend money appropriated to an agency.

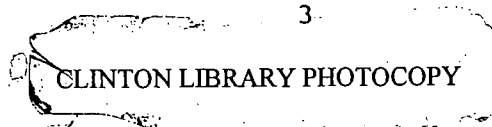


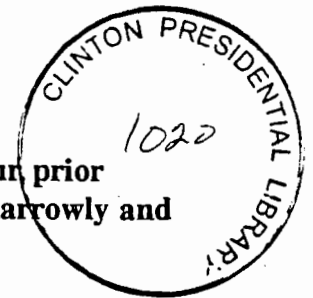
That analogy will be wholly undercut if we construe the Act (and particularly its provision for cancelling "discretionary budget authority") as permitting the President to invalidate an entire substantive provision of law simply by identifying some form of "budget authority" contained in or affected by the provision. The reduction in employee contributions to the retirement fund is only one of a number of substantive provisions of law that are triggered by the special open season Congress enacted, and it is only one of many financial consequences that follow from an employee's decision to switch from CSRS to FERS. The authority to cancel the open season provision therefore cannot plausibly be compared to any power the President has traditionally exercised to decline to spend the full amount of funds that Congress has appropriated to a particular agency, or for a particular purpose, for a fiscal year. Rather, our defense of the cancellation will (necessarily) blur the line between the refusal to spend appropriated funds and the invalidation of substantive provisions of law.³

2. Defending the CSRS/FERS cancellation will jeopardize our alliance with Congress in the constitutional defense.

In defending the Line Item Veto Act against the claim that the Act violates separation of powers principles by authorizing the President to "repeal" Acts of Congress, it will be very important to have the full support of the Senate and House as amici curiae, arguing that Congress does not regard the Act as an infringement on its constitutional prerogatives. If we defend the cancellation on the theory described above, the Senate Legal Counsel is expected to file an amicus brief arguing that the cancellation was improper. (Such an argument would be consistent with the Congressional Budget Office's longstanding view that reductions in governmental income resulting from provisions contained in appropriations laws should not be scored as "discretionary new budget authority.") Such a filing would impair the image of interbranch unity we need to project, and might lead the Supreme Court to conclude that if the Act is sustained, the judiciary will be required (in the course of ruling on challenges to individual cancellations) to resolve disputes between the political branches concerning arcane budgetary matters.

³ Cancellation of limited tax benefits is also concededly different from the authority that the President has historically possessed to decline to spend appropriated funds. The President's authority to cancel tax provisions, however, is subject to limitations of its own -- most obviously, the requirement that no more than 100 taxpayers be affected. The President's power to cancel limited tax benefits, moreover, is clear on the face of the Line Item Veto Act, while the contention that the President may cancel entire provisions of law based on relatively modest budget impacts has no apparent textual basis (and no apparent stopping point). Finally, invalidation of the President's authority to cancel limited tax benefits would (assuming that authority to be severable) leave the core of the Line Item Veto Act intact. The provisions governing discretionary budget authority, by contrast, have always been regarded as the most important and most defensible feature of the Act.





3. **Defending the CSRS/FERS cancellation is inconsistent with our prior representations that the President will exercise his authority narrowly and with care and circumspection.**

The President has tried, in a variety of ways, to convey the message that he regards the cancellation authority under the Line Item Veto Act as an especially important presidential prerogative, to be exercised with particular care and circumspection. It is quite important that we do all we can to persuade the Court that the Act is in fact being administered on that basis. The Supreme Court's decisions during the last Term suggest a particular aversion to anything that smacks of "symbolic legislation," and we should make every effort to prevent the Court from regarding the Line Item Veto Act in that light.

To defend the CSRS/FERS cancellation -- even in the district court -- would significantly undermine that effort. The draft brief does not contend that the reduction in employee contributions that the President's special message identified as the cancelled item falls within the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i). Instead, the draft brief argues (in essence) that established OMB scoring practices can be used to replace rather than to elucidate the statutory definition. OMB sincerely regards the various scoring rules (and its own construction of them) as substantial constraints on its own discretion. The contention that the President's cancellation authority extends beyond items covered by the statutory definition, however, is likely to strike the Supreme Court as an extraordinary assertion of executive power.

Similarly, to defend the cancellation on the alternative theory that the "open season" provision of the Treasury Appropriations Act triggers certain provisions of other laws that might fit the definition of "budget authority" in 2 U.S.C. 622(2) would require us to offer a rationale that is not set forth in the President's cancellation message -- suggesting that the President may rely on statutory provisions and financial consequences that are far afield from the appropriations provision that he purported to cancel. That alternative would undermine another important point we made in Raines v. Byrd in defense of the Act: that the President is subject to important procedural limitations on the exercise of his cancellation authority by the requirements that he (a) make specific determinations and (b) include particular information about the cancellation in his cancellation message, both of which are lacking here with respect to the suggested alternative rationale.

At worst, a defense of the cancellation along the lines set forth in the draft brief may suggest to the Court that the President's authority is being exercised cavalierly or carelessly. Even if the Court does not regard our position as wholly unreasonable, however, it will surely conclude that the President is intent on construing his own cancellation authority under the Line Item Veto Act in the broadest possible manner. That perception cannot help but lessen the Court's willingness to sustain the Act against constitutional challenge.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. email	To James Castello from Charles Konigsberg. Subject: Doug Letter's Comments follow. (1 page)	09/11/1995	P5	1021
002a. email	To Charles Konigsberg from Douglas Letter. Subject: Re: Revised item veto analysis--any comments. (1 page)	05/02/1995	P5	1022
002b. email	To Douglas Letter and Paul Weinstein, Jr. from Charles Konigsberg. Subject: Revised item veto analysis--any comments? (13 pages)	05/02/1995	P5	1023
003. email	To Charles Konigsberg from Douglas Letter. Subject: Re: Revised item veto analysis--any comments? (1 page)	05/03/1995	P5	1024
004. email	To Patrick Griffin, Erin O'Connor, Ann Cattalini, Douglas Letter, et al from Charles Konigsberg. Subject: Urgent--Need pat's Sign-off by 5:30. (2 pages)	05/05/1995	P5	1025
005. email	To Robert Damus and Douglas Letter from Charles Konigsberg. Subject: Here is the item veto compromise (1 page)	03/24/1995	P5	1026
006. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Proposals/S.4, S.14, and S.137. (5 pages)	03/16/1995	P5	1027
007a. note	To Judge Mikva from Sheri. (1 page)	03/13/1995	P5	1028
007b. draft	Memo for Abner Mikva from Walter Dellinger. Subject: Line Item Veto Proposals/S.4, S.14, S.137. (5 pages)	03/14/1995	P5	1029
008a. email	To Jacob Lew, Martha Foley, Barbara Chow, et al from Charles Konigsberg. Subject: Item Veto--Separate Enrollment. (1 page)	03/10/1995	P5	1030

COLLECTION:

Clinton Presidential Records
Counsel's Office
James Castello
OA/Box Number: 6729

FOLDER TITLE:

Line Item Veto [1]

2007-0624-F
vz1197

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]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008b. email	To Charles Konigsberg, Jacob Lew, Martha Foley, Barbara Chow, et al from Douglas Letter. Subject: Re: Item Veto--Separate Enrollment. (1 page)	03/10/1995	P5 1031
009. email	Duplicate of 008a. (1 page)	03/10/1995	P5 Dup of 1030
010a. memo	For Abner Mikva and Pat Griffin from Jack Lew. Subject: Balanced Budget and Line Item Veto Technical Issues. (1 page)	01/26/1995	P5 1033
010b. draft	Memo on Technical Issues. (1 page)	01/25/1995	P5 1034
010c. memo	Line Item Veto Technical Issues. (1 page)	01/20/1995	P5 1035
010d. memo	For Robert Damus from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to S.4 and S.14. (3 pages)	01/20/1995	P5 1036

COLLECTION:

Clinton Presidential Records
Counsel's Office
James Castello
OA/Box Number: 6729

FOLDER TITLE:

Line Item Veto [1]

2007-0624-F

vz1197

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]

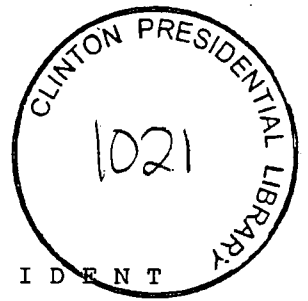
C. Closed in accordance with restrictions contained in donor's deed of gift.

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]



EXECUTIVE OFFICE OF THE PRESIDENT

11-Sep-1995 04:03pm

TO: James Castello

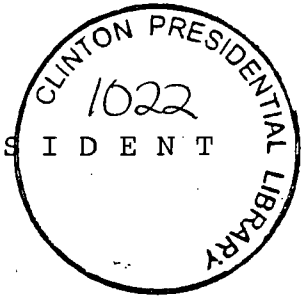
FROM: Charles S. Konigsberg
Office of Mgmt and Budget

SUBJECT: Doug Letter's comments follow

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.

Line Item Veto



EXECUTIVE OFFICE OF THE PRESIDENT

02-May-1995 05:45pm

TO: Charles S. Konigsberg

FROM: Douglas N. Letter
Office of the Counsel

CC: Paul J. Weinstein, Jr

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

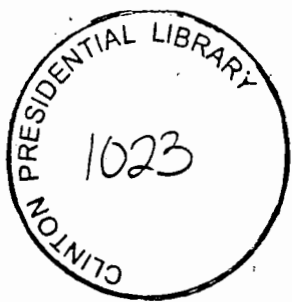
Chuck: I want to consult James Castello, the Dpty WH Counsel, before I give you a definitive response on this. A few comments I have now are:

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.



THE WHITE HOUSE
WASHINGTON

James - See my
e-mail on this.
Doug

E X E C U T I V E O F F I C E O F T H E P R E S I D E

02-May-1995 10:02am

TO: Douglas N. Letter
TO: Paul J. Weinstein, Jr

FROM: Charles S. Konigsberg
Office of Mgmt and Budget

SUBJECT: Revised item veto analysis--any comments?

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.

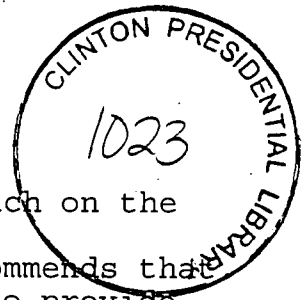
Comment--This time constraint would unnecessarily constrain the Administration's ability to carefully review each appropriation and tax item. Appropriations bills are normally enacted within a short period of time at the end of a fiscal year. Ten calendar days would be an unnecessarily short period of 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

THE WHITE HOUSE

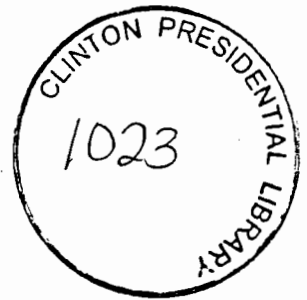
WASHINGTON



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."

THE WHITE HOUSE

WASHINGTON



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.

why not
vastly?

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. ?

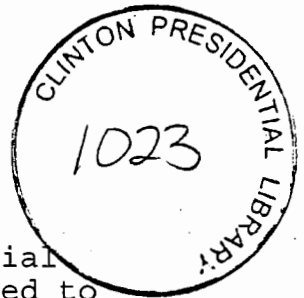
[DOJ will supplement] *what would the problem be then?*

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]

THE WHITE HOUSE

WASHINGTON



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.

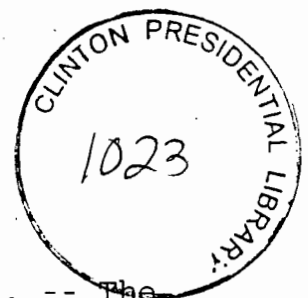
The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram 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]

THE WHITE HOUSE

WASHINGTON



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."

THE WHITE HOUSE

WASHINGTON



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.

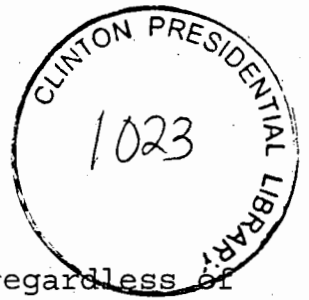
DOJ Comment--DOJ firmly believes that the use of the terms "veto" and "repeal" raises serious constitutional concerns that are not posed by the budget authority provisions of the House bill. In particular, U.S. Const. art. I, § 7, cl. 2 provides that the President can exercise his "veto" power only before 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 art. 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,

THE WHITE HOUSE

WASHINGTON



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."

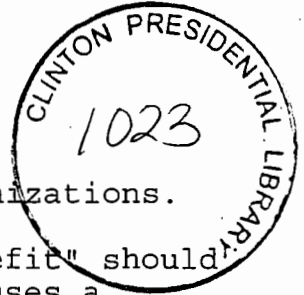
Comment (from Treasury)--[Treasury to expand their analysis]

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

THE WHITE HOUSE

WASHINGTON



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.

*Viacom
legislation* →

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."

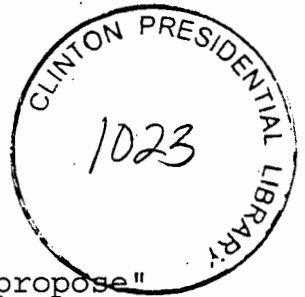
Comment (from Treasury): This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section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

It is unclear 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 have the effect of amendments to a particular section of the Code (enacted before this legislation) having a sunset provision when the rest of the provision does not.

THE WHITE HOUSE

WASHINGTON



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."

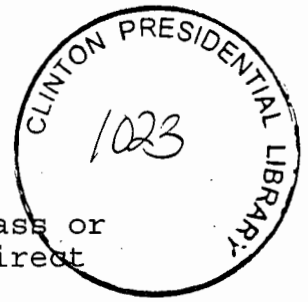
Comment--The Administration supports the broad application of item veto authority to direct, as well as discretionary spending. The President's objective of curbing wasteful spending provisions would be furthered by extending the rescission authority in the House bill to authorizing legislation which 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

THE WHITE HOUSE
WASHINGTON



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

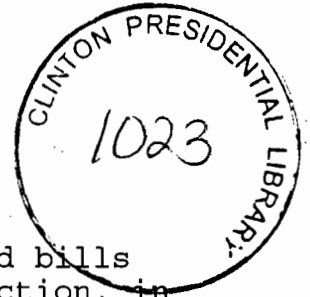
2. Annually appropriated entitlements.--The Senate bill would apparently require that each item of appropriation --including appropriations which fund underlying entitlement obligations -- be separately enrolled.

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?]

THE WHITE HOUSE

WASHINGTON

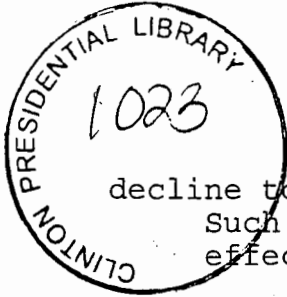


V. JUDICIAL REVIEW

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



THE WHITE HOUSE
WASHINGTON

No!
remedial
or equitable
discretionary
doctrines

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).

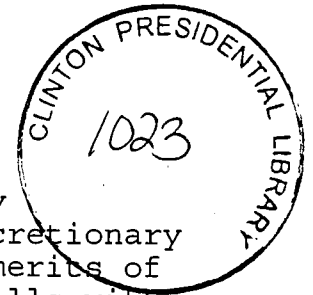
B. Severability.--The Senate-passed bill, see S. 4, ?6(d), includes a "severability" provision. The House-passed bill does not.

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 WHITE HOUSE

WASHINGTON



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.



E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

03-May-1995 03:11pm

TO: Charles S. Konigsberg

FROM: Douglas N. Letter
Office of the Counsel

CC: Paul J. Weinstein, Jr

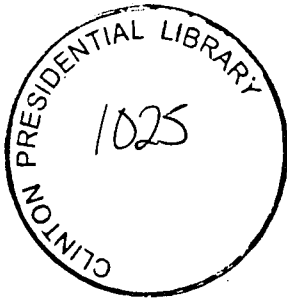
SUBJECT: RE: Revised item veto analysis--any comments?

Chuck: I just spoke to Mike Small in OLC. He explained what OLC's continuing doubts are about the Senate approach, and said he would fax me what he is sending you about this. I have no problem with what OLC is saying. My understanding from Mike is that they perceive a litigation risk since the type of en bloc voting that would occur here is different from what the Senate has been doing for years because it would involve more controversial subjects, and thus might be more likely to raise the Supreme Court's concern.

I explained to Mike my objection to the three-judge court review mechanism with mandatory Supreme Court review, and he said he was perfectly willing to defer on this. I pointed out that there might be some peripheral challenges to the statute that arise before the big challenge that we expect to the heart of it; it does not make sense to require a 3-judge court and Supreme Court review for that. In addition, this is a very cumbersome mechanism that works fine sometimes and is a procedural mess other times. Moreover, if the House adopts the key wording changes that OLC suggests to the House version and that version is then enacted, I don't think there really are any serious constitutional questions that would merit Supreme Court review. Thus, if a dist ct upheld such a statute, and the DC Circuit affirmed, I think we would oppose any need for Supreme Court review. We should therefore urge that this part be changed to provide for expedited review but in the DC dist ct, with expedition all the way up the line if appeals are taken, but that there is no need for mandatory Supreme Court review. In sum, we need not worry; if the statute is struck down as unconstitutional by the lower courts, the Supreme Court will take the case, and if the statute is instead upheld by the lower court, Supreme Court review might be unnecessary.

cc: James Castello

Line Item Veto



EXECUTIVE OFFICE OF THE PRESIDENT

05-May-1995 03:25pm

TO: (See Below)

FROM: Charles S. Konigsberg
Office of Mgmt and Budget

SUBJECT: URGENT--NEED POTUS ACTION BY 5:30 TODAY

BARRY AND MARTHA HAD A FEW CHANGES TO THE POTUS ITEM VETO LETTER WHICH YOU APPROVED LAST WEEK. THE 2d and 3d PARAGRAPHS ARE REVISED. PLEASE LET ME KNOW BY 5:30 PM IF YOU APPROVE; WE NEED TO GET IT TO LEON IN FINAL FORM BY COB TODAY. THANKS.

DRAFT POTUS LETTER TO GINGRICH AND DOLE

May __, 1995

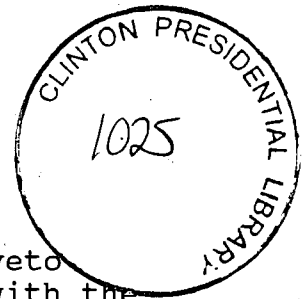
Dear _____:

I am writing to urge that Congress quickly complete work on line-item veto legislation so I can use it -- this year -- to curb wasteful tax and spending provisions.

We must not let another year go by without the President having authority to eliminate special interest provisions, such as the tax benefits that were targeted to individual businesses earlier this year in H.R. 831.

I am disappointed that six weeks after the Senate passed its version of line-item veto legislation, neither body has appointed conferees. As you may recall, I commended the House and the Senate last month for passing line item veto legislation. However, the job is not complete until a bill is sent to my desk that provides strong line item veto authority that can be used this year.

I have consistently urged the Congress to pass the strongest possible line-item veto. While both the House and Senate versions would provide authority to eliminate wasteful spending and tax provisions, the House-passed bill is much stronger -- and more workable.

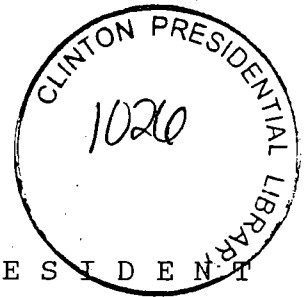


I appreciate your making passage of line-item veto legislation a priority. I look forward to working with the Congress to enact the line-item veto quickly.

Sincerely,

Distribution:

TO: Patrick J. Griffin
CC: Erin A. O'Connor
CC: Ann M. Cattalini
CC: Douglas N. Letter
CC: Paul J. Weinstein, Jr
CC: Jacob J. Lew
CC: LAWRENCE J. HAAS



E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Mar-1995 12:42pm

TO: Robert G. Damus
TO: Douglas N. Letter

FROM: Charles S. Konigsberg
 Office of Mgmt and Budget

CC: Jacob J. Lew

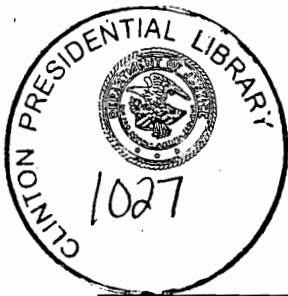
SUBJECT: HERE IS THE ITEM VETO COMPROMISE WE DISCUSSED...

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).



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 16, 1995

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

**ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET**

From: Walter Dellinger 
Assistant Attorney General

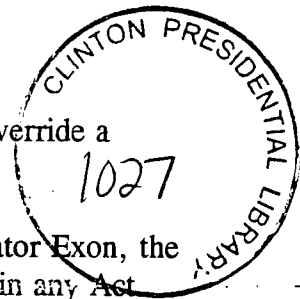
Re: Line Item Veto Proposals/S.4, S.14 and S.137

This memorandum responds to your request for advice on two matters arising from line item veto proposals pending before the Senate. First, you have asked us to compare two bills, S.4 and S.14, in actual operation and effect. Second, you have asked for our views on S.137, a bill introduced by Senator Bradley, that attempts to provide the President with effective line-item veto authority by requiring that items in appropriations bills and tax expenditure provisions in revenue bills be separately enrolled and presented to the President.

S.4 and S.14

We have previously reviewed both S.4 and S.14, and have concluded that both proposals likely would survive constitutional challenge. See Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Before the Subcomm. on the Constitution, Federalism, and Property Rights, Senate Judiciary Comm., January 24, 1995 (the "Dellinger Statement"). Briefly, S.4, which has been introduced by Senate Majority Leader Dole and Senator McCain, would amend the Congressional Budget and Impoundment Control Act of 1974 so as to authorize the President to rescind all or part of any budget authority. (In order to exercise this rescission authority, the President must make certain findings.) Further, any amount of budget authority rescinded is to be deemed cancelled unless, during a specified period, a majority of each House of Congress passes "rescission disapproval" legislation that would make available the rescinded budget authority, and the President signs that legislation into law. Should the President veto the rescission disapproval legislation, that veto may be overridden by two-thirds of the members of both Houses. Because it is likely that the President will in fact veto any legislation that disapproves of an earlier exercise of his rescission authority, it can be expected that S.4 will

in practice ordinarily require a supermajority of each House of Congress to override a Presidential rescission.



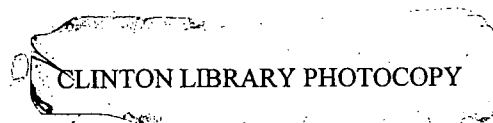
Under S.14, which has been introduced by Senator Domenici and Senator Exon, the President may propose to Congress the cancellation of budget items provided in any Act. Within prescribed time limits, the President may transmit a special message to Congress proposing such a cancellation and submitting a bill to effect that cancellation. The President's bill would be afforded expedited consideration by Congress. Either House of Congress may reject the President's bill. During the period in which Congress is considering the President's bill, the budget item in question is effectively suspended, *i.e.*, the funds that the President has targeted for cancellation remain frozen until one House has rejected the President's bill.

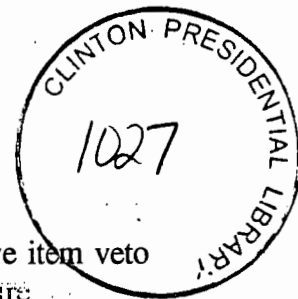
In actual practice, the chief difference between S.4 and S.14 is that under S.4, it would ordinarily require a two-thirds vote of each House of Congress to reinstate a spending item that the President has targeted for elimination, while under S.14, it would require only a majority vote of a single House to reinstate the item. Nonetheless, the requirement of a visible majority vote for reinstatement would heighten the accountability of individual members of Congress for supporting such spending. Accordingly, we have previously concluded that

S.14 is not as expansive as the rescission power granted to the President under S.4 -- which would in practice require two-thirds of each House to force an expenditure to be made if the President backed up his rescission decision with a veto of any legislation cancelling his rescission. Nevertheless, S.14 is still a powerful tool for subjecting to public scrutiny government spending that the President believes should be cut.

Dellinger Statement at 9.

Further, S.4 would not diminish Congress' control over federal spending as significantly as some of the bill's opponents appear to believe. Congress would retain the power to exempt any particular appropriation bill (or particular item within an appropriations bill) from the coverage of S.4 (as Congress, of course, also would under S.14). That is, Congress could explicitly provide, with respect to any particular appropriation bill, that the President could not exercise his statutory authority to rescind spending items in that bill. To be sure, a clear statement in the appropriations bill of Congress' intent to deprive the President of his otherwise general rescission authority would probably be necessary to accomplish that objective. Nonetheless, if S.4 becomes law, it will be within Congress' power, by simple majority votes of both Houses, to present the President with an appropriations bill as to which he would have no (or restricted) line-item rescission authority.





S.137

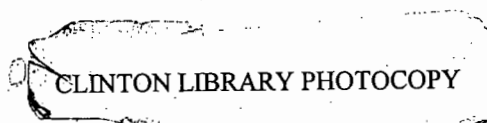
You have also asked for our views on S.137, a bill "[t]o create a legislative item veto by requiring separate enrollment of items in appropriations bills and tax expenditure provisions on revenue bills."

S.137 would amend the Congressional Budget and Impoundment Control Act of 1974 by adding a new title XI, the substance of which is as follows. Whenever any general or special appropriation bill, any supplemental, deficiency, or continuing appropriation bill or joint resolution, or any revenue bill containing a tax expenditure provision passes both Houses of Congress, the enrolling clerk of the House in which the bill originated "shall enroll each item of appropriation or tax expenditure provision of such bill or joint resolution as a separate bill or joint resolution." Proposed section 1101(a)(1). Further, "[a] bill or joint resolution enrolled" in the prescribed fashion "with respect to an item of appropriation or tax expenditure provision shall be deemed to be a bill under clauses 2 and 3 of section 7 of article 1 of the Constitution of the United States and shall be signed by the presiding officers of both Houses of Congress and presented to the President for approval or disapproval (and otherwise treated for all purposes) in the manner provided for bills and joint resolutions generally." Section 2(b). The terms "item of appropriation" and "tax-expenditure provision" are both defined. Section 2(c).

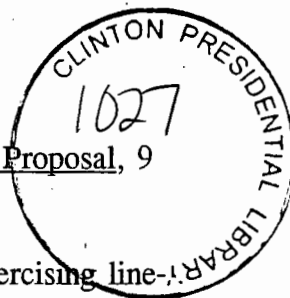
Clause 2 of article I, § 7 of the Constitution governs the procedure by which a bill or joint resolution becomes law. It declares in relevant part that:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

As our Office has consistently maintained, "[t]his language mandates a fairly straightforward procedure: after both houses of Congress have passed a 'Bill,' they must present it to the President, who can either 'approve . . . it' (by signing it) or 'not' (by returning it). In either event, the 'Bill' is to be treated as a single unit; nothing in the text permits the President to approve and sign one portion of a 'Bill' while disapproving and returning another portion." Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Before the Subcomm. on the Constitution of the Comm. on the Judiciary, United States Senate, Concerning Line-Item Veto: The President's Constitutional



Authority, at 1-2 (June 15, 1994). See also Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 29 (1985).



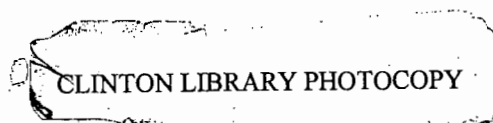
S.137 attempts to avoid this constitutional difficulty in the President's exercising line-item veto authority by requiring each individual item of appropriation or tax expenditure provision in a single bill passed by both Houses of Congress to be separately enrolled and separately presented to the President. The President would then be able to veto any of these individual "bills." S.137 seeks to achieve this outcome by "deeming" each line item that is separately enrolled in the prescribed manner to be a "bill" in the constitutional sense.

We have not been convinced of the constitutionality of this approach in the past, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. at 30, and we continue to question its validity. On what seems to us to be the best reading of the Presentment Clause, 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.

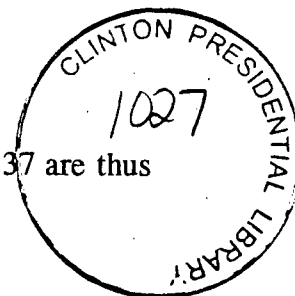
Nevertheless, the question is not free from doubt. The argument in favor of the constitutionality of this device is that Congress has the authority to determine, under its own procedural rules, what does and what does not constitute a separate "bill" to be enrolled and presented to the President. The courts might defer to Congress' judgment as to what constitutes a bill as long as that judgment was not an unreasonable one. A court might conclude that, for reasons of efficiency or convenience, each House may pass, in a single vote, an entire "package" of what will become separately enrolled bills.

Furthermore, there appear to be ways to refine S.137 so as to avoid the objection that what must be presented to the President is the "bill" in exactly the form voted on by each House. So long as the Houses of Congress have treated each bill subsequently presented to the President as a bill at the time of each of their respective final votes, this objection would not arise. Thus, for example, internal House and Senate procedures that provided for disaggregating an appropriations bill into separate bills and then for voting en bloc on those bills would result in the President's being presented with exactly the bill(s) that was (were) voted on by each House. The chances of S.137's being sustained would be improved were the bill amended to incorporate such refinements.

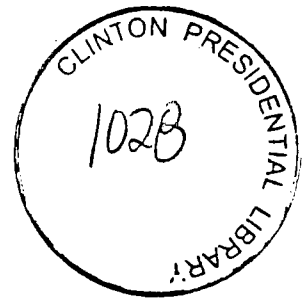
Congress should be aware, however, of the very significant difference in the litigation prospects of S.4 and S.14 on the one hand, and S.137 on the other. S.4 and S.14 are bills that would essentially delegate to the President authority not to spend money under legislation that he had signed into law. We are confident that the courts would sustain either version (S.4 or S.14) against a non-delegation challenge. S.137, however, raises very difficult questions under the "finely wrought" textual provisions of the Presentment Clause. INS v.



Chadha, 462 U.S. 919, 951 (1983). The chances of judicial invalidation of S.137 are thus substantially greater than they are in the case of the other two proposals.¹



¹ One further constitutional difficulty in S.137 should be noted. As drafted, S.137 appears to prescribe, by legislation, the procedures that each House of Congress is to follow for enrolling a covered bill. (The provision in question, section 1101, relates to the responsibility of the clerk of the appropriate House to unbundle a covered bill after it has been voted on.) As we have pointed out before, see Dellinger Statement at 4, n.7, such a provision would raise a constitutional issue were it understood to preclude either House from subsequently adopting procedural rules that differed from those set out in the statute. The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const. art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." INS v. Chadha, 462 U.S. at 955-56 n.21. We remain doubtful that an Act of Congress can deprive either House of its power to control that House's internal procedural rules through its own independent action. Accordingly, construing S.137 to make the procedures set forth in the bill unalterable by the unilateral action of either House would raise a constitutional difficulty. To avoid this difficulty, we would recommend that S.137 be amended to make clear that each House reserves the right to alter the procedure it is to follow.



March 13, 1995

TO: Judge Mikva
FROM: Sheri

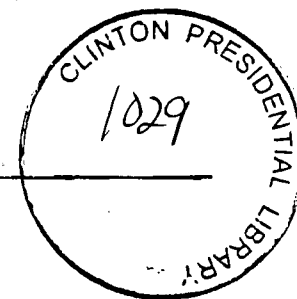
Pat Griffen stopped by -- asked that I relay to you that it looks like the Senate is going to go for the separate enrollment on the line item veto. Pat thinks that we need to be ready for the legal question of constitutionality.

*Walter Dellinger =
did apply for Independent Counsel*

**DRAFT**

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 14, 1995

**MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT**From: Walter Dellinger
Assistant Attorney General**DRAFT**

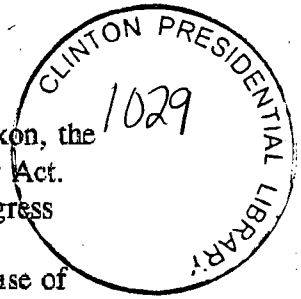
Re: Line Item Veto Proposals/S.4, S.14 and S.137

This memorandum responds to your request for advice on two matters arising from line item veto proposals pending before the Senate. First, you have asked us to compare two bills, S.4 and S.14, in actual operation and effect. Second, you have asked for our views on S.137, a bill introduced by Senator Bradley, that attempts to provide the President with effective line-item veto authority by requiring that items in appropriations bills and tax expenditure provisions in revenue bills be separately enrolled and presented to the President.

S.4 and S.14

We have previously reviewed both S.4 and S.14, and have concluded that both proposals likely would survive constitutional challenge. See Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Department of Justice, Before the Subcomm. on the Constitution, Federalism, and Property Rights, Senate Judiciary Comm., January 24, 1995 (the "Dellinger Statement"). Briefly, S.4, which has been introduced by Senate Majority Leader Dole and Senator McCain, would amend the Congressional Budget and Impoundment Control Act of 1974 so as to authorize the President to rescind all or part of any budget authority. (In order to exercise this rescission authority, the President must make certain findings.) Further, any amount of budget authority rescinded is to be deemed cancelled unless, during a specified period, a majority of each House of Congress passes "rescission disapproval" legislation that would make available the rescinded budget authority, and the President signs that legislation into law. Should the President veto the rescission disapproval legislation, that veto may be overridden by two-thirds of the members of both Houses. Because it is likely that the President will in fact veto any legislation that disapproves of an earlier exercise of his rescission authority, it can be expected that S.4 will in practice ordinarily require a supermajority of each House of Congress to override a Presidential rescission.

DRAFT



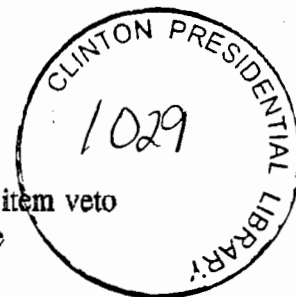
Under S.14, which has been introduced by Senator Domenici and Senator Exon, the President may propose to Congress the cancellation of budget items provided in any Act. Within prescribed time limits, the President may transmit a special message to Congress proposing such a cancellation and submitting a bill to effect that cancellation. The President's bill would be afforded expedited consideration by Congress. Either House of Congress may reject the President's bill. During the period in which Congress is considering the President's bill, the budget item in question is effectively suspended, *i.e.*, the funds that the President has targeted for cancellation remain frozen until one House has rejected the President's bill.

In actual practice, the chief difference between S.4 and S.14 is that under S.4, it would ordinarily require a two-thirds vote of each House of Congress to reinstate a spending item that the President has targeted for elimination, while under S.14, it would require only a majority vote of a single House to reinstate the item. Nonetheless, the requirement of a visible majority vote for reinstatement would heighten the accountability of individual members of Congress for supporting such spending. Accordingly, we have previously concluded that

S.14 is not as expansive as the rescission power granted to the President under S.4 -- which would in practice require two-thirds of each House to force an expenditure to be made if the President backed up his rescission decision with a veto of any legislation cancelling his rescission. Nevertheless, S.14 is still a powerful tool for subjecting to public scrutiny government spending that the President believes should be cut.

Dellinger Statement at 9.

Further, S.4 would not diminish Congress' control over federal spending as significantly as some of the bill's opponents appear to believe. Congress would retain the power to exempt any particular appropriation bill (or particular item within an appropriations bill) from the coverage of S.4 (as Congress, of course, also would under S.14). That is, Congress could explicitly provide, with respect to any particular appropriation bill, that the President could not exercise his statutory authority to rescind spending items in that bill. To be sure, a clear statement in the appropriations bill of Congress' intent to deprive the President of his otherwise general rescission authority would probably be necessary to accomplish that objective. Nonetheless, if S.4 becomes law, it will be within Congress' power, by simple majority votes of both Houses, to present the President with an appropriations bill as to which he would have no (or restricted) line-item rescission authority.

DRAFT**S.137**

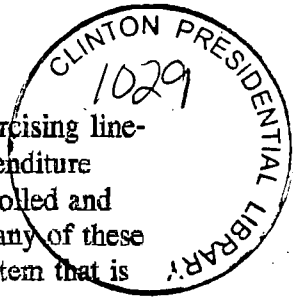
You have also asked for our views on S.137, a bill "[t]o create a legislative item veto by requiring separate enrollment of items in appropriations bills and tax expenditure provisions on revenue bills."

S.137 would amend the Congressional Budget and Impoundment Control Act of 1974 by adding a new title XI, the substance of which is as follows. Whenever any general or special appropriation bill, any supplemental, deficiency, or continuing appropriation bill or joint resolution, or any revenue bill containing a tax expenditure provision passes both Houses of Congress, the enrolling clerk of the House in which the bill originated "shall enroll each item of appropriation or tax expenditure provision of such bill or joint resolution as a separate bill or joint resolution." Proposed section 1101(a)(1). Further, "[a] bill or joint resolution enrolled" in the prescribed fashion "with respect to an item of appropriation or tax expenditure provision shall be deemed to be a bill under clauses 2 and 3 of section 7 of article 1 of the Constitution of the United States and shall be signed by the presiding officers of both Houses of Congress and presented to the President for approval or disapproval (and otherwise treated for all purposes) in the manner provided for bills and joint resolutions generally." Section 2(b). The terms "item of appropriation" and "tax-expenditure provision" are both defined. Section 2(c).

Clause 2 of article I, § 7 of the Constitution governs the procedure by which a bill or joint resolution becomes law. It declares in relevant part that:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

As our Office has consistently maintained, "[t]his language mandates a fairly straightforward procedure: after both houses of Congress have passed a 'Bill,' they must present it to the President, who can either 'approve . . . it' (by signing it) or 'not' (by returning it). In either event, the 'Bill' is to be treated as a single unit; nothing in the text permits the President to approve and sign one portion of a 'Bill' while disapproving and returning another portion." Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Before the Subcomm. on the Constitution of the Comm. on the Judiciary, United States Senate, Concerning Line-Item Veto: The President's Constitutional Authority, at 1-2 (June 15, 1994). See also Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 29 (1985).

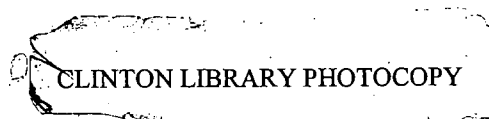
DRAFT

S.137 attempts to avoid this constitutional difficulty in the President's exercising line-item veto authority by requiring each individual item of appropriation or tax expenditure provision in a single bill passed by both Houses of Congress to be separately enrolled and separately presented to the President. The President would then be able to veto any of these individual "bills." S.137 seeks to achieve this outcome by "deeming" each line item that is separately enrolled in the prescribed manner to be a "bill" in the constitutional sense.

We have not been convinced of the constitutionality of this approach in the past, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. at 30, and we continue to question its validity. On what seems to us to be the best reading of the Presentment Clause, 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.

Nevertheless, the question is not free from doubt. The argument in favor of the constitutionality of this device is that Congress has the authority to determine, under its own procedural rules, what does and what does not constitute a separate "bill" to be enrolled and presented to the President. We believe that the courts might well defer to Congress' judgment as to what constitutes a bill as long as that judgment is not an unreasonable one. A court might conclude that, for reasons of efficiency or convenience, each House may pass, in a single vote, an entire "package" of what will become separately enrolled bills. Moreover, there appear to be ways to refine S.137 so as to avoid the objection that what must be presented to the President is the "bill" in exactly the form voted on by each House. So long as the Houses of Congress have treated each bill subsequently presented to the President as a bill at the time of each of their respective final votes, this objection would not arise. Thus, for example, internal House and Senate procedures that provided for disaggregating an appropriations bill into separate bills and then for voting en bloc on those bills would result in the President being presented with exactly the bill(s) that was (were) voted on by each House. Given Congress' undoubtedly broad power to control its own procedures, we cannot say that Congress is flatly precluded from adopting this method of passing bills, enrolling them, and presenting them to the President.

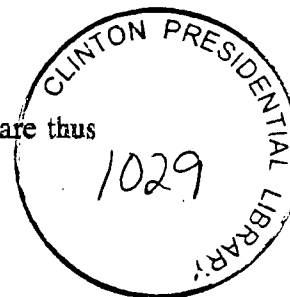
Congress should be aware, however, of the very significant difference in the litigation prospects of S.4 and S.14 on the one hand, and S.137 on the other. S.4 and S.14 are bills that would essentially delegate to the President authority not to spend money under legislation that he had signed into law. We are confident that the courts would sustain either version (S.4 or S.14) against a non-delegation challenge. S.137, however, raises very difficult questions under the "finely wrought" textual provisions of the Presentment Clause. INS v.



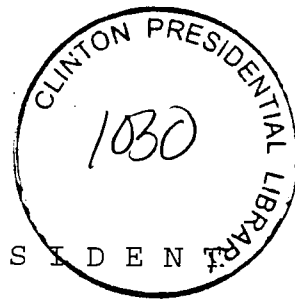
DRAFT

Chadha, 462 U.S. 919, 951 (1983). The chances of judicial invalidation of S.137 are thus substantially greater than they are in the case of the other two proposals.¹

cc: Alice Rivlin



One further constitutional difficulty in S.137 should be noted. As drafted, S.137 appears to prescribe, by legislation, the procedures that each House of Congress is to follow for enrolling a covered bill. (The provision in question, section 1101, relates to the responsibility of the clerk of the appropriate House to unbundle a covered bill after it has been voted on.) As we have pointed out before, see Dellinger Statement at 4, n.7, such a provision would raise a constitutional issue were it understood to preclude either House from subsequently adopting procedural rules that differed from those set out in the statute. The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const. art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." INS v. Chadha, 462 U.S. at 955-56 n.21. We remain doubtful that an Act of Congress can deprive either House of its power to control that House's internal procedural rules through its own independent action. Accordingly, construing S.137 to make the procedures set forth in the bill unalterable by the unilateral action of either House would raise a constitutional difficulty. To avoid this difficulty, we would recommend that S.137 be amended to make clear that each House reserves the right to alter the procedure it is to follow.



EXECUTIVE OFFICE OF THE PRESIDENT

10-Mar-1995 11:03am

TO: (See Below)

FROM: Charles S. Konigsberg
Office of Mgmt and Budget

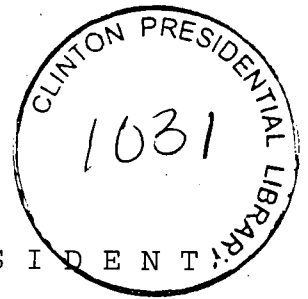
SUBJECT: ITEM VETO--SEPARATE ENROLLMENT

Congressional Monitor reports this morning that Domenici and McCain may break their impasse by compromising on the "separate enrollment" approach to item veto. This approach--the way it is normally drafted--requires the enrolling clerks, after an approps. bill is passed, to enroll each item of the bill as a separate bill for presentment to the President. Therefore, the hundreds of separate bills actually going to the President could be signed or vetoed. Problem is that the separate bills would NOT have been separately voted on by the Congress. This approach would therefore be unconstitutional (I staffed Stevens and Byrd on this issue in '87 when they raised a constitutional point of order on this point). I've asked Justice to dig out anything Dellinger may have already said on this and to be prepared to write a memo on this point if nothing has been said thus far. We need to discuss today how to respond -- it may be possible to fix the constitutional problem -- by requiring Congress to vote again, en bloc, on all of the separately enrolled bills -- but we need to think about whether we want to assist in perfecting this compromise approach.

Distribution:

TO: Jacob J. Lew
TO: Martha Foley
TO: Barbara C. Chow
TO: Joseph Minarik
TO: Robert G. Damus
TO: Douglas N. Letter
TO: Paul J. Weinstein, Jr
TO: Charles E. Kieffer
TO: Barry B. Anderson

CC: James J. Jukes
CC: Lydia Muniz



E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

10-Mar-1995 11:20am

TO: (See Below)

FROM: Douglas N. Letter
Office of the Counsel

SUBJECT: RE: ITEM VETO--SEPARATE ENROLLMENT

Is there also a practical problem with this proposal because it might not be a simple ministerial issue to divide up a large bill into smaller parts? There might be substantial disagreements as to what parts of the larger bill should be put together into smaller ones. How that dividing is done could be quite significant if the person doing the dividing puts a part of the bill that the President supports with a part that he does not, as opposed to separating them into two different new bills. Would there be rules for how the congressional personnel are to take large bills apart and rearrange them into many smaller bills?

Distribution:

TO: Charles S. Konigsberg

CC: Jacob J. Lew
CC: Martha Foley
CC: Barbara C. Chow
CC: Joseph Minarik
CC: Robert G. Damus
CC: Paul J. Weinstein, Jr
CC: Charles E. Kieffer
CC: Barry B. Anderson
CC: James J. Jukes
CC: Lydia Muniz

January 26, 1995

MEMORANDUM FOR ABNER MIKVA AND PAT GRIFFIN

SUBJECT: BALANCED BUDGET AND LINE ITEM VETO TECHNICAL ISSUES

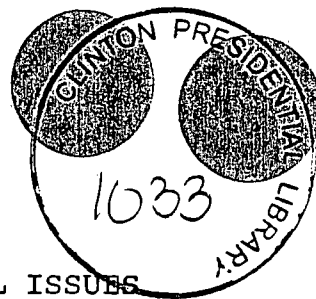
FROM: JACK LEW

cc: Martha Foley, Chuck Konigsberg, Cliff Sloan, Bob Damus,
Barbara Chow

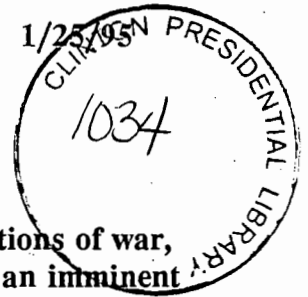
After this morning's 7:30 meeting, Alice Rivlin asked me to follow up with you on the issue of providing technical assistance at a staff level on the line item veto and balanced budget amendment.

In order to expedite a discussion of which issues to discuss, and who should make the staff contacts, Chuck Konigsberg in our office has prepared the attached list of technical issues on the BBA, and Bob Damus has prepared the list on item veto. Since both issues are proceeding even at this moment, the opportunity for technical assistance could slip away if we do not make contacts very soon.

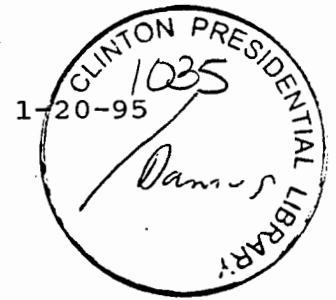
Chuck and I will be in touch with Martha, Barbara and Cliff this afternoon to try and close the loop on both the substance of the technical assistance, and who will be making the contacts.



Technical Issues - S.J.Res. 1



1. **Military Threat Provision.** S.J.Res. 1 limits military waivers to declarations of war, and where "the United States is engaged in military conflict which causes an imminent and serious military threat to national security". By contrast, H.J.Res. 1 permits a majority waiver where a threat exists, but without being "engaged in military conflict."
2. **"Tax Revenue" vs. "Revenue".** S.J.Res. 1 calls for a vote of each House to increase "revenue." This budgetary term is broader than "tax revenue" which is used in H.J.Res. 1.
3. **Budget Process Flexibility.** House and Senate versions have different mechanisms-- statement of receipts and outlays to be adopted by law (H.J.Res. 1) vs. a general balance requirement (S.J.Res. 1). The latter, S.J.Res 1, leaves more budget process flexibility to implementing legislation.
4. **Debt Limit.** H.J.Res. 1 requires a super-majority vote to increase debt held by the public "as of the date this Article takes effect." S.J.Res. 1 requires a super-majority vote to increase the "limit on debt held by the public" without specifying what the limit is. There is no such limit in current law.
5. **Effective Date.** H.J.Res. 1 is effective "for" FY 2002; S.J.Res. 1 is effective "beginning with" FY 2002. Is a budget resolution for FY 98, which includes FY 2002 as year-5, subject to the balanced budget requirement under the House version, but not the Senate version?
6. **U.S. Definition.** H.J.Res. 1 applies to total outlays/receipts of "the United States." S.J.Res. 1 applies to total outlays/receipts of the "United States Government." These two provisions might be interpreted differently with regard to how the amendment applies to off-budget or quasi-governmental entities.
7. **Enforcement by the Courts and the President.** Neither version is clear regarding the enforcement powers and responsibilities of the judiciary or the President. Neither version is clear about whether enforcement is limited solely to implementing legislation.
8. **Balance Required in Every Year.** Both versions require balance in each "fiscal year." However, Congress is currently considering proposals for a biennial budget period. In order to preserve the flexibility of future Congress' to adjust the fiscal periods of the government, the language would have to be changed from "fiscal year" to "budget period."



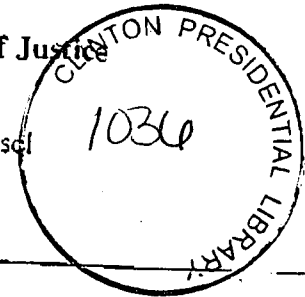
Line Item Veto
Technical Issues

1. Direct Spending. S. 14 allows cancellation of "an amount of direct spending." Direct spending is provided in direct spending provisions, not accounts (e.g., a provision amends Medicaid to provide a new benefit). The direct spending provision is estimated to cost a certain amount. But it is the provision, not "an amount" that would be cancelled by the President. (S. 4 applies only to discretionary spending, and so raises no issue in this regard).
2. Expiration. S. 14 provides that it ceases to be effective on September 30, 1998. It is unclear what happens at that time to funds withheld, particularly direct spending and multiyear funds. Do they become available again since the authority provided by the act to withhold them has expired? (S.4 raises no issue here since it would be permanent law.)
3. Targeted Tax Benefits. The bill provides a very general definition of the "targeted tax benefits" to which it applies. The general definition leaves considerable scope for differing judgments and uncertainty as to what is included -- raising the prospect of disputes or litigation. For example, the definition is far less clear than the term "tax expenditure", which has some definition in the Budget, as well as in the Congressional Budget Act. "Tax expenditure" is at least a budget term of art; "targeted tax benefit" is not.
4. Repeal/Cancellation. S. 14 provides that targeted tax benefits are "repealed" rather than "cancelled." The Department of Justice prefers the word "cancelled" to avoid constitutional questions.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 20, 1995

**MEMORANDUM TO ROBERT DAMUS
GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET**

From: Walter Dellinger *WD*
Assistant Attorney General

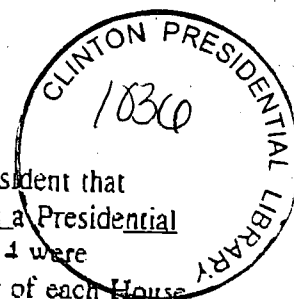
Re: Line Item Veto/Proposed Changes to S.4 and S.14

This memorandum responds to your request that we provide your office with our proposed changes to the line item veto bills that have been introduced in the Senate this year, S.4 and S.14.

S.4

1. S.4 purports to establish procedural rules by which Congress would consider legislation to disapprove presidential rescission. The bill requires that, whenever the President rescinds any budget authority, he must transmit a special message to each House. The President's message triggers procedural consequences. Among them, a "rescission disapproval bill" (section 1101(h)) may then be introduced to disapprove the President's rescission. Section 1113(b) prescribes the manner in which the Senate is to consider a rescission disapproval bill received from the House of Representatives, while section 1113(c) prescribes rules of order in both the Senate and the House of Representatives for such a bill.

These provisions would raise constitutional issues if they were understood to preclude either House from subsequently adopting rules different from those set out in the statute. The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const., art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." *INS v. Chadha*, 462 U.S. 919, 955-56, n.21 (1983). We doubt that an Act of Congress can ultimately deprive either House of its power to control that House's internal procedural rules through its own independent action. "The rules power is one of several powers that the houses possess independently to make their legislative powers effective. The House of Representatives and the courts have long maintained that a house's power to exercise its ancillary functions



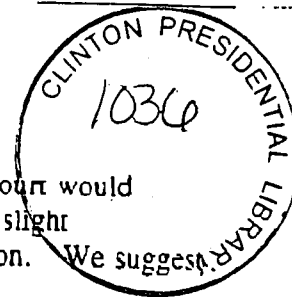
cannot be abridged by a statute passed by both houses and signed by the President that attempts to channel or regulate those powers." Paul R.Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 855 (1987). Accordingly, if S.4 were construed to put the procedures prescribed in section 1113 beyond the power of each House to modify by unilateral action, it would present a constitutional question. To preclude this possibility, we recommend that S.4 include an explicit provision to the effect that nothing in it is intended to limit or displace each House's authority to revise its own procedural rules by unilateral action. While such a disclaimer might be considered surplusage, it would serve to eliminate any question of Congress' intent. Disclaimers of this sort are frequently found in federal statutes. See, e.g., 19 U.S.C. §§ 2191(a), 2903(d).

2. The "reasons and justifications" for the President's determination to rescind budget authority must be set forth in the message that the President is required to send to Congress that provides notice of his decision to rescind the budget authority. Section 1111(3). This helps to cabin the delegation to the President, because it requires an explanation of his actions. We are somewhat troubled, however, by the requirement that the President's message specify "all facts, circumstances, and considerations relating to or bearing upon the rescission" Section 1111(5) (emphasis added). Read literally, this provision would obligate the President to say more than is reasonably necessary and appropriate to explain a rescission decision, and thus may constitute an encroachment upon the President's deliberative process. We suggest that the provision be revised to state that the President should comply with the requirement to the "maximum extent practicable."

S.14

1. S.14 sets forth an expedited procedure for consideration of a bill proposed by the President that would rescind budget authority. The President's bill would be transmitted to Congress along with a "special message" notifying Congress of the proposed rescission. During the pendency of consideration of the President's bill, the budget authority in question is suspended. When either House of Congress rejects the President's proposal, the budget authority must be released for obligation. This is reflected in Section 2(e) of the bill, which states that "[a]ny budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect until the day after the date on which either House rejects the bill transmitted with that special message." (emphasis added).

It could be argued that the rejection by either House of Congress of the President's proposal to cancel the budget authority, which has the effect of ending the suspension of spending that was triggered by transmittal of the President's special message, constitutes a one-House "veto" of executive branch action. A one-House veto violates the requirement of Article I of the Constitution that legislative acts "altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" must be accomplished through bicameral passage of a bill and presentment to the President. INS v. Chadha, 462 U.S. 919.



952 (1983). Although we believe that this argument is unsound, and that a court would likely conclude that S. 14 does not entail a one-House veto, we recommend a slight modification to Section 2(e) so that it avoids any reference to one-House action. We suggest that the provision be changed to read as follows:

Any budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect while the bill transmitted with that special message is pending before Congress.

2. For the reasons set forth above in connection with our discussion of the provision of S. 4 that would establish procedural rules by which Congress would consider legislation to disapprove presidential rescission, we note that each House would retain the authority to alter the rules in S. 14 for expedited consideration of a proposed presidential rescission.

cc: Abner J. Mikva

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. note	OMB/LA Line Item Veto Meeting. (1 page)	02/06/1995	P5	1037
002. memo	For Abner Mikva from Walter Dellinger. Subject: Line Item Veto/S.14. (3 pages)	01/20/1995	P5	1038
003. memo	For Robert Damus from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to S.4 and S.14. (3 pages)	01/20/1995	P5	1039
004. memo	For Janet Reno from Walter Dellinger. Subject: The Line Item Veto Act. (11 pages)	01/04/1995	P5	1040

COLLECTION:

Clinton Presidential Records
Counsel's Office
James Castello
OA/Box Number: 6729

FOLDER TITLE:

Line Item Veto [2]

Van Zbinden
2007-0624-F
vz1198

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.

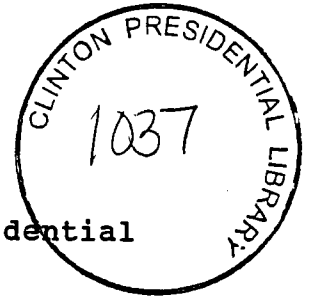
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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]

CLINTON LIBRARY PHOTOCOPY



1. Issue - HR 2 contains references throughout to presidential "veto," as follows:

- "veto" of targeted tax benefits;
 - "any provision of law vetoed under this Act ... shall be deemed repealed";
 - "provision(s) of law vetoed under this Act"; and
 - a bill or joint resolution which "disapproves vetoes of targeted tax benefits."
- S. 14 provides for "cancellation of any budget item" which is defined to include the repeal of direct spending and targeted tax benefits.
- S. 4 speaks only of the "rescission of budget authority".

2. DOJ has argued that use of the terms "veto" and "repeal" in the targeted tax benefits provisions of the Act is subject to misunderstanding and raises **two constitutional concerns--**

- HR 2 purports to authorize the President to veto targeted tax benefits after they have become law, contrary to Article I, sec. 7 which permits veto only before enactment; and
- use of the word "repeal" suggests that the President is being given the unilateral power to change existing law, raising possible delegation and Chadha issues.

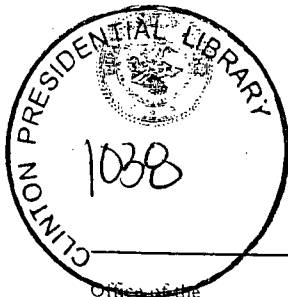
3. DOJ recommends that the word "suspend" be used, instead of veto (citing an 1892 Court decision holding that Congress may authorize the President to suspend the operation of a statute).

4. If "suspend" is used instead of "veto," must be decided **whether suspension would be:**

permanent - in effect a cancellation similar to rescission;

or

temporary - subject to a later presidential decision to implement the statute and, if so, whether the power to resurrect a statute could be used at any point in the future.



U. S. Department of Justice

Office of Legal Counsel

*Don
Linn*

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 20, 1995

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

From: Walter Dellinger *WED*
Assistant Attorney General

Re: Line Item Veto/S.14

As you know, we have been reviewing various statutory line item veto measures that have been introduced in this session of Congress. One of those measures, S.14 (which was introduced by Senators Exon and Domenici) sets forth an expedited procedure for consideration of a bill proposed by the President that would rescind budget authority. The President's bill would be transmitted to Congress along with a "special message" notifying Congress of the proposed rescission. During the pendency of consideration of the President's bill, the budget authority in question is suspended. When either House of Congress rejects the President's proposal, the budget authority must be released for obligation. S.14 delegates less authority to the President than S.4 (introduced by Senate Majority Leader Dole and Senator McCain), another line item veto bill that we have reviewed. S.4 provides for the automatic cancellation of budget authority that the President rescinds unless Congress overrides the President's action through legislation that restores the budget authority in question.

We have been advised that S.14 stands a better chance of passage in the Senate than S.4. Therefore, we would like to alert you to one potential constitutional problem with S.14 that is not raised by S.4. It could be argued that the provision in S.14 by which either House of Congress can reject the President's proposal to cancel the budget authority, and thereby end the suspension of spending that was triggered by transmittal of the President's special message, constitutes a one-House "veto" of executive branch action that violates the constitutional requirement that legislative acts "altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" must be accomplished through bicameral passage of a bill and presentment to the President. INS v. Chadha, 462 U.S. 919, 952 (1983).

We believe that this argument is unsound. Under S.14, each House merely votes on the rescission bill that is submitted with the President's message. Consideration of proposed legislation, and voting to approve or reject it, constitute the ordinary business of the Houses of Congress. That spending on the budget authority in question would be suspended while Congress considers the President's rescission proposal is a common-sense device to prevent the potentially wasteful expenditure of funds that ultimately might be cancelled if Congress approves the President's bill. If Congress acts on the President's proposal, either affirmatively or negatively, that action would be in accordance with Article I's requirement of bicameralism. If it has become clear that Congress has finally rejected the President's proposal -- an event whose occurrence is signalled by a negative vote on the proposal by either House -- S.14 declares that the contested budget authority then becomes available for obligation or takes effect.

This arrangement is distinguishable from the procedure invalidated in Chadha. Under that procedure, Congress could countermand an Executive decision -- there, the suspension of an alien's deportation -- by an affirmative vote on a one-House "resolution" that simply stated that the House opposed that decision. 462 U.S. 926, 952. In other words, under the contested procedure in Chadha, each House was directly reviewing an administrative decision. By contrast, under S.14, the Houses are not reviewing any administrative action: they are considering a bill. Further, in Chadha, each House had the power to effect changes in the law (the legal status of deportable aliens) without operating in accordance with Article I. That would not be true under S.14, where Congress can "alter[] the legal rights, duties, and relations of persons . . . outside the Legislative Branch," 462 U.S. at 952, only if it acts in conformity with Article I.

It might be responded that, under S.14, Congress in effect can alter legal relationships by the action of a single House: the President's withholding of the contested expenditure might be characterized as a kind of "stay" of an enacted appropriation, and the action of one House in voting down his proposal to cancel that appropriation could be seen as a decision to "lift" that "stay." Thus, S.14 would enable Congress, without bicameral approval, to affect rights and powers outside the Legislature. On the advice of the Justice Department, President Reagan objected to a statute that gave Congress (through the Comptroller General) the ability to stay the execution of the procurement laws under the Competition in Contracting Act. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984). It might be said that S.14 presented an analogous problem.

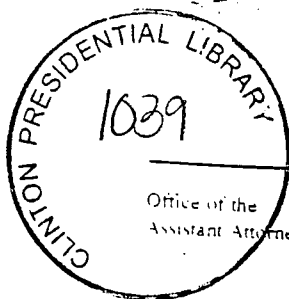
Even assuming the validity of this characterization of Congress' powers under S.14, we would point out that the courts have upheld the Comptroller General's power to stay procurements, over the Executive's protest. See Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), modified on other grounds, 893 F.2d 205 (9th Cir. 1989) (en banc); Ameron, Inc. v. United States Army Corps of Engineers, 809 F.2d 979 (3d Cir. 1986). But in any event, we find this characterization of S.14 misleading. S.14 does not confer on one House of Congress the power to review a suspension of budget authority. The decision to stay expenditures during the pendency of the proposed rescission legislation, and to lift that

stay when the rescission legislation is rejected, is a decision that would be made by this Congress by the enactment of S.14 through the constitutionally prescribed method of bicameral passage and presentment to the President. Rejection of the President's bill -- action that either House of Congress may take on its own, consistent with Article I -- signals the end of the pendency of the rescission bill, and the end of the period in which the suspension is in effect. In short, there is a subtle but critical difference between congressional action that operates directly to reverse an Executive decision, and congressional action that affects an Executive action only through the ordinary workings of the Article I process.

All told then, we believe that S.14 does not present a Chadha problem. However, there is a risk that the courts might hold otherwise. Paradoxically, the risk of a court decision striking down S.14 seems greater than the risk that S.4 would be invalidated, even though the latter delegates more authority to the President. Therefore, we recommend a slight modification to the critical provision of S.14, Section 2(e), so that it avoids any reference to one-House action. At present, Section 2(e) provides that "[a]ny budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect until the day after the date on which either House rejects the bill transmitted with that special message." (emphasis added). We suggest that the provision be changed to read as follows:

Any budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect while the bill transmitted with that special message is pending before Congress.

cc: Bob Damus



U. S. Department of Justice

Office of Legal Counsel

Washington, D. C. 20530

January 20, 1995

**MEMORANDUM TO ROBERT DAMUS
GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET**

From: Walter Dellinger *WED*
Assistant Attorney General

Re: Line Item Veto/Proposed Changes to S.4 and S.14

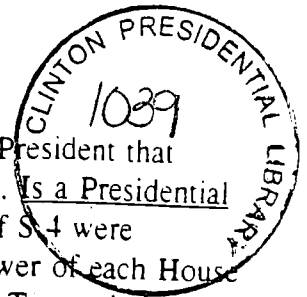
This memorandum responds to your request that we provide your office with our proposed changes to the line item veto bills that have been introduced in the Senate this year, S.4 and S.14.

S.4

1. S.4 purports to establish procedural rules by which Congress would consider legislation to disapprove presidential rescission. The bill requires that, whenever the President rescinds any budget authority, he must transmit a special message to each House. The President's message triggers procedural consequences. Among them, a "rescission disapproval bill" (section 1101(b)) may then be introduced to disapprove the President's rescission. Section 1113(b) prescribes the manner in which the Senate is to consider a rescission disapproval bill received from the House of Representatives, while section 1113(c) prescribes rules of order in both the Senate and the House of Representatives for such a bill.

These provisions would raise constitutional issues if they were understood to preclude either House from subsequently adopting rules different from those set out in the statute. The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const., art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." *INS v. Chadha*, 462 U.S. 919, 955-56, n.21 (1983). We doubt that an Act of Congress can ultimately deprive either House of its power to control that House's internal procedural rules through its own independent action. "The rules power is one of several powers that the houses possess independently to make their legislative powers effective. The House of Representatives and the courts have long maintained that a house's power to exercise its ancillary functions

cannot be abridged by a statute passed by both houses and signed by the President that attempts to channel or regulate those powers." Paul R.Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 855 (1987). Accordingly, if S.4 were construed to put the procedures prescribed in section 1113 beyond the power of each House to modify by unilateral action, it would present a constitutional question. To preclude this possibility, we recommend that S.4 include an explicit provision to the effect that nothing in it is intended to limit or displace each House's authority to revise its own procedural rules by unilateral action. While such a disclaimer might be considered surplusage, it would serve to eliminate any question of Congress' intent. Disclaimers of this sort are frequently found in federal statutes. See, e.g., 19 U.S.C. §§ 2191(a), 2903(d)

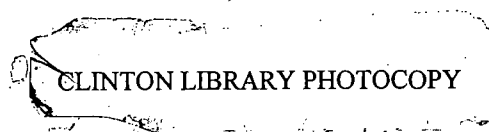


2. The "reasons and justifications" for the President's determination to rescind budget authority must be set forth in the message that the President is required to send to Congress that provides notice of his decision to rescind the budget authority. Section 1111(3). This helps to cabin the delegation to the President, because it requires an explanation of his actions. We are somewhat troubled, however, by the requirement that the President's message specify "all facts, circumstances, and considerations relating to or bearing upon the rescission" Section 1111(5) (emphasis added). Read literally, this provision would obligate the President to say more than is reasonably necessary and appropriate to explain a rescission decision, and thus may constitute an encroachment upon the President's deliberative process. We suggest that the provision be revised to state that the President should comply with the requirement to the "maximum extent practicable."

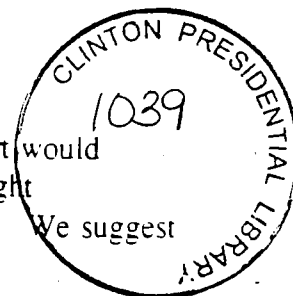
S.14

1. S.14 sets forth an expedited procedure for consideration of a bill proposed by the President that would rescind budget authority. The President's bill would be transmitted to Congress along with a "special message" notifying Congress of the proposed rescission. During the pendency of consideration of the President's bill, the budget authority in question is suspended. When either House of Congress rejects the President's proposal, the budget authority must be released for obligation. This is reflected in Section 2(e) of the bill, which states that "[a]ny budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect until the day after the date on which either House rejects the bill transmitted with that special message." (emphasis added).

It could be argued that the rejection by either House of Congress of the President's proposal to cancel the budget authority, which has the effect of ending the suspension of spending that was triggered by transmittal of the President's special message, constitutes a one-House "veto" of executive branch action. A one-House veto violates the requirement of Article I of the Constitution that legislative acts "altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" must be accomplished through bicameral passage of a bill and presentment to the President. INS v. Chadha, 462 U.S. 919.



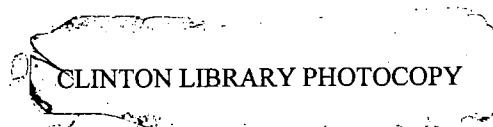
952 (1983). Although we believe that this argument is unsound, and that a court would likely conclude that S.14 does not entail a one-House veto, we recommend a slight modification to Section 2(e) so that it avoids any reference to one-House action. We suggest that the provision be changed to read as follows:

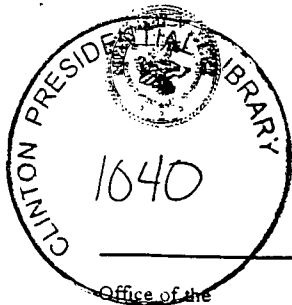


Any budget item proposed to be canceled in a special message transmitted to Congress under subsection (b) shall not be made available for obligation or take effect while the bill transmitted with that special message is pending before Congress.

2. For the reasons set forth above in connection with our discussion of the provision of S.4 that would establish procedural rules by which Congress would consider legislation to disapprove presidential rescission, we note that each House would retain the authority to alter the rules in S.14 for expedited consideration of a proposed presidential rescission.

cc: Abner J. Mikva





U. S. Department of Justice

Office of Legal Counsel

Ampt
Line Item
Veto

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 4, 1995

**MEMORANDUM FOR JANET RENO
ATTORNEY GENERAL**

From: Walter Dellinger *WD*
Assistant Attorney General

Re: The Line Item Veto Act

This memorandum sets forth our comments on the proposed Line Item Veto Act (the "Act") that is expected to be introduced shortly in the House of Representatives.¹ The Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted tax benefit within any revenue bill." It also purports to establish procedural rules by which Congress would consider legislation to disapprove any such rescission or veto. Our comments are limited to the constitutional issues that are posed by these provisions of the Act.

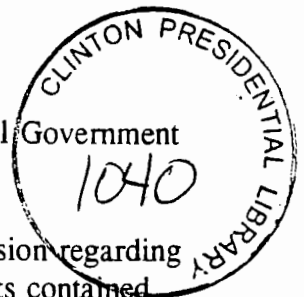
In our view, the provision of the Act authorizing the President to rescind discretionary budget items is constitutional. Although the provisions authorizing the President to "veto" targeted tax benefits and establishing procedural rules for congressional consideration of disapproval legislation raise constitutional concerns, we believe that these concerns can be alleviated through minor redrafting, proposed below, that would not disturb the essence of the two provisions.

I. Description of the Act

Section 2 of the Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted tax benefit within any revenue bill." The President may exercise this power only if he determines that such a rescission or veto (a)

¹ We understand that a comparable bill may be introduced soon in the Senate.

would help reduce the Federal budget deficit; (b) would not impair any essential Government functions; and (c) would not harm the national interest.²

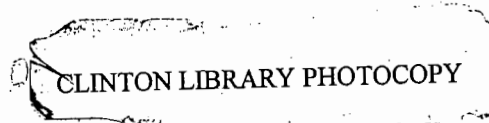


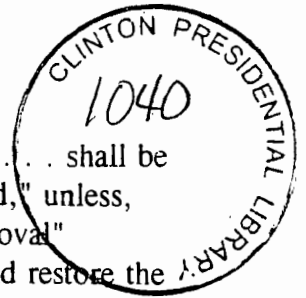
Although it is entitled "The Line Item Veto Act," and although its provision regarding targeted tax benefits speaks in terms of a presidential "veto" of any such benefits contained within a revenue bill, the Act does not authorize the President to strike out particular segments of a bill at the same time that he signs the remaining portions of the bill into law -- which the Justice Department has long believed would violate the Presentment Clause of Article I, section 7 of the Constitution.³ Rather, under the Act, the President signs the entire bill into law (thus complying with the Presentment Clause), but may thereafter "rescind" discretionary budget authority or "veto" targeted tax benefits. Specifically, the Act gives the President a period of "twenty calendar days . . . after the date of enactment" of an appropriations or revenue bill within which to transmit a "special message" notifying Congress of a rescission or "veto." § 2 (emphasis added).⁴

² The term "targeted tax benefit" is defined in the Act to mean "any provision which has the practical effect of providing a benefit in the form of a differential treatment to a particular taxpayer or a limited class of taxpayers, whether or not such provision is limited by its terms to a particular taxpayer or a class of taxpayers. Such term does not include any benefit provided to a class of taxpayers distinguished on the basis of general demographic conditions such as income, number of dependents, or marital status." § 4(3). The term "discretionary budget authority" is not defined in the Act. Therefore, we have looked to other sources in attempting to divine its meaning. The General Account Office defines the term "budget authority" as "[a]uthority provided by law to enter into financial obligations that will result in immediate or future outlays involving federal government funds. . . . The basic forms of budget authority include (1) appropriations, (2) borrowing authority, (3) contract authority, and (4) authority to obligate and expend offsetting receipts and collections." A Glossary of Terms Used in the Federal Budget Process 21 (1993). Another key term that is used in the budget process is "discretionary appropriations," which, according to the Budget Enforcement Act of 1990 ("BEA"), means "budgetary resources (except those provided to fund direct-spending programs) provided in appropriations Acts." 2 U.S.C. § 900(c)(7). The term "direct-spending programs" is defined in the BEA as "(A) budget authority provided in law other than appropriations Acts; (B) entitlement authority; and (C) the food stamp program." Id. § 900(c)(8). Putting these definitions together, we assume that the term "discretionary budget authority," as used in the Act, refers to authority provided for in appropriations measures, and does not include entitlements, the food stamp program, and other direct spending.

³ See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, re: The President's Veto Power, 12 Op. O.L.C. 159, 160 (preliminary print 1988) (under the Presentment Clause, the President "has two, but only two, options with respect to the instrument presented: to 'approve . . . it' or 'not.'"); accord Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Before the Subcomm. on the Constitution, Senate Comm. on the Judiciary, 103d Cong. 2d Sess. (June 15, 1994); Memorandum for the Attorney General, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, re: Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28 (1985).

⁴ We assume that the word "enactment" is intended to have its common meaning: "[t]he method or process by which a bill in the Legislature becomes a law." Black's Law Dictionary 526 (6th ed. 1990). A bill becomes law after it is passed by a majority of both Houses of Congress, and is signed by the President. See INS v. Chadha, 462 U.S. 919, 945-51 (1983); see also Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) (construing legislation that was to take effect upon "enactment," which was understood to mean the day that the President signed the legislation).





The Act further provides that "any amount of budget authority rescinded . . . shall be deemed canceled," and any targeted tax benefit vetoed "shall be deemed repealed," unless, during a specified period, a majority of each House of Congress passes "disapproval" legislation that would make available the rescinded budget authority or that would restore the tax benefit, and the President signs that legislation. § 3.⁵ A presidential veto of such legislation may itself be overridden by two-thirds of the members of both Houses.

The final provision of the Act of relevance to the constitutional analysis is Section 5. It has two key components. First, it purports to prescribe the manner in which the Senate is to consider legislation disapproving the President's action that it receives from the House of Representatives. Second, it purports to prescribe rules of order in both the Senate and the House of Representatives for proceeding with such legislation.

II. Constitutional Analysis

A. Discretionary Budget Authority

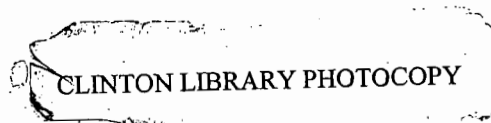
We begin with the provision of the Act that would grant the President the power to rescind discretionary budget authority, unless Congress passes legislation disapproving the President's action within a prescribed period, and the President signs that legislation or it is passed over his veto by a two-thirds vote of both Houses. We believe that the provision is constitutional.⁶

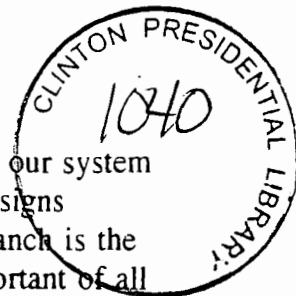
The chief constitutional argument against the provision is that it would violate general principles of the separation of powers between the branches of government, because it delegates a core legislative function to the Executive Branch.⁷ The concept of the separation

⁵ A line item veto statute that authorizes the President to strike out segments of a bill upon presentment to him for his signature would not "cancel" or "repeal" existing law, because it would preclude those segments from becoming law in the first place. Here, however, the use of the terms "canceled" and "repealed" further indicates that the President may wield his powers under the Act after the discretionary budget authority or targeted tax benefit, along with the rest of the appropriations or revenue bill of which they are a part, has been signed into law.

⁶ This conclusion is consistent with the prior views of the Justice Department. In a 1983 memorandum in which it determined that a line item veto statute that authorized the President to strike out segments of a bill while signing the remainder into law would violate the Constitution, the Department observed that "Congress could adopt a statute that would provide the President with general authority not to expend any item of appropriation that he determined to be contrary to the national interest." See Memorandum to Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, re: Constitutional Amendment (S.J. Res. 178) and Bill (S. 1921) to Allow the President to Veto Items of Appropriation, at 5 (December 21, 1983).

⁷ It could also be argued that the proposed rescission authority in the Act violates the specific textual requirements of Article I, § 7 of the Constitution governing the manner in which laws are made. We do not think that this argument carries substantial weight. We address it below in the context of our discussion of the





of powers is embodied in the structure of the Constitution, and is at the center of our system of government. The Constitution creates distinct branches of government, and assigns particular functions to them. Among the functions assigned to the Legislative Branch is the power to appropriate funds.⁸ This "power of the purse" is perhaps the most important of all of Congress' constitutional responsibilities.⁹ Thus, it may be contended that authorizing the President to rescind discretionary budget authority constitutes an abdication of legislative power to the Executive Branch.¹⁰

In our judgment, however, this argument is ultimately unpersuasive. It is well-established that Congress may delegate sweeping discretionary powers to the Executive, including powers that relate directly to the Nation's fisc. For example, Congress may authorize the President to raise or lower tariffs,¹¹ to set the price of agricultural commodities,¹² or to recover excess wartime profits.¹³ Indeed, on only two occasions -- both of which came nearly sixty years ago -- has the Supreme Court ever struck down a statute on the grounds that it impermissibly delegated power to the President.¹⁴

possible textual problems with the provision of the Act authorizing the President to "veto" targeted tax benefits.

⁸ U.S. Const. art. I, § 9, cl. 2 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

⁹ See The Federalist No. 58 at 359 (James Madison) (Clinton Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and 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.").

¹⁰ It is on this basis that some members of Congress have opposed proposals that would have made presidential rescissions of budget authority (or presidential impoundments of appropriated funds) automatically effective, unless Congress passed legislation disapproving the President's action. See, e.g., 119 Cong. Rec. 15236 (1973) (statement of Sen. Ervin) ("The Constitution of the United States vests the power of the purse in Congress alone, subject to the power of the President to veto any bill authorizing an appropriation or any bill which makes an appropriation that he deems unwise."); 135 Cong. Rec. 28087 (1989) (statement of Sen. Hatfield) ("fundamental issue" posed by automatic rescission proposal "is the shift in the balance of power between the . . . legislative and executive branch" that it would work); 139 Cong. Rec. H2101 (daily ed. April 28, 1993) (statement of Rep. Stokes) (automatic rescission proposal "would have the effect of transferring power from the legislative branch to the executive branch, without the benefit of a constitutional amendment, and weakening Congress' inherent constitutional power of the purse").

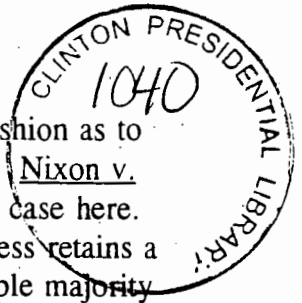
¹¹ See J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

¹² See United States v. Rock Royal Co-operatives, Inc., 307 U.S. 533 (1939).

¹³ See Lichter v. United States, 334 U.S. 742 (1948).

¹⁴ See Mistretta v. United States, 488 U.S. 361, 373 (1989) ("Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards.") (internal citations omitted).

To be sure, a statute cannot delegate power to the President in such a fashion as to preclude Congress from "accomplishing its constitutionally assigned functions." Nixon v. Administrator, Gen. Servs., 433 U.S. 425, 443 (1977).¹⁵ But that is hardly the case here. In authorizing the President to rescind discretionary budgetary authority, Congress retains a sufficient degree of its legislative prerogative. The Act provides that, by a simple majority of both Houses, Congress can pass disapproval legislation that overturns a presidential rescission. (A presidential veto of such legislation may be overridden by 2/3 of the members of both Houses of Congress.)¹⁶



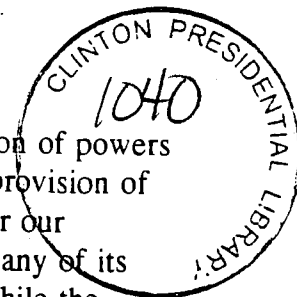
Even where Congress reserves some measure of latitude for itself, a delegation of authority to the President will still violate separation of powers principles if it does not contain "intelligible principles" that serve to direct Executive Branch action.¹⁷ That standard is satisfied here, however. The Act provides that the President may rescind discretionary budget authority only when he makes specific determinations regarding the effect of rescission on the public fisc, government functions, and the national interest.¹⁸ Furthermore, the President may only exercise that authority for a limited period of time -- within twenty days from the date of enactment of the bill containing the budget authority that the President intends to rescind. In short, the President is not granted a roving charter to rescind, at any time he sees fit, a particular appropriations measure just because he disagrees with its purpose. Accordingly, the President is not usurping congressional power to pass appropriations laws. The Act simply gives the President a level of discretion in executing those laws.

¹⁵ See also Morrison v. Olson, 487 U.S. 654, 691 (1988); CFTC v. Schor, 478 U.S. 833, 856-57 (1986).

¹⁶ We concede that Congress would encounter practical hurdles in seeking to pass legislation disapproving the President's exercise of rescission authority. See Neal Devins, Budget Reform and the Balance of Powers, 31 Wm. & Mary L. Rev. 993, 1018 (1990) (Congress will be reluctant to vote for a bill to overturn the "fiscal restraint" that is ostensibly reflected by presidential rescission). In our view, this aspect of the measure does not create a constitutional question, but instead speaks to the Act's relative merits as a matter of policy.

¹⁷ Mistretta, 488 U.S. at 372.

¹⁸ Those determinations must be set forth, to the "maximum extent practicable," in the message that the President is required to send to Congress that provides notice of his decision to rescind discretionary budget authority. § 5(a)(4),(5). The message must also state the "reasons and justifications" for the rescission. § 5(a)(3). This too helps to cabin the delegation to the President, because it requires an explanation of his actions. We are somewhat troubled, however, by the requirement that the President's message specify "all factions, circumstances, and considerations relating to or bearing upon the rescission" § 5(a)(5) (emphasis added). (We assume that the word "factions" is a mistake, and is meant to be "factors"). Read literally, this provision would obligate the President to say more than is reasonably necessary and appropriate to explain a rescission decision, and thus may constitute an encroachment upon the President's deliberative process. We suggest that the provision be revised to state that the President should comply with the requirement to the "maximum extent practicable."



Finally, historical practice can be a legitimate guide to resolving separation of powers questions where, as is the case here, the matter is not controlled by an explicit provision of the Constitution.¹⁹ As Justice Jackson put it, "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."²⁰ Therefore, it is significant that the proposed rescission authority granted by the Act is not entirely unprecedented: other statutes have authorized the President to control the outlay of appropriated funds.

For example, under the Congressional Budget and Impoundment Control Act of 1974 ("CBICA"), the President is authorized to "defer any budget authority provided for a specific purpose or project" until the start of the next year fiscal year, if certain conditions are met. 2 U.S.C. § 684.²¹ This provision of the CBICA, which permits the President to withhold appropriated funds from obligation or expenditure,²² is a lawful delegation of some of Congress' appropriations power to the President. Another comparable statute is the Anti-Deficiency Act, which establishes a general framework under which the President may, in his discretion, choose not to expend appropriated funds across a range of programs. See 31

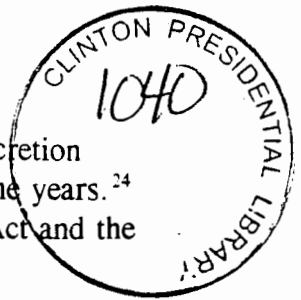
¹⁹ Cf. INS v. Chadha, 462 U.S. 919, 945 (1983) (dismissing "utilitarian" argument that statutes authorizing one House of Congress to "veto" Executive Branch decisions had worked well in practice, where explicit text of Constitution rendered that form of legislative action invalid).

²⁰ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also Freytag v. C.I.R., 501 U.S. 868, 918 (1991) (Scalia, J., concurring) ("[m]odern practice as well as original practice" supports notion that entities that are not cabinet-level departments of the Executive Branch should nevertheless be considered "Departments" for purposes of the Appointments Clause of Article II of the Constitution).

²¹ As originally enacted, the CBICA required the President to make available any deferred budget authority if either House of Congress passed a resolution disapproving the President's deferral. This one-House veto of Executive Branch decisions was held unconstitutional in light of the Supreme Court's ruling in INS v. Chadha, 462 U.S. 919 (1983), which invalidated that form of legislative action. See City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). In response, Congress amended the deferral provision of CBICA to its current form. See Pub. L. No. 100-119, title II, § 206(a), 101 Stat. 785 (1987).

²² The term "deferral of budget authority" is defined in the CBICA to include "withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities," and "any other type of Executive action which effectively precludes the obligation or expenditure of budget authority" 2 U.S.C. § 682(1). The CBICA also provides that the President may "propose" to rescind budget authority. Id. § 683(a). Unlike the grant of deferral power, this provision of CBICA does not authorize the President to withhold appropriated funds from obligation or expenditure. That can only occur if, within a set period, Congress passes legislation approving the President's proposed rescission, and the President signs that legislation. Id. § 683(b). The Act shifts the burden of action to Congress: presidential rescission will take effect, unless Congress passes disapproval legislation, and the President signs that legislation.

U.S.C. §§ 1341-42, 1349-51, 1511-19.²³ The President has enjoyed similar discretion under other laws designed to control expenditures that have been enacted over the years.²⁴ The constitutionality of general framework legislation like the Anti-Deficiency Act and the various expenditure control measures has not been doubted.²⁵



We recognize that the Act's grant to the President of the power to rescind discretionary budget authority is quite broad. As we understand it, discretionary budget authority makes up a significant portion of the total federal budget. It encompasses essentially all appropriations for national defense, and most domestic spending (other than spending for entitlement programs, such as Social Security and Medicare, and interest payments on the national debt). Given both the dollar amounts involved and the functions and programs at issue, the Act would constitute an expansive delegation to the President. Nonetheless, we believe that it is consistent with applicable constitutional limits on delegations to the Executive Branch.²⁶

B. Targeted Tax Benefits

Just as the provision of the Act granting rescission authority is intended to give the President discretion with respect to the expenditure of funds, the provision dealing with targeted tax benefits seeks to give the President discretion with respect to taxation. It does so by purporting to authorize the President to "veto" targeted tax benefits after they become law, thus resulting in their "repeal." (§ 3(a)(2)). The use of the terms "veto" and "repeal" is constitutionally problematic. Article I, section 7 of the Constitution provides that the

²³ See also State Highway Comm'n v. Volpe, 479 F.2d 1099, 1118 (8th Cir. 1973) (discussing Anti-Deficiency Act); William Bradford Middlekauff, Note, Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure, 100 Yale L. J. 209, 210-11 (1990) (same).

²⁴ See, e.g., Ralph S. Abascal & John R. Kramer, Presidential Impoundment Part I: Historical Genesis and Constitutional Framework, 62 Geo. L.J. 1549, 1569 (1974) (discussing "budget ceiling" measures of the late 1960s and early 1970s).

²⁵ See Kate Stith, Congress' Power of the Purse, 97 Yale L.J. 1343, 1363-64 & n.97 (1988).

²⁶ Supporters of the measure are likely to argue that the Act actually would restore a proper balance of power between the Executive and Legislative Branches (and, at the same time, promote public accountability) with respect to budget matters. In the eyes of some, that balance has been distorted by Congress' practice of aggregating many items of appropriation into a single appropriations bill, including proverbial "pork barrel" items. This places the President in the difficult position of having to choose between approving the bill in its entirety, or vetoing the whole bill -- including vital appropriations -- simply because of his objection to a particular item. By putting the President in this box, the theory goes, the existing system of appropriations has seriously diminished the power of the presidency because it essentially eliminates the threat of a presidential veto that would otherwise hang over the heads of legislators as they craft appropriations bills. See Douglas W. Kmiec, OLC's Opinion Writing Function: The Legal Adhesive For a Unitary Executive, 15 Cardozo L. Rev. 337, 354 n.70 (1993); see also L. Gordon Crovitz, The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year, 18 Pepp. L. Rev. 43 (1990).

President only can exercise his "veto" power before a provision becomes law. As for the word "repeal," it suggests that the President is being given authorization to change existing law on his own. This arguably would entail an overly broad delegation of authority to the President in violation of general separation of powers principles, and violate the plain textual provisions of Article I, section 7 of the Constitution governing the manner in which federal laws are to be made and altered. To avoid these constitutional shoals, we recommend that the Act be recast so that it eliminates the word "veto" from the targeted tax benefit provision, and confers on the President the power to suspend (rather than "repeal") such benefits. These changes would preserve the purpose of the provision: an attempt to give the President discretion with respect to the implementation of targeted tax benefits. Moreover, the changes would place the targeted tax benefit provision of the Act on the same secure constitutional footing as the provision regarding rescission of discretionary budget authority.

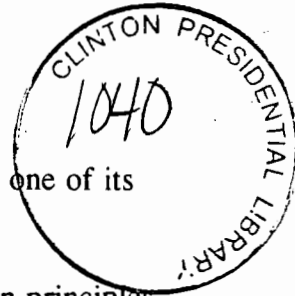
The starting point in the analysis of the targeted tax benefit provision of the Act is the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983), for it reveals the interplay between the general separation of powers limits on the delegation of power and the specific textual commands of the Constitution governing the method by which laws are to be enacted. In Chadha, the Court admonished that "[e]xplicit and unambiguous provisions" of Article I, section 7, prescribe "a single, finely wrought and exhaustively considered, procedure" for the enactment of legislation. Id. at 945, 951.²⁷ Under that procedure, each House of Congress must pass a bill by majority vote. Id. at 948. After bicameral passage, the bill must be presented to the President for his signature or veto. Id. at 946-47. This same procedure must be followed with respect to efforts to repeal or amend existing legislation. Id. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I. ").

At issue in Chadha was a statute that provided that either House of Congress could adopt a resolution overriding Executive Branch action with respect to certain matters involving the deportation of aliens. This "one-House veto" had the effect of remaking the law under which the Executive Branch made deportation decisions; hence, it was a form of legislative action. Id. at 952. In invalidating the one-House veto, the Court stated that Congress may take legislative action only pursuant to the fixed procedures of Article I, section 7 -- bicameral passage and presentment to the President. Chadha may also be

²⁷ In pertinent part, Article I, section 7 of the Constitution provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve it he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated

characterized as a delegation case: Congress delegated its legislative power to one of its Houses in violation of general separation of powers principles.²⁸



Similarly, the specific text of Article I, section 7 and general delegation principles may call into question the provisions of the Act regarding targeted tax benefits. The Act provides that after a revenue bill has been enacted into law, the President may go back and "veto" any targeted tax benefits contained therein. The term "veto" is misleading, since the President cannot "veto" something that is already law. What the Act does, however, is to bestow on the President the power to repeal part of a law, unless a majority of each House of Congress passes legislation disapproving the repeal, and the President signs the disapproval legislation. A presidential veto of that legislation can be overridden by 2/3 of the members of each House of Congress.²⁹ In effect, the Act empowers the President to make -- or, more accurately, "unmake" -- the Nation's revenue laws.³⁰ This may conflict with the express constitutional procedures for enacting legislation, and may amount to an impermissible delegation of power to the President.³¹

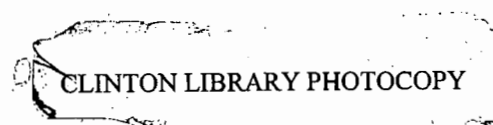
Accordingly, we recommend that the Act be redrafted so that it states that, after signing a revenue bill into law, the President would have the authority to suspend the implementation of any targeted tax benefits within the bill, rather than the power to "repeal"

²⁸ See Bowsher v. Synar, 478 U.S. 714, 755 (1986) (Stevens, J., concurring) (through one-House veto, Congress attempted to "delegate its policymaking authority to one of its components"); Laurence H. Tribe, American Constitutional Law § 4.3, at 216 (2d ed. 1988) (Chadha supports the proposition that Congress may not "delegate[]" legislative power "to itself"); see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275 (1991) ("Congress may not delegate the power to legislate to its own agents or its own Members.") (discussing Chadha).

²⁹ See Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276, 280 (1919) (two-thirds of quorum, not of full membership of House, suffices to overcome a Presidential veto).

³⁰ By contrast, the Act provides that rescinded discretionary budget authority is "cancelled," not "repealed." § 3(a)(1). While the terms "repeal" and "cancel" may mean the same thing in some contexts, we do not believe that is the case here. As we interpret the Act, the grant of rescission authority gives the President the discretion to spend less than the dollar amount designated in an appropriations measure, thereby "cancelling" that figure. If the President exercises that discretion, however, the appropriations measure itself and the budget authority contained therein would not be repealed. We expect that the sponsors of the legislation will make this point clear when they introduce and debate the Act.

³¹ A statute that authorizes the President to exercise line item veto authority at the presentment stage suffers from a different constitutional defect. By its terms, Article I, section 7 does not permit the President to reject segments of a bill while signing the remainder into law. It only allows for two options: the President must either sign or reject the whole bill. See supra note 3. Thus, the problem with a statute that authorizes a President to strike out segments of a bill while signing the remainder into law is that it augments the President's veto power beyond what is specified in the Constitution. As currently drafted, the targeted tax benefit provision of the Act may have other flaws, but the augmentation problem is not among them.



those benefits.³² (We also recommend that the term "veto" be eliminated from the Act, because it is inaccurate to say that a President can veto a provision after it has been enacted.) Were the Act so redrafted, the President would be given leeway with respect to the administration of our revenue laws, but he would not have the power formally to change them on his own. Suspension could take a variety of forms. For example, it could take the form of a power to stay implementation of targeted tax benefits; the stay subsequently could be lifted and reinstated, either by the President who imposed it in the first instance or by a future President. Alternatively, the Act could provide the President with only one bite at the apple, and preclude him or any of his successors from lifting the suspension once it is imposed. Cf. The Orono, 18 F. Cas. 830 (C.C.D. Mass. 1812) (Story, J.) (statute did not authorize the President to revive embargo laws once they were revoked by him). Either approach would, in our view, be constitutional.

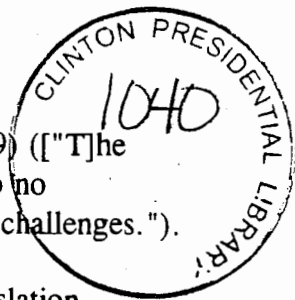
Whatever form that suspension takes, some might assert that authorizing the President to suspend targeted tax benefits (and to rescind discretionary budget authority, for that matter) allows the President unilaterally to modify laws in contravention of Chadha.³³ This contention misses the mark because it overlooks the distinction between presidential action that amends or eliminates a duly enacted law, and presidential action that maintains a law but affects its implementation. In authorizing the President to suspend targeted tax benefits, Congress would have delegated to him the authority to administer the law by declining to enforce it; the suspended benefit would still remain the law, however.³⁴ The President's exercise of this suspension authority would not implicate the specific textual requirements of Article I, section 7, because they simply do not apply to administration of the laws by the Executive Branch. Chadha, 462 U.S. at 953 n.16. This would leave delegation principles as the only possible constitutional objection to suspension of targeted tax benefits. See id. (the Executive's administration of the laws "involves only a question of delegation doctrine"). But any such objection would be no more substantial than the delegation arguments that we considered and rejected above in connection with the Act's grant of presidential rescission

³² For the sake of consistency, we recommend that the Act be modified so as to provide that rescinded budget authority is deemed "suspended," rather than "cancelled."

³³ See Legislative Line-Item Veto Proposals, Hearings Before the Subcomm. on the Legislative Process, House Comm. on Rules, 102d Cong. 2d Sess. 304 (1992) (statement of Louis Fisher, Congressional Research Service) (proposal to make presidential rescissions automatically effective would be at odds with constitutional strictures regarding the making of laws); cf. Abner J. Mikva & Michael F. Hertz, Impoundment of Funds -- The Courts, The Congress and The President: A Constitutional Triangle, 69 Nw. U. L. Rev. 335, 381 (1974) ("If the President does not have the power to sever a provision before he signs the bill into law, then it can hardly be contended that such [inherent] power accrues to him after the bill has become law.").

³⁴ Although the "permanent suspension" alternative may seem to be the functional equivalent of a permanent repeal, it is in fact different for constitutional purposes in that a suspended law would remain on the books. The difference between permanent suspension and permanent repeal can also be seen in another way. Permanent suspension is akin to a statute that creates a targeted tax benefit, but makes the operation of the benefit contingent on a specific presidential determination of some sort. If the President does not make that determination, the benefit will not exist.

authority. See Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223 (1989) ("The delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges.").



C. Procedures for Congressional Consideration of Disapproval Legislation

The provisions of the Act that establish procedures for the consideration in Congress of legislation to disapprove an exercise of the President's authority to rescind discretionary budget authority or veto targeted tax benefits would raise constitutional issues if they were understood to attempt to regulate, by statute, the internal procedural rules of each House.

The Act requires that, whenever the President rescinds any budget authority or vetoes any targeted tax benefit, he must transmit a special message to each House. The President's message triggers procedural consequences. Among them, a "rescission/receipts disapproval bill" (§ 5(d)) may then be introduced to disapprove the President's rescission or to override his veto, as the case may be. Section 5(d) prescribes the manner in which the Senate is to consider a rescission/disapproval bill received from the House of Representatives, while section 5(e) prescribes rules of order in both the Senate and the House of Representatives for such a bill.

The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const., art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." Chadha, 462 U.S. at 955-56, n.21.³⁵ We doubt that an Act of Congress can deprive either House of its power to control that House's internal procedural rules through its own independent action. "The rules power is one of several powers that the houses possess independently to make their legislative powers effective. The House of Representatives and the courts have long maintained that a house's power to exercise its ancillary functions cannot be abridged by a statute passed by both houses and signed by the President that attempts to channel or regulate those powers."³⁶ Accordingly, if the Act were construed to put the procedures prescribed in section 5 beyond the power of each House to modify by unilateral action, it would present a constitutional question. To preclude this possibility, we recommend that the Act include an explicit provision to the effect that nothing in it is intended to limit or displace each House's authority to revise its own procedural rules by unilateral action.³⁷ Disclaimers of this sort are frequently found in federal statutes. See, e.g., 19 U.S.C. §§ 2191(a), 2903(d).

³⁵ See also United States v. Ballin, 144 U.S. 1, 5 (1892).

³⁶ Paul R.Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 855 (1987).

³⁷ While such a disclaimer might be considered surplusage, it would serve to eliminate any question of Congress' intent.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to H.R.2. (12 pages)	03/27/1995	P5 1041
002. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Legislation/H.R.2. (4 pages)	06/13/1995	P5 1042

COLLECTION:

Clinton Presidential Records
Counsel's Office
Lisa Hertzner (Schertler)
OA/Box Number: 11581

FOLDER TITLE:

Line Item Veto: Legislative Background

Van Zbinden
2007-0624-F
vz1199

RESTRICTION CODES

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

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

- 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]

- 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]

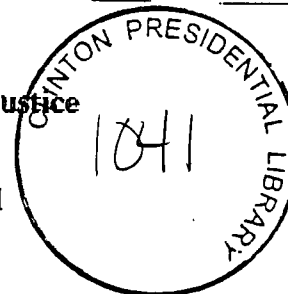
- C. Closed in accordance with restrictions contained in donor's deed of gift.
- PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
- RR. Document will be reviewed upon request.

CLINTON LIBRARY PHOTOCOPY



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 27, 1995

**MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT****ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET**From: Walter Dellinger *WED*
Assistant Attorney General

Re: Line Item Veto\Proposed Changes to H.R. 2

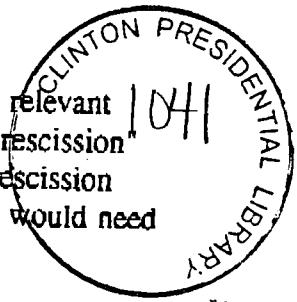
I am attaching two proposed mark-ups of H.R. 2 that reflect our suggested changes to the bill. Most significantly, in an effort to cure potential constitutional problems with the targeted tax benefit provisions of the existing bill, both proposals would eliminate the words "veto" and "repeal" from those provisions.

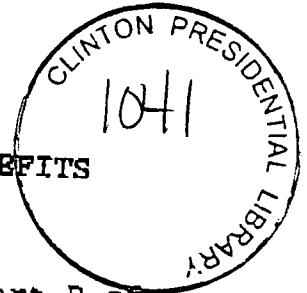
The proposed mark-ups are identical except in one critical respect. The first proposal would give the President the power to "rescind" targeted tax benefits, the effect of which would be to "cancel" such benefits. The terms "rescind" and "cancelled" are used in the bill to describe the President's power on the budget authority side. The second proposal would give the President the power to "suspend" targeted tax benefits; the suspension subsequently could be lifted if the President made certain findings. From a litigation risk standpoint, presidential "suspension" of targeted tax benefits is clearly preferable, because the courts have long upheld acts of Congress that give the President the authority to suspend provisions of the law. By contrast, to say that the President has the power to "rescind" a targeted tax benefit is more susceptible to constitutional attack on the grounds that it appears to give the President the unilateral power to "repeal" a provision of law -- the very problem with the existing version of H.R. 2 that we are trying to avoid.

In reviewing both proposed mark-ups, please note the following:

- Existing provisions of the bill are denoted in regular type-face.
- Suggested new words and provisions are denoted in **bold**.
- Suggested deletions are [bracketed and underlined].

- The mark-ups do not include all sections of the bill, only the most relevant sections. If our suggestions are accepted, parallel changes (e.g., "rescission" of targeted tax benefits, rather than "veto" of such benefits, and "rescission disapproval bill," rather than "rescission/receipts disapproval bill") would need to be made in the sections that are not set forth in the mark-up.





PROPOSAL # 1: "RESCISSION" OF TARGETED TAX BENEFITS

Sec. 2 LINE ITEM VETO AUTHORITY

(a) In General-- Notwithstanding the provisions of part B of title X of the Congressional Budget and Impoundment Control Act of 1974, and subject to the provisions of this section, the President may rescind all or part of any dollar amount of any discretionary budget authority specified in an appropriation Act or conference report or joint explanatory statement accompanying a conference report on the Act, or rescind [veto] any targeted tax benefit which is subject to the terms of this Act if the President --

(1) determines that --

- (A) such rescission [or veto] would help reduce the Federal budget deficit;
- (B) such rescission [or veto] will not impair any essential Government functions; and
- (C) such rescission [or veto] will not harm the national interest; and

(2) notifies the Congress of such rescission [or veto] by a special message not later than ten calendar days (not including Sundays) after the date of enactment of an appropriation Act providing such budget authority or a revenue or reconciliation Act containing a targeted tax benefit.

Sec. 3 LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED 1041

(a) (1) Any amount of budget authority rescinded under this Act as set forth in a special message by the President shall be deemed canceled unless, during the period described in subsection (b), a rescission[/receipts] disapproval bill making available all of the amount rescinded is enacted into law.

(2) Any targeted tax benefit rescinded [provision of law vetoed] under this Act as set forth in a special message by the President shall be deemed canceled [repealed] unless, during the period described in subsection (b), a rescission[/receipts] disapproval bill restoring the benefit [provision] is enacted into law.

SEC. 4 DEFINITIONS

As used in this Act:

(1) The term "rescission[/receipts] disapproval bill" means a bill or joint resolution which only disapproves, in whole, rescissions of discretionary budget authority or only disapproves rescissions [vetoed] of targeted tax benefits in a special message transmitted by the President under this Act and --

(A) which does not have a preamble;

(B) (i) in the case of a special message regarding rescissions of discretionary budget authority, the matter after the enacting clause of which is as follows: "That Congress disapproves each rescission of discretionary budget authority of the President as submitted by the President in a special message

on __," the blank space being filled in with the appropriate date and the public law to which the message relates; and

(ii) in the case of a special message regarding rescissions [vetoes] of targeted tax benefits, the matter after the enacting clause of which is as follows: "That Congress disapproves each rescission [veto] of targeted tax benefits of the President as submitted by the President in a special message on __," the blank space being filled in with the appropriate date and the public law to which the message relates; and

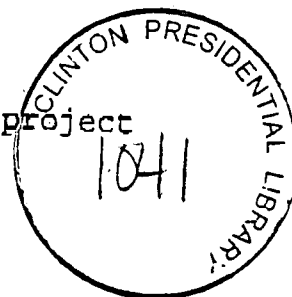
(C) the title of which is as follows: "A bill disapproving the recommendation submitted by the President on __," the blank space being filled in with the date of submission of the relevant special message and the public law to which the message relates.

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

(a) Presidential Special Message -- Whenever the President rescinds any budget authority or targeted tax benefit as provided in this Act [or vetoes any provision of law as provided in this Act], the President shall transmit to both Houses of Congress a special message specifying --

(1) the amount of budget authority [rescinded] or the targeted tax benefit [provision] rescinded [vetoes]

(2) any account, department, or establishment of the Government to which such budget authority is



available for obligation, and the specific project or governmental functions involved;

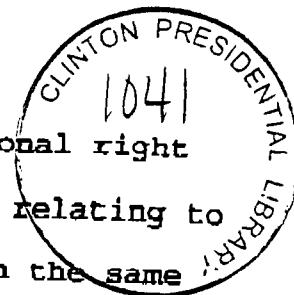
(3) the reasons and justifications for the determination to rescind budget authority or [veto] any targeted tax benefit [provision] pursuant to this Act;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the rescission [or veto]; and

(5) to the maximum extent practicable, 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.

(g) This section is enacted by the Congress--

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of rescission bills as defined in section 4(1) of this Act; and it supersedes other rules only to the extent that they are inconsistent therewith; and



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

SEC. 8 SEVERABILITY

If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.

PROPOSAL # 2: "SUSPENSION" OF TARGETED TAX BENEFITS

Section 2

LINE ITEM VETO AUTHORITY

[[a]] IN GENERAL-- Notwithstanding the provisions of part B of title X of The Congressional Budget and Impoundment Control Act of 1974, and subject to the provisions of this section, the President may rescind all or part of any discretionary budget authority or suspend [veto] any targeted tax benefit, which is subject to the terms of this Act if the President -

(1) determines that --

(A) such rescission or suspension [veto] would help reduce the Federal budget deficit;

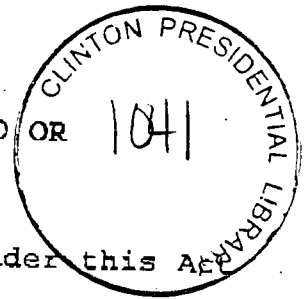
(B) such rescission or suspension [veto] will not impair any essential Government functions; and

(C) such rescission or suspension [veto] will not harm the national interest; and

(2) notifies the Congress of such rescission or suspension [veto] by a special message not later than twenty calendar days (not including Saturdays, Sundays, or holidays) after the enactment of a regular or supplemental appropriation Act or a joint resolution making continuing appropriations providing such budget authority or a revenue Act containing a targeted tax benefit.

The President shall submit a separate rescission or suspension message for each appropriation Act and for each revenue Act under this paragraph.

Sec. 3. LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED OR
LIFTED



(a) ~~[(1)]~~ Any amount of budget authority rescinded under this Act as set forth in a special message by the President shall be ~~[deemed]~~ cancelled unless, during the period described in subsection (b) of this section, a rescission/receipts disapproval bill making available all of the amount rescinded is enacted into law.

(b) ~~[(a)(2)]~~ Any suspension of a targeted tax benefit ~~[provision of law vetoed]~~ under this Act as set forth in a special message by the President shall be effective unless

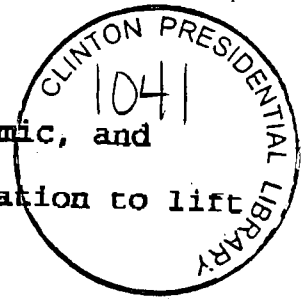
(1) during the period described in subsection (c) ~~[(b)]~~ of this section, a rescission/receipts disapproval bill restoring that benefit ~~[provision]~~ is enacted into law; or

(2) the suspension is lifted by the President, provided that the President

(A) determines that such action would advance the national interest, and that the suspension is no longer necessary to help reduce the Federal budget deficit; and

(B) notifies the Congress of the determination to lift the suspension by a special message specifying, to the maximum extent practicable,

(1) the reasons and justifications for the determination to lift the suspension;



(2) the estimated fiscal, economic, and budgetary effect of the determination to lift the suspension; and

(3) all actions, circumstances, and considerations relating to or bearing upon the determination to lift the suspension.

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

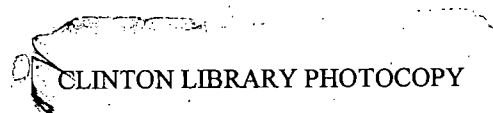
(a) PRESIDENTIAL SPECIAL MESSAGE -- Whenever the President rescinds any budget authority as provided in this Act or suspends [vetoes] any targeted tax benefit [provision of law] as provided in this Act, the President shall transmit to both Houses of Congress a special message specifying --

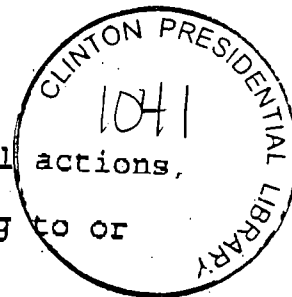
(1) the amount of budget authority rescinded or the targeted tax benefit [provision] suspended [vetoes];

(2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;

(3) the reasons and justifications for the determination to rescind budget authority or suspend [veto] any targeted tax benefit [provision] pursuant to this Act;

(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the rescission or suspension [veto]; and



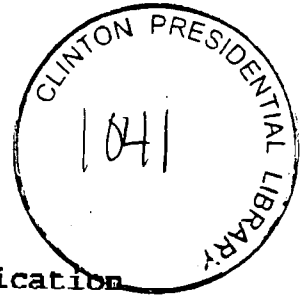


(5) to the maximum extent practicable, all actions, circumstances, and considerations relating to or bearing upon the rescission or suspension [veto] and the decision to effect the rescission or suspension [veto], and to the maximum extent practicable, the estimated effect of the rescission upon the objects, purposes, and programs for which the budget authority is provided.

(g) This section is enacted by the Congress--

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such it is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in that House in the case of rescission bills as defined in section 4(1) of this Act; and it supersedes other rules only to the extent that they are inconsistent therewith; and

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

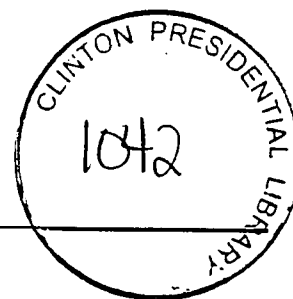
**SEC. 8 SEVERABILITY**

If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances shall not be affected thereby.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

June 13, 1995

MEMORANDUM FOR

ABNER J. MIKVA
COUNSEL TO THE PRESIDENTALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGETFrom: Walter Dellinger
Assistant Attorney GeneralRe: Line Item Veto Legislation/H.R. 2

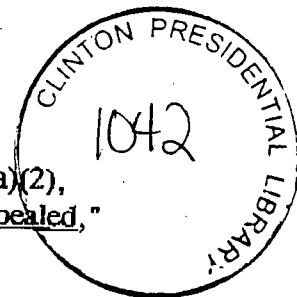
This memorandum summarizes our views on the line item veto legislation that has passed the House of Representatives, H.R. 2, the Line Item Veto Act. In our view, the provisions of the bill that grant the President the power to "rescind" discretionary budget authority are constitutional. However, the provisions that grant the President the power to "veto" targeted tax benefits, thus resulting in the "repeal" of those benefits, raise significant constitutional concerns. We believe that those concerns can be alleviated through drafting changes that we propose below.

I. Overview of H.R. 2

H.R. 2 would authorize the President to "rescind all or part of any dollar amount of any discretionary budget authority . . . or veto any targeted tax benefit which is subject to the terms of [the] Act]." § 2(a). H.R. 2 further provides that this authority can only be exercised if the President makes certain determinations regarding the impact of the rescission or veto (§2(a)(1)), and notifies Congress of the rescission or veto by a "special message" not later than ten calendar days after the enactment of the law containing the discretionary budget authority or targeted tax benefit at issue. § 2(a)(2).

Section 3(a) of the bill describes the effect of the exercise of the President's "rescission" and "veto" power. Section 3(a)(1) states that "[a]ny amount of discretionary budget authority rescinded under this Act shall be deemed cancelled," unless a bill

disapproving the President's rescission is enacted. A parallel provision, Section 3(a)(2), states that any targeted tax benefit that is vetoed under the Act "shall be deemed repealed," unless a bill disapproving the President's veto is enacted.



II. Discussion

A. Discretionary Budget Authority

At bottom, the provisions of H.R. 2 granting the President power to rescind discretionary budget authority give the President discretion to decline to spend funds that previously have been appropriated. We believe that these provisions constitute a permissible delegation to the President. It is well-established that Congress may delegate broad powers to the President, including powers that affect the nation's fisc. In addition, H.R. 2 sets forth discernible standards that serve to guide the exercise of the delegated power: the President may rescind budget authority only when he makes specific determinations, and only during a fixed, limited time period. Furthermore, the type of rescission power conferred on the President under H.R. 2 is not entirely unprecedented, as prior statutes have given the President some modicum of control over the outlay of appropriated funds.

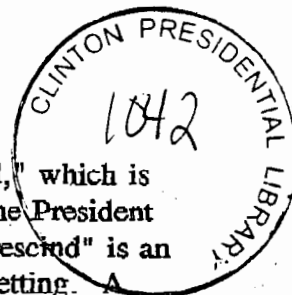
In short, H.R. 2 provides the President with a recognizable tool -- a delegation of power -- to cut government spending. As such, it stands on far more secure constitutional footing than the novel approach to curbing spending that is contained in the line item veto legislation that has passed the Senate. Under that legislation, individual items of spending in an appropriation bill that has passed both Houses of Congress would be disaggregated from one another, enrolled as separate bills, and then voted on en bloc by both Houses. Thereafter, each separately enrolled bill would be presented to the President, who could then veto any of the separate bills. In our view, the separate enrollment procedure of the Senate legislation raises complex questions under the Presentment Clause of the Constitution (Article I, section 7 clause 2) that simply are not posed by the delegation of power to the President in H.R. 2 to rescind discretionary budget authority.

B. Targeted Tax Benefits

The constitutional concerns posed by the targeted tax benefit provisions of H.R. 2 can be cured through two drafting changes.

1. Replacing the Word "Veto"

The first change entails replacing the word "veto" in the provision that describes the nature of the power that the President would exercise over targeted tax benefits. The change is needed because the Presentment Clause provides that the President only can exercise his "veto" power before a provision becomes law, i.e., when a bill is presented to him for his approval or disapproval. As drafted, however, H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law.



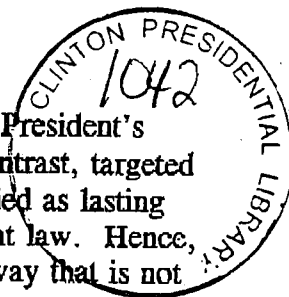
One possible alternative would be to change the word "veto" to "rescind," which is the same word that is used in H.R. 2 to describe the nature of the power that the President would exercise over discretionary budget authority. But therein lies the rub: "rescind" is an accepted term of art in the spending setting, but seems out of place in the tax setting. A better alternative might be to replace "veto" with "deny the availability of." That formulation makes clear that, after a targeted tax benefit has become law, the President would have discretion to decline to permit persons to claim the benefit. This would put the targeted tax benefit provisions of H.R. 2 on a parallel track with the discretionary budget authority provisions of the bill, which give the President discretion to decline to spend appropriated funds.

2. Replacing the Word "Repealed"

The second change to the targeted tax benefit provisions of H.R. 2 entails replacing the word "repealed" in the section that describes the effect of the exercise of the President's authority to "veto" targeted tax benefits. The change is needed because the word "repealed" intimates that the President is being given the unilateral power to amend existing law. This presents two substantial constitutional problems. First, it would seem to violate the commands of the Presentment Clause, which specifies the only manner in which federal laws may be made, modified, or annulled: through passage of a bill by both Houses of Congress; presentment of the bill to the President; and approval of the bill by the President (or if the bill is disapproved, passage of a bill overriding the President's action by 2/3 of the members of both Houses of Congress). Second, it arguably would amount to an unconstitutional delegation of power to the President, *i.e.*, the power to make and "unmake" laws. Together, the twin problems reflect the flip side of the same coin: a federal law cannot be eliminated altogether by the President, acting on his own accord. For constitutional reasons, therefore, the language that replaces "repealed" in H.R. 2 should steer clear of that mark.

Replacing "repealed" with "cancelled" is problematic because the thesaurus expressly equates "cancelled" with "repealed." To be sure, H.R. 2 uses the term "cancelled" to describe what happens to discretionary budget authority that is rescinded. It therefore could be argued that the discretionary budget authority provisions are also at risk. In our view, however, that contention does not stand up to close scrutiny. While "cancelled" and "repealed" may mean the same thing in some contexts, we do not believe that is the case when it comes to characterizing the effect of a rescission of discretionary budget authority. Put another way, the word "cancelled" does not have the same connotations on the discretionary budget authority side that it does on the tax benefit side. For one, if the President "cancels" all or a portion of discretionary budget authority, the underlying appropriations law remains in place; all that has changed is the dollar amount specified therein. However, if the President "cancels" a targeted tax benefit, nothing remains of the law. Moreover, discretionary budget authority tends to be short-lived. It is typically provided in appropriations laws that cover limited periods of time, *e.g.*, one or two fiscal years. See 2 U.S.C. § 900(c)(3),(7) (defining discretionary budget authority as resources provided in appropriations acts, other than resources for mandatory spending). Thus, if the

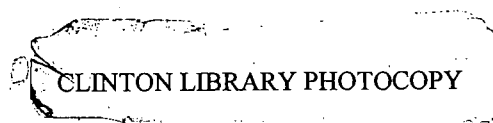
President rescinds discretionary budget authority, thereby "cancelling" it, the President's action only affects spending for the particular time period in question. By contrast, targeted tax benefits generally are not enacted for just a limited time. They are intended as lasting fixtures in the U.S. Code, unless and until removed therefrom by a subsequent law. Hence, if the President "cancels" a targeted tax benefit, the effect is permanent in a way that is not true of the cancellation of discretionary budget authority.



We believe that the word "suspended" is the most suitable replacement for "repealed." The Supreme Court has long upheld the constitutionality of statutes that delegate to the President the power to suspend the operation of particular laws, see Field v. Clark, 143 U.S. 649 (1892), and there are scores of examples of such statutes in the U.S. Code. Furthermore, "suspended" would dovetail neatly with the phrase "deny the availability," which we proposed above as the best replacement for "veto." If the targeted tax benefit provisions of H.R. 2 are revised along the lines of our suggestions, the upshot would be the following formulation: "Any targeted tax benefit, the availability of which is denied, shall be deemed suspended."

The use of the word "suspended" need not give rise to a state of affairs in which targeted tax benefits are denied, only to be made available again whenever the President sees fit. This scenario easily can be avoided through language that sets forth very precise and stringent conditions that must be met before the President can lift the suspension. Another way to cabin the exercise of the President's power would be to provide that a suspension must remain in place for a specified period of time. All of this is to say that there are ample ways to draft the bill to make a "suspension" of a targeted tax benefit enduring -- indeed, to make it something that approaches the permanence that is contemplated by the use of the word "repealed" in H.R. 2 as it stands now, but without setting off the constitutional alarm bells that are triggered by that term.

Finally, we note that "suspended" is not the only possible word that could be used in lieu of "repealed." Other alternatives include "stayed" or "held in abeyance." An alternative that sounds more permanent is the phrase "not in effect." If that language is used along with our suggested substitute for "veto," the bill would read: "Any targeted tax benefit, the availability of which is denied, shall be deemed not in effect."



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	New York Provider Tax Provision. [liva0805.doc] (4 pages)	08/05/1997	P5 1043
002. email	To President@whitehouse.gov from Benjamin Lear, III. Subject: Power of Executive Branch. [partial] (1 page)	~~04/12/1997~~	~~P6(b)(6)~~
003. memo	For Erskine Bowles from Charles Ruff, William Marshall, and Lisa Hertzner. Subject: Line Item Veto Litigation. (3 pages)	11/03/1997	P5 1044
004. draft	Duplicate of 003. (3 pages)	11/03/1997	P5 1045 - Dup 1044
005. draft	Duplicate of 003. (3 pages)	11/03/1997	P5 1046 - Dup 1044
006. draft	Duplicate of 003. (3 pages)	11/03/1997	P5 1047 - Dup 1044
007. memo	Limited Tax Benefits as defined by the Joint Committee on Taxation with marginalia. (4 pages)	08/03/1997	P5 1048
008. note	Hearing on LIV. (1 page)	01/14/1998	P5 1049
009. note	For file. Substantive Arguments. (3 pages)	c.08/1997	P5 1050
010. email	To Charles Ruff from William Marshall. Subject: Line Item. (1 page)	08/07/1997	P5 1051
011a. email	To Charles Ruff and Lisa Hertzner from William Marshall. Subject: Line Item Veto. (1 page)	08/01/1997	P5 1052
011b. email	To William Marshall from Robert Weiner. Subject: Re: Line Item Veto. (1 page)	08/01/1997	P5 1053

COLLECTION:

Clinton Presidential Records
Counsel's Office
Lisa Hertzner (Schertler)
OA/Box Number: 11581

FOLDER TITLE:

Line Item Veto: Notes/Memos

Van Zbinden
2007-0624-F
vz1200

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]

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
011c. email	To Robert Weiner from William Marshall. Subject: Re: Line Item Veto. (1 page)	08/01/1997	P5 1054

COLLECTION:

Clinton Presidential Records
Counsel's Office
Lisa Hertzner (Schertler)
OA/Box Number: 11581

FOLDER TITLE:

Line Item Veto: Notes/Memos

Van Zbinden
2007-0624-F
vz1200

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]

CLINTON LIBRARY PHOTOCOPY

New York Provider Tax Provision

Description of the Provision. Section 4722 of the bill includes a provision that deems permissible all of NY's illegal provider taxes for the purposes of Federal Medicaid match. The provision deems permissible an expired regional tax as well as several taxes the state continues to collect.

Background. Congress enacted the 1991 Medicaid provider tax law to address State "gaming" of the Medicaid program, through provider tax and donation schemes. The law was enacted to curb the unprecedented growth in Medicaid costs in the late 1980's and early 1990's. The law requires that all provider taxes must be uniform and broad based to prevent state "recycling" of Federal Medicaid funds.

Since the provider tax law was enacted, HCFA found that 16 states, including NY, continue to collect illegal provider taxes. According to HCFA staff, NY's impermissible provider taxes total \$1.7 billion. Because HCFA has not yet taken a disallowance for the illegal taxes, CBO scored the reconciliation bill provision at only \$200 million in FY98; however the total could be larger.

NY has three kinds of provider taxes that HCFA determined to be illegal: 1) a tax that varies by region that was given special consideration in the 1991 law; 2) other taxes that fail to meet the broad-based and uniformity requirements; and, 3) taxes on impermissible classes of providers. The bill deems approved for NY only the first two types of provider taxes. We understand that the intent of the 1991 law was to permit NY to levy the regional tax, but to prohibit the collection of other taxes that do not meet the standards of uniformity and broad-baseness. However, the provision in the reconciliation bill is too broad because it would also deem permissible the other NY provider taxes that fail the test of broad-baseness and uniformity. The Administration would support a correction to allow NY's regional tax only, but none has yet been proposed.

Arguments Against the Provision.

- The provision opens the door for other states to request forgiveness for similar illegal taxes. According to HCFA, 15 states currently have illegal provider taxes totaling \$3.5 billion.
- Under the bill, New York is allowed levy provider taxes that are impermissible in other states.
- Deeming all of NY's provider taxes permissible would allow NY to continue to collect these taxes, therefore increasing future Medicaid costs.
- The provision undermines the Secretary's authority to determine which taxes are illegal.
- *This can be corrected administratively without legislation.* If the Administration wants to deem NY's regional tax permissible, it can do so through a technical correction to the regulation so NY would not be subject to the disallowance.

DRAFT

CLINTON LIBRARY PHOTOCOPY

8/5/97 lwa0805.doc

State and Local Employees Medicare Buy-In

Current Law. Employees of state and local governments hired before April 1, 1986 are not required to pay Hospital Insurance (Part A) payroll taxes. Those employees who have reached age 65 but have not earned entitlement to Part A coverage through other employment (or through the employment of a spouse) can enroll in Part A, but they must pay the Part A premium. In many cases, the state or local government (from which the employee retired) pays the Part A premium on behalf of these individuals as part of their retirement package.

Description of the Provision. The BBA waives the Part A premium for individuals meeting the following requirements: (1) their Part A premiums are not paid by a former employer; and (2) they have paid the Part A premium and have been enrolled in Part B for the preceding *seven* years. This provision applies to premiums for months beginning with January 1, 1998. Most of the beneficiaries would be former teachers in California school systems.

Scope of the Provision. This proposal is not new. A variation of this provision was included in the Ways & Means title of the final House-passed spending bill. Under the original, House-passed provision (which would have waived the premium for individuals who have paid the Part A premium and been enrolled in Part B for the preceding *five* years), CBO estimated that about 30,000 individuals would meet the specified criteria.

While we do not have CBO's revised participation estimate (i.e., reflecting the seven year requirement), we believe that the provision included in the BBA may affect even fewer beneficiaries. CBO scored the House provision as a net cost of \$800 million over five years but estimates that the BBA provision has a net cost of \$600 million over the same period.

Background. We understand this provision has strong support from the California congressional delegation, particularly in the House (e.g., Reps Thomas, Stark, and Matsui).

Arguments Against the Provision.

- Contradicts Medicare reform package that is expressly designed to increase the solvency of the HI Trust Fund. This proposal increases Part A spending but only benefits a small portion of Medicare beneficiaries.
- Contrary to basic notion that individuals/employers pay for their Medicare benefits.
- May open the door for other retirees who have not paid into Medicare and thus must pay the Part A premium. For example, the state and local governments who currently pay the Part A premium could be next in line for relief.

Alaska FMAP

Description of Provision. Section 4752 of the reconciliation bill increases Alaska's Federal Medical Assistance Percentage above the level of the current law formula. Under current law, Alaska's FMAP would be 50 percent. The bill increases the FMAP to 59.8 percent for FYs 1998, 1999, and 2000 (which is approximately the national average).

Background. Under current law, the Medicaid Federal Medical Assistance Percentage (FMAP) is based on the average per capita income in a State relative to the national average per capita income. Over many years, States have argued that the FMAP is inequitable and does not accurately reflect each States' special circumstances. For example, it does not take into account the number of people in poverty in each State, the geographic differences in medical prices, a State's revenue capacity, etc. Alaska argues that their FMAP should be increased because the cost of delivering medical care in Alaska is so much higher than the rest of the country because supplies must be transported to remote areas by air and medical providers must be paid very well to entice them to come to Alaska. However, Alaska's personal income is higher than other states, which causes their current FMAP to remain at the minimum 50%.

Arguments Against the Provision. While the Administration has consistently supported efforts to examine alternatives to the current Medicaid matching structure, we believe that changing the FMAP for Alaska alone is unwarranted and does not address the underlying inequities in the current system.

This provision could open up Pandora's box. Other states will be encouraged to seek similar legislation, with the result that Medicaid costs will rise and the program will become less even-handed. For example, New York has argued consistently that the current FMAP formula is inequitable. Making a similar change to New York's FMAP would cost much more than the \$200 million federal cost of the Alaska provision.

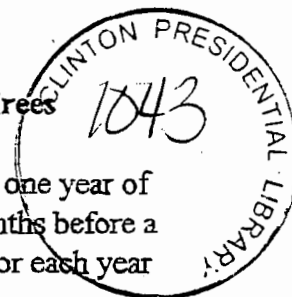
There are many measures of State "need" or fiscal capacity that could be the basis for Federal Medicaid payments to states. States often argue that the measure most beneficial to them is the measure upon which the national formula should be based. Any comprehensive, budget neutral change in the formula results in "winners" and "losers." The Administration proposed to establish a Commission in the FY 1997 and 1998 President's Budget bills to examine and make recommendations on the most appropriate way to change the formula. Changing the formula for certain states in a piecemeal manner will create only "winners" at a cost to the Federal Treasury.

DRAFT

CLINTON LIBRARY PHOTOCOPY

3/5/97 livar0805.doc

Waiver of Delayed Enrollment Penalties for Certain Disabled Retirees



Current law. Under current law, beneficiaries who fail to enroll in Part B within one year of their initial enrollment period (generally, the seven month period beginning 4 months before a beneficiary turns 65) must pay a penalty equal to a 10 percent premium increase for each year that the beneficiary delays enrollment.

One exception to the penalty is for beneficiaries who remain employed upon attaining age 65 and retain employer sponsored health coverage (i.e., the "currently employed" exception). These beneficiaries are offered a "special enrollment period"-- with no premium penalty -- when they retiree or otherwise lose their coverage.

Description of the Provision. The BBA provision creates an exception for disabled retirees that is similar to the currently employed exception. The provision creates a special enrollment period (i.e., waives the premium penalty) for disabled individuals who involuntarily lose health coverage provided to them, or to them through their spouse, by a current or former employer.

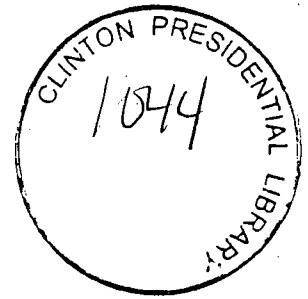
CBO scored this proposal at \$0.1 billion in costs over five years, and \$0.2 billion in costs over ten years (net of premiums).

Scope of the Provision. While designed to address a specific problem in Wisconsin (see Background below) this provision would apply to all disabled retirees who have their employer sponsored coverage involuntarily terminated.

Background. The BBA provision evolved as a specific reaction to the closing of a Pabst brewery in Milwaukee (Rep. Klecka is the provision's champion). In the Pabst case, the brewery closure resulted in the termination of health insurance for all its retirees. Thus, Klecka originally sought an exception for all retirees who involuntarily lose their coverage. The final version of the bill, however, narrowed the exception only to disabled retirees.

Ironically, the Social Security Administration (SSA) field office in Wisconsin actually corrected the Pabst situation administratively (SSA has the authority to waive the premium penalty in very specific situations), thus *the retirees for whom the provision is intended no longer need relief*. However, it appears the Congress believes that the SSA authority would not always be used in similar situations in the future and thus left the exception in place.

Arguments Against the Provision. The intended beneficiaries no longer need the help. This is piecemeal special protection for one group of beneficiaries (disabled retirees) that will not be afforded to all Medicare retirees who involuntarily lose their employer sponsored coverage. The Administration supports a complete reform of the Part B premium penalty system, not reforming the system in a piecemeal fashion. The President's FY 1998 Budget included such a reform proposal. The proposal replaced the current punitive Part B premium surcharge with a surcharge based on the actuarially determined cost of late enrollment. (Representatives of the disabled will disagree.)



THE WHITE HOUSE
WASHINGTON

November 3, 1997

MEMORANDUM FOR ERSKINE BOWLES

FROM:  CHARLES F.C. RUFF
WILLIAM MARSHALL
LISA HERTZER

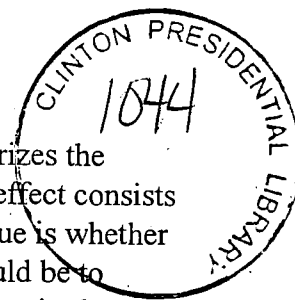
SUBJECT: LINE ITEM VETO LITIGATION

On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory question has been joined with the constitutional challenges to the line item veto that have been brought in the consolidated cases currently before Judge Hogan. OMB strongly asserts that the cancellation is permissible under the Act. The Department of Justice has serious reservations. Senate and House Counsel are also reviewing this issue and are considering whether to file on the side of the plaintiffs, contending that this particular cancellation exceeds the President's authority under the Act. This memorandum briefly outlines the issues involved.

A. BACKGROUND

Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS). OMB estimated that the budgetary effect of Section 642 would be a cost of \$854,000 thousand dollars (over five years) in lost federal receipts from employee contributions, and this figure was cited in the President's Special Message to Congress announcing the cancellation of this provision. Section 642 also would have increased federal outlays in future years based upon the need for added federal agency contributions to the federal employee trust funds. Significantly, on Friday the Congressional Budget Office relied on this fact (and not upon the reduction of employee receipts) in its report concluding that the cancellation of Section 642 would constitute a reduction in budget authority that would reduce the deficit as required by the Act. The cost in increased outlays, however, was not included in the President's Special Message to Congress.

The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation can be defended on the grounds that the effect of Section 642 would be to increase federal outlays even though that rationale was not presented to the Congress in the President's Special Message.



B. THE STATUTORY ISSUE

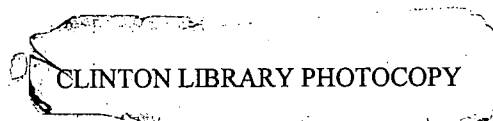
1. The Concerns Raised by DOJ

DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact that Congress was so specific and narrow in its explicit grant to the President of authority to cancel lost-receipt provisions would argue against the position that Congress, at the same time, implicitly intended to grant the President a broad authority to cancel such provisions outside the limited tax benefit context.

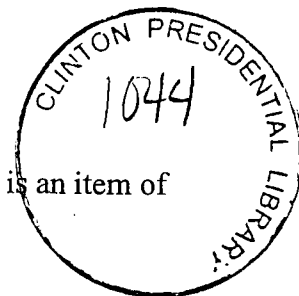
Second, and perhaps more significantly, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt-reducing provisions would weaken their constitutional defense of the Act. Throughout the line item veto litigation, DOJ has taken the position that the Act grants only very modest powers to the President and that the powers granted to him under the Act are within the range of actions that have historically been within the prerogative of the President. For example, DOJ's briefs are replete with examples of the President's historical right not to spend monies that have been allocated to the Executive. At the same time, DOJ has acknowledged in its briefs that the Act's allowance of cancellation of tax benefits is on less firm historical ground because the voiding of tax benefits is not the same as the simple refusal of the President to spend allocated funds. Accordingly, DOJ has attempted to defend the Act's provisions granting the President the power to cancel limited tax benefits as being very narrow and circumscribed. They are therefore concerned that reading the Act to authorize a broad power for the President to cancel receipt-reducing provisions would be inconsistent with their constitutional position.

2. The Position of OMB

OMB believes that the cancellation was on firm statutory footing. Under OMB's reading, the Act allows the President to cancel a dollar amount of discretionary budget authority -- defined in the Act as "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." "Budget authority," in turn, is defined in the Congressional Budget Act as including offsetting receipts as negative budget authority and the reduction of receipts as positive budget authority.



Accordingly, OMB concludes that the reduction of receipts created by Section 642 is an item of budget authority subject to cancellation.



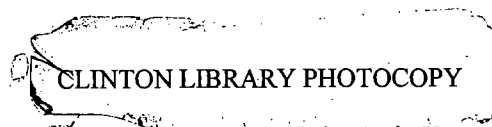
C. RE-CHARACTERIZING THE CANCELLATION

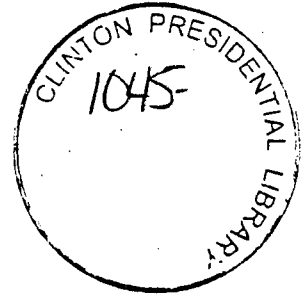
During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. As noted previously, allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years. Accordingly, both DOJ and OMB seem to agree that the cancellation could have been properly effectuated if the Special Message submitting the cancellation to the Congress set forth these estimated future outlays rather than the lost receipts as the items to be canceled. It is unclear, however, whether this theory could prevail in court. First, the Act does not provide for amending the Special Message and the five day time period for sending the message to Congress would appear to militate against any claim that a message could be changed, or re-characterized, substantively after its submission. Second, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000 thousand in lost receipts. Substituting a new dollar amount based upon amounts of future outlays, therefore, would not "amend" the previous cancellation; it would constitute an entirely new cancellation. OMB, on the other hand, argues that it is the item and not only the funds that are canceled by a line item veto. They also point out that the Congressional Budget Office, in concluding that the cancellation of Section 642 would reduce outlays, was not limited by the characterization contained in the Special Message.

D. RECOMMENDATION

Seth Waxman feels strongly that our already delicate position on the line item veto will be weakened by having to defend the broader interpretation of the Act necessary to encompass the Section 642 cancellation. We are sensitive to the concerns of the Solicitor General as our expert on Supreme Court matters but are hesitant to put the President in the position of having to abandon a position he took on considered advice of OMB and his advisors. We are inclined to suggest that we defend the cancellation on the narrow grounds that the line item veto of Section 642 was permissible under the Act as a reduction in outlays and that if any error occurred, it was only in the form of the Special Message. We believe, however, that you should hear from Seth before making a decision.

Because DOJ attorneys will be meeting with Senate Counsel to discuss this issue in the next few days and because the line item veto cases are on an expedited briefing schedule, we will need to internally resolve this issue as soon as possible. We recommend meeting with you to discuss this issue at your earliest convenience.





November 3, 1997

MEMORANDUM FOR ERSKINE BOWLES

FROM: CHARLES F.C. RUFF
WILLIAM MARSHALL
LISA HERTZER

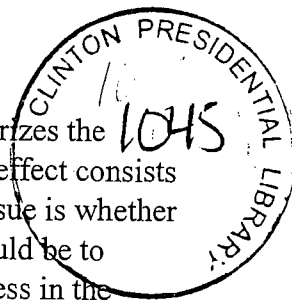
SUBJECT: LINE ITEM VETO LITIGATION

On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory question has been joined with the constitutional challenges to the line item veto that have been brought in the consolidated cases currently before Judge Hogan ~~in the federal district court~~. OMB strongly asserts that the cancellation is permissible under the Act. The Department of Justice has serious reservations. Senate and House Counsel are also reviewing this issue and are considering whether to file on the side of the plaintiffs, contending that this particular cancellation exceeds the President's authority under the Act. This memorandum briefly outlines the issues involved.

A. BACKGROUND

Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS). OMB estimated that the budgetary effect of Section 642 would be a cost of \$854,000 thousand dollars (over five years) in lost federal receipts from employee contributions, and this figure was cited in the President's Special Message to Congress announcing the cancellation of this provision. Section 642 also would have also increased federal outlays in future years based upon the need for added federal agency contributions to the federal employee trust funds. Significantly, on Friday the Congressional Budget Office relied on this fact (and not the reduction of employee receipts) in its report concluding that the cancellation of Section 642 would constitute a reduction in budget authority that would reduce the deficit. Direct reference to the cost in increased outlays, however, was not included in the President's Special Message to Congress line item vetoing Section 642. ✓

The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation can be defended on the grounds that the effect of Section 642 would be to increase federal outlays even though that rationale was not presented to the Congress in the President's Special Message.



B. THE STATUTORY ISSUE

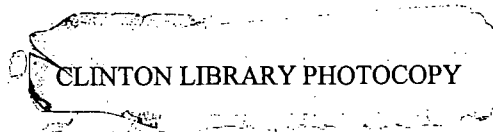
1. The Concerns Raised by DOJ

DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact that Congress was so specific and narrow in its explicit grant to the President of authority to cancel lost-receipt provisions would argue against the position that Congress, at the same time, implicitly intended to grant the President a broad authority to cancel such provisions outside the limited tax benefit context.

Second, and perhaps more significantly, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt-reducing provisions would weaken their constitutional defense of the Act. Throughout the line item veto litigation, DOJ has taken the position that the Act grants only very modest powers to the President and that the powers granted to him under the Act are within the range of actions that have historically been within the prerogative of the President. For example, DOJ's briefs are replete with examples of the President's historical right not to spend monies that have been allocated to the Executive. At the same time, DOJ has acknowledged in its briefs that the Act's allowance of cancellation of tax benefits is on less firm historical ground because the voiding of tax benefits is not the same as the simple refusal of the President to spend allocated funds. Accordingly, DOJ has attempted to defend the Act's provisions granting the President the power to cancel limited tax benefits as being very narrow and circumscribed. They are therefore concerned that reading the Act to authorize a broad power for the President to cancel receipt-reducing provisions would be inconsistent with their constitutional position.

2. The Position of OMB

OMB believes that the cancellation was on firm statutory footing. Under OMB's reading, the Act allows the President to cancel a dollar amount of discretionary budget authority -- defined in the Act as "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." "Budget authority," in turn, is defined in the Congressional Budget Act as including offsetting receipts as negative budget authority and the reduction of receipts as positive budget authority. Accordingly, OMB concludes that the reduction of receipts created by Section 642 is an item of



budget authority subject to cancellation.



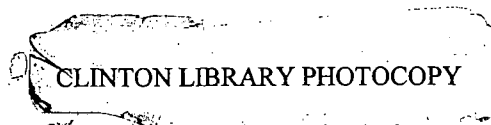
C. RE-CHARACTERIZING THE CANCELLATION

During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. As noted previously, allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years. Accordingly, both DOJ and OMB seem to agree that the cancellation could have been properly effectuated if the Special Message submitting the cancellation to the Congress set forth these estimated future outlays rather than the lost receipts as the items to be canceled. It is unclear, however, whether this theory could prevail in court. First, the Act does not provide for amending the Special Message and the five day time period for sending the message to Congress would appear to militate against any claim that a message could be changed, or re-characterized, substantively after its submission. Second, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000 thousand in lost receipts. Substituting a new dollar amount based upon amounts of future outlays, therefore, would not "amend" the previous cancellation; it would constitute an entirely new cancellation. OMB, on the other hand, argues that it is the item and not only the funds that are canceled by a line item veto.

D. RECOMMENDATION

Seth Waxman feels strongly that our already delicate position on the line-item veto will be weakened by having to defend the broader interpretation of the Act necessary to encompass the Section 642 cancellation. We are sensitive to the concerns of the Solicitor General as our expert on Supreme Court matters but are hesitant to put the President in the position of having to abandon a position he took on considered advice of OMB and his advisors. We are inclined to suggest that we defend the cancellation on the narrow grounds that the line item veto of Section 642 was permissible under the Act as a reduction in outlays and that if any error occurred it was only in the form of the Special Message. We believe, however, that you should hear from Seth before making a decision.

Because DOJ attorneys will be meeting with Senate Counsel to discuss this issue in the next few days and because the line item veto cases are on an expedited briefing schedule, we will need to internally resolve this issue as soon as possible. We recommend meeting with you to discuss this issue at your earliest convenience.



November 3, 1997



MEMORANDUM FOR ERSKINE BOWLES

FROM: CHARLES F.C. RUFF
WILLIAM MARSHALL
LISA HERTZER

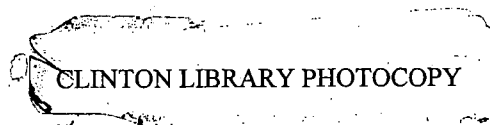
SUBJECT: LINE ITEM VETO LITIGATION

On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act.) This issue has been joined with the constitutional challenges to the line item veto that have been brought in the consolidated cases currently before Judge Hogan in the federal district court for the District of Columbia. OMB strongly asserts that the cancellation is permissible under the Act. The Department of Justice has serious reservations. Senate and House Counsel are also reviewing this issue and apparently may file on the side of the plaintiffs contending this particular cancellation exceeds the President's authority under the Act. This memorandum briefly outlines the issues involved.

A. BACKGROUND

Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS). OMB estimated that the budgetary effect of Section 642 would be a cost of \$854,000 thousand dollars (over five years) in lost federal receipts from employee contributions and this figure was cited in the President's Special Message to Congress announcing the cancellation of this provision. Section 642, however, would have also increased federal outlays in future years based upon the need for added federal employer contributions to the federal employee trust funds. The cost in increased outlays, however, was not included in the Special Message.

The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation can be defended on the grounds that its effect will be to decrease federal outlays even though that rationale was not presented to the Congress in the President's Special Message.



B. THE STATUTORY ISSUE

1. The Concerns Raised by DOJ

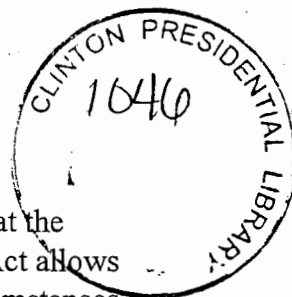
DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits.) The fact that Congress was so specific and narrow in its explicit grant to the President of authority to cancel lost receipt provisions would argue against the position that Congress implicitly intended that the President have a broad authority to cancel such provisions outside the limited tax benefit context.

Second, and perhaps more significantly, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt reducing provisions would weaken their constitutional defense of the line item veto legislation. Throughout the line item veto litigation, DOJ has taken the position that the Act grants only very modest powers to the President and that the powers granted to him under the Act are within the range of actions that have historically been within the prerogative of the President. For example, DOJ's briefs are replete with examples of the President's historical right not to spend monies that have been allocated to the Executive. At the same time, DOJ has acknowledged in its briefs that the Act's allowance of cancellation of tax benefits is on less firm historical ground because the voiding of tax benefits is not the same as the simple refusal of the President to spend allocated funds. Accordingly, DOJ has attempted to defend the Act's provisions granting the President the power to cancel limited tax benefits as being very narrow and circumscribed. They are therefore concerned that reading the Act to authorize a broad power for the President to cancel receipt reducing provisions would be inconsistent with their constitutional position.

2. The Position of OMB

OMB believes that the cancellation was on firm statutory footing. Under OMB's reading, the Act allows the President to cancel a dollar amount of discretionary budget authority -- defined as "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure is not included." "Budget authority," in turn, is defined as including offsetting receipts as negative budget authority and the reduction of receipts as positive budget authority. Accordingly, OMB concludes that the reduction of receipts created by Section 642 is an item of budget authority subject to cancellation. (OMB points out that this understanding was shared by the Congressional Budget Office which scored the veto of Section 642 as one canceling an item of budget authority and reducing the deficit.)

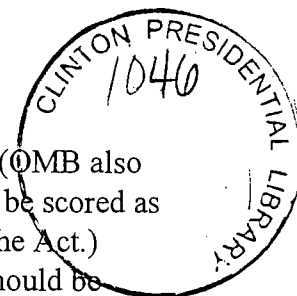
In response to DOJ's contention that this position may present too broad a reading of the President's cancellation authority, OMB offers a narrower position based on the specific point that in this case the canceled provision, Section 642, was an entitlement provision passed in an appropriations bill. This consideration is significant, according to OMB, because Section 642 could have been properly canceled if passed as part of an entitlement bill. Its passage in an



appropriations measure, accordingly, should not remove its cancellation eligibility. (OMB also notes that under budgetary law, an entitlement change in an appropriations bill must be scored as "budget authority," and therefore eligible for cancellation under OMB's reading of the Act.)

Moreover, the position that an entitlement provision passed in appropriations bills should be subject to cancellation does not lead to an expansive reading of the line item veto power.

According to OMB, changes in entitlement law passed through appropriations measures occur only 6 or 7 times a year.



C. RE-CHARACTERIZING THE CANCELLATION

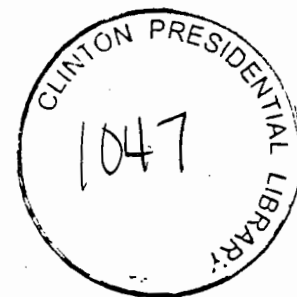
During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. Allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years.

Accordingly, both DOJ and OMB seem to agree that the cancellation could have been properly effectuated if the Special Message submitting the cancellation to the Congress set forth the estimated outlays rather than the lost receipts as the items to be canceled. It is unclear, however, whether relying on this theory would prevail in court. First, the Act does not provide for amending the Special Message and the five day time period for sending the message to Congress would appear to mitigate against any claim that a message could be changed, or re-characterized, significantly after its submission. Second, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000 thousand in lost receipts, an item that would be replaced, not "amended" by the substitution of estimated outlays. OMB, on the other hand, argues that it is the item and not only the funds that are canceled by a line item veto

D. TIMING

Because DOJ attorneys will be meeting with Senate Counsel to discuss this issue in the next few days and because the line item veto cases are on an expedited briefing schedule, we will need to internally resolve this issue as soon as possible. We recommend meeting with you to further discuss this issue at your earliest convenience.

November 3, 1997



MEMORANDUM FOR ERSKINE BOWLES

FROM: CHARLES F.C. RUFF
WILLIAM MARSHALL
LISA HERTZER

SUBJECT: LINE ITEM VETO LITIGATION

On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). ^{of} This issue has been joined with the constitutional challenges to the line item veto that have been brought in the consolidated cases currently before Judge Hogan in the federal district court for the District of Columbia. OMB strongly asserts that the cancellation is permissible under the Act. The Department of Justice has serious reservations. Senaté and House Counsel are also reviewing this issue and apparently may file on the side of the plaintiffs contending this particular cancellation exceeds the President's authority under the Act. This memorandum briefly outlines the issues involved.

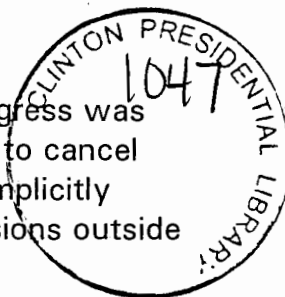
A. BACKGROUND

Section 642 would have allowed federal employees to switch retirement coverage to the Federal Employees Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS). OMB estimated that the budgetary effect of the cancellation would be \$854,000 thousand dollars (over five years) ^{to CSRS} based upon the loss of federal receipts from employee contributions. ^{Since the Act specifies three types of provisions that are subject to the line item veto,} The question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. ^{In other words, the issue is whether this pension provision qualifies as a "dollar amount of discretionary budget authority" under the Act.}

B. THE CONCERNS RAISED BY DOJ

DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and

highly specified circumstances (limited tax benefits.) The fact that Congress was so specific and narrow in its explicit grant to the President of authority to cancel lost receipt provisions would argue against the position that Congress implicitly intended that the President have a broad authority to cancel such provisions outside the limited tax benefit context.

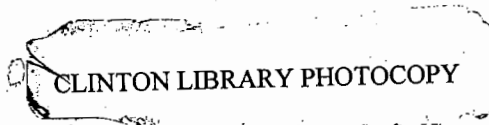


Second, and perhaps more significantly, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt reducing provisions would weaken their constitutional defense of the line item veto legislation. Throughout the line item veto litigation, DOJ has taken the position that the Act grants only very modest powers to the President and that the powers granted to him under the Act are within the range of actions that have historically been within the prerogative of the President. For example, DOJ's briefs are replete with example of the President's historical right not to spend monies that have been allocated to the Executive. At the same time, DOJ has acknowledged in its briefs that the Act's allowance of cancellation of tax benefits is on less firm historical ground because the voiding of tax benefits is not the same as the simple refusal of the President to spend allocated funds. Accordingly, DOJ has attempted to defend Act's provisions granting the President the power to cancel limited tax benefits as being very narrow and circumscribed. They are therefore concerned that reading the Act to authorize a broad power for the President to cancel receipt reducing provisions would be inconsistent with their constitutional position.

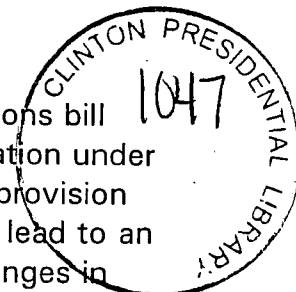
C. THE POSITION OF OMB

OMB believes that the cancellation was on firm statutory footing. Under OMB's reading, the Act allows the President to cancel a dollar amount of discretionary budget authority -- defined as "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure is not included." "Budget authority," in turn, is defined as including offsetting receipts as negative budget authority and the reduction of receipts as positive budget authority. Accordingly, OMB concludes that the reduction of receipts created by Section 642 is an item of budget authority subject to cancellation. (OMB points out that this understanding was shared by the Congressional Budget Office which scored the veto of Section 642 as one canceling an item of budget authority.)

In response to DOJ's contention that this position may present too broad a reading of the President's cancellation authority, OMB offers a narrower position based on the specific point that in this case the canceled provision, Section 642, was an entitlement provision passed in an appropriations bill. This consideration is significant, according to OMB, because Section 642 could have been properly canceled if passed as part of an entitlement bill. Its passage in an appropriations measure, accordingly, should not remove its cancellation eligibility. (OMB also



notes that under budgetary law, an entitlement change in an appropriations bill must be scored as "budget authority," and therefore eligible for cancellation under OMB's reading of the Act.) Moreover, the position that an entitlement provision passed in appropriations bills should be subject to cancellation does not lead to an expansive reading of the line item veto power. According to OMB, changes in entitlement law passed through appropriations measures occur only 6 or 7 times a year.



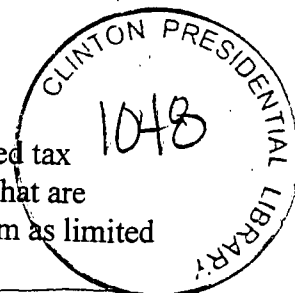
D. RE-CHARACTERIZING THE CANCELLATION

During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. Allowing federal employees to switch enrollment from CSRS to FERS will lead to additional outlays in future years. Accordingly, both DOJ and OMB seem to agree that the cancellation could have been properly effectuated if the Special Message submitting the cancellation to the Congress set forth the estimated outlays rather than the lost receipts as the items to be canceled. It is unclear, however, whether relying on this theory would prevail in court. First, the Act does not provide for amending the Special Message and the five day time period for sending the message to Congress would appear to mitigate against any claim that a message could be changed significantly after its submission. Second, DOJ argues that, technically speaking (and consistent with its constitutional theory), a line item veto does not cancel a provision. It cancels the funds to be expended under that provision. If this is true, then the item that was canceled in this case was the \$854,000 thousand in lost receipts, an item that would be replaced, not "amended" by the substitution of estimated outlays.

E. TIMING

Because DOJ attorneys will be meeting with Senate Counsel to discuss this issue in the next few days and because the line item veto cases are on an expedited briefing schedule, we will need to internally resolve this issue as soon as possible. We recommend meeting with you to further discuss this issue at your earliest convenience.

Special message - put in more than minimum
draw on vast expertise of depts



The following is a list of the least defensible of the 79 provisions identified as limited tax benefits by the Joint Committee on Taxation (JCT). A number of other provisions that are objectionable are not included in the following list because JCT did not identify them as limited tax benefits.

→ • **Treatment of Remainder Interest for Purposes of Excludable Gain on a Principal Residence** (Sec. 312(a) (partial))

fewer than 100 beneficiaries?
Litigation
Retrospective to 5/7
This provision treats the sale of a remainder interest in a home in the same manner as the outright sale, and thereby permits the taxpayer to claim the full \$500,000 exemption.

There are only moderate tax policy objections to this provision, but there may be non-tax policy reasons to cancel it. The businesses that will purchase remainder interests tend to charge exorbitant interest and fees, and are subject to criticism by consumer advocates and others.

The revenue loss from this provision is not separately stated on the revenue table for the Act.

* • **Estate Tax Relief for Conservation Easements** (Sec. 598) (?)

The Act allows a deduction against estate tax for 40% of the remaining value of the property after reduction due to the effect of conservation easement up to \$500,000.

This provision is objectionable on tax policy grounds. There is a sufficient tax benefit for conservation easements under current law. The estate tax is not an efficient vehicle for promoting conservation. The provision has been promoted by Senators Chafee, Baucus, and Daschle, and Rep. Houghton. *cost less to buy prop outright*

This provision is estimated to lose \$82 million over five years and \$361 million over ten years.

X • **First-Time Homebuyer Credits in the District of Columbia** (Sec. 701 (partial))

Individuals would be entitled to a \$5,000 first-time home buyer tax credit for the purchase of a principal residence in DC, subject to relatively high income thresholds.

This provision is objectionable on tax policy grounds. Significant tax and financial assistance is already available for home ownership, and the provision is not sufficiently targeted. The provision was introduced by Senator Jeffords, and is supported by Senators Mack and D.C. Delegate Holmes-Norton.

This provision is estimated to lose \$74 million over five years.

X • **Chain Retailers Treated as Wholesale Distributors under the Gasoline Excise Tax Refund Rules** (Sec. 905)

This provision would treat retailers that own and make retail sales from 10 or more retail

gasoline outlets as wholesale distributors, and allow them to sell gasoline to States and local governments tax exempt and collect the refund of the gas tax themselves.

This provision is not wholly objectionable on tax policy grounds. However, while there are good arguments in favor of allowing large retailers to sell gasoline net of tax, we are concerned that the proposal would put small retailers at a competitive disadvantage. The proposal also raises administrative concerns. It is a special interest provision for the benefit of certain members of the Petroleum Marketers Association of America, and was promoted by Representative Watkins.

This provision is estimated to lose negligible revenue over 5 years.

• Reduce Excise Tax on Hard Cider (Sec. 908)

The provision taxes hard cider at the rate applicable to beer produced by small breweries (22.6 cents per gallon) rather than the higher rate that applies to wine or to larger beer breweries.

This provision is somewhat objectionable on tax policy grounds. The taxes imposed on a particular alcoholic beverage should be revised only in the context of a general review of alcoholic beverage tax rates. This is a special interest provision for New York and Vermont cider producers. It was favored by Senators Moynihan, Leahy, and Jeffords.

This provision is estimated to lose \$3 million over five years and \$7 million over ten years.

• Deferral of Gain on Sales of Stock in Farm Product Refining Firms to Farm Coops Which Supply the Firm with Raw Farm Products for Refining (Sec. 968)

The provision grants gain deferral on the sale of stock of a refiner or processor to a farmers' cooperative to allow farmers more control and "gain better economic footing."

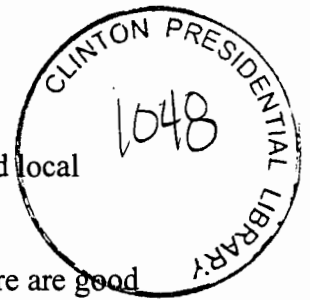
This provision is objectionable on tax policy grounds. The provision does not assure the benefits of the tax deferral will go to the farmers, nor that the farmers benefiting, if any, will be small businesses or families. This provision is a special interest provision for a sugar beet producer. It was supported by Senator Conrad. (The provision is reportedly promoted by investor Harold Simmons of Texas).

This provision is estimated to lose \$84 million over five years and \$104 million over ten.

• Provide Above-the-Line Deduction for Expenses of State and Local Government Officials (Sec. 975)

This provision allows certain State or local government employees to deduct business expenses in computing AGI ("above-the-line"). This treatment benefits eligible taxpayer in contrast to "below the line" deductions, including allowing deductions even if the taxpayer does not itemize.

This provision is somewhat objectionable on tax policy grounds. In general, the beneficiaries of

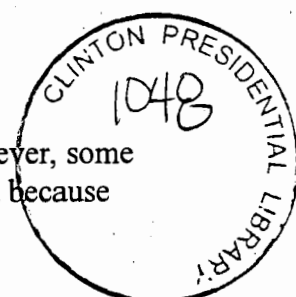


CLEAR
Standing
Cider produce

Standing -
Farmers coop?
Sales after
12/31/97

reducer is
taxpayers

iseline tax
still in place
go back to
baseline
referred
directing to
this



this provision are not sufficiently unique to warrant special treatment. There are, however, some countervailing policy arguments. The provision is of particular interest to Senator Lott because local officials in Mississippi would be eligible for the deduction.

This provision is estimated to lose \$27 million over five years and \$58 million over ten years.

X (4) • **Elective Carryback of Amtrak Net Operating Losses (Sec. 977)**

This type of provision is exceedingly rare in the tax system: It allows Amtrak to carry back net operating losses against the income of other companies to years for which the statute of limitations has closed, and thereby receive a refund of taxes for \$2.3 billion.

This provision is highly objectionable on tax policy grounds. It provides a sham tax refund that is a thinly veiled spending measure: an artifice that could become common and that in many cases would not be subject to cancellation (even when line-item veto could have applied to a spending measure). However, because of the way "limited tax benefit" is defined, it is unclear whether this item should have been included on the list and whether it is actually subject to cancellation. This provision is of particular interest to Senators Roth and Moynihan, who had supported the creation of a special trust fund for inter-city rail transport (which is not included in the Act).

This provision is estimated to lose \$ 2.3 billion over five years.

(7) • **Exception from Subpart F for Active Financial Services Income (Sec. 1175)**

Until 1986, a special exemption from current taxation applied to foreign "active financing income" for insurance companies and securities dealers; this exemption was repealed because it was unadministrable. The Act restores an exception for a single year.

This provision is objectionable on tax policy grounds. It inadequately addresses concerns raised in 1986 (when a prior exemption was repealed). It is also not worthwhile to provide this special rule for only one year (1998). Securities dealers and insurance companies, especially those in New York and Connecticut, have lobbied heavily on this issue.

This provision is estimated to lose \$94 million over five years.

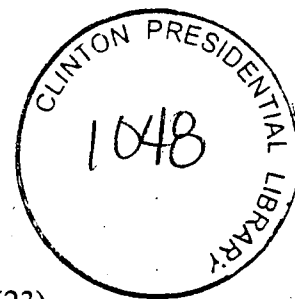
• **Opportunity to Correct Failures under Section 2032A (Sec. 1313)**

To qualify for certain estate tax relief, an executor must make an election that substantially complies with requirements in regulations. Under current law, however, certain specified mistakes in the election can be cured. The Act expands the scope of the right to cure defects by eliminating the constraint that the executor substantially comply with the requirements.

This provision is objectionable on tax policy grounds.. It would essentially require the IRS to audit every return which purports to make the election. Current law already gives generous

opportunities to correct errors.

This provision is estimated to lose negligible revenue.



- **Repeal UBIT on Income from an S Corporation to an ESOP (Sec. 1523)**

Last year's small business tax bill permitted tax-exempt organizations to hold S corporation stock provided that they treat their income from the corporation as taxable income. The Act allows an employee stock ownership plan (ESOP) to avoid this rule.

This provision is objectionable on tax policy grounds. It allows income from an S corporation paid through an ESOP to essentially avoid tax. This provision is of interest to Senator Breaux.

This provision is estimated to lose \$149 million over five years and \$400 million over ten years.

- **Estate Tax Relief for Money Going to ESOP in Existence on 8/1/96 and Decedents Dying Before 1/1/99 (Sec. 1530)**

The provision allows a deduction from gross estate for a qualified gratuitous transfer of employer securities to an ESOP to the extent of the remainder interest.

This provision is highly objectionable on tax policy grounds. It is a rifle shot for a single taxpayer--Vester Hughes (also called the Sammons provision). It is a retroactive change in law has the effect of giving the estate of Charles Sammons a charitable deduction for stock that is being transferred to favored employees rather than to a charity. This provision was promoted by Senator Daschle, Senator Nickles, and Rep. Sam Johnson (R. Texas).

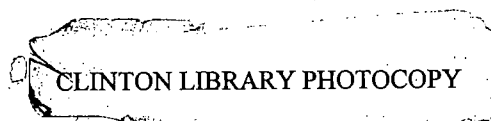
This provision is estimated to lose negligible revenue over five years.

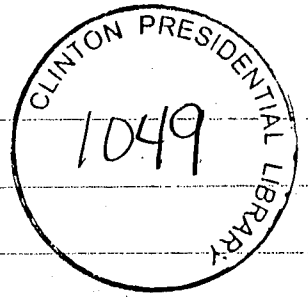
- **Oklahoma Technical on Indian Wage Credits and Development of Incentives for Property with 10-Year Lives or Less (Sec. 1604(c)(2))**

A provision enacted in 1993 provided special tax benefits within Indian reservations, which term was mistakenly defined to include the majority of the state of Oklahoma. The Act ineffectively limits the definition of Indian reservation (so that it still covers an overly large portion of Oklahoma). The portion of the change that has been identified as a limited tax benefit, however, is a transition rule that prevents the technical correction from applying when taxpayers already took advantage of the earlier mistake.

This provision is objectionable on tax policy grounds because it grants special benefits to a group of taxpayers based solely on whether they claimed the questionable beneficial treatment. This rewards aggressive taxpayers. Of interest to the Oklahoma delegation, including Rep. Watkins and Senator Nickles.

The revenue loss from this provision is not separately stated on the revenue table.





1/14/98 - Hearing on HIV
Judge Thomas Hogan

Neil -

One of suits is new statutory claim

That switch in funds is not cancelable

Dollar Amount of Discretionary Budget Authority -
any provision that would require specific \$
amt. to be spent -

Categories of Budget Authority - 4

Revenue
Reductions seen
as spending

These reductions in revenue have always been treated by OMB for
scoring purposes as spending - Q is whether this means
them is subject to HIV.

Our constitutional argument has been based on narrowness
of delegation. If anything beyond text of HIV Act, -
compromise arg to SCT

Damus:

discretionary budget authority and other terms defined
under Budget Enforcement Act

Entitlement law change -

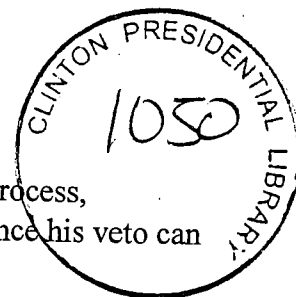
< Acc to Damus - look at what law amending -
entitlement law

not just effect
on budget

Dis Budget Authority is Key phrase - all 5 laws
define same way - reduced receipts not incl.

An entitlement law change in an appropriations bill is

Substantive arguments by challengers of power:

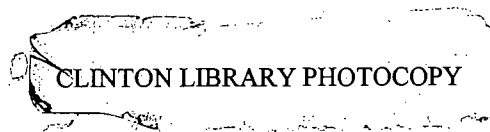


1. Congress has power to make law -- legislative functions. In lawmaking process, President does not have legislative power. Only is check on legislative power, since his veto can be overridden by Congress.
2. Effect of Act is to give President power to selectively veto. Time period between signature of bill and veto is meaningless. Sign and cancel mechanism violates Article I requirements for the repeal of legislation. This is unilateral power to repeal provisions of law.
3. Disapproval bill process is insignificant because it still requires passage of a new law, showing that by his line-item veto, the President has repealed a law.
4. Argument that this law is extension of practice of delegating to President discretionary power to curb spending does not apply to tax and entitlement provisions.
5. Act authorizes more than just adjustments to spending. It is power to cancel government activities.
6. Act does not provide President guidance on how much to cut or what items to cut. Gives the President fundamentally legislative authority, bounded only by his own view of which previously legislated programs should continue to exist. No intelligible principles laid out.
7. Congress often delegates to President to fill in details of laws because can be dependent on facts, be benefited by expertise of executive branch. This is more than gap-filling.
8. Example of Gramm-Rudman Act where Congress delegates to President power to sequester. Court ruled that delegation was constitutional because Congress made the basic policy choices about which levels of predicted federal spending should result in sequestration and had spelled out the formula.

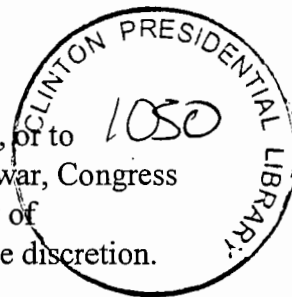
WE WANT TO EQUATE EXERCISE OF DELEGATION TO THIS SORT OF ACTION BASED ON PRINCIPLES SET FORTH BY CONGRESS, BOTH BY DESIGNATING PROVISIONS TO WHICH THE ACT APPLIES AND BY SETTING FORTH CRITERIA THAT THE PRESIDENT MUST SATISFY BEFORE EXERCISING VETO.

SUBSTANTIVE ARGUMENTS FOR CONSTITUTIONALITY OF LINE ITEM VETO

1. Authority to cancel is conditional. This is extension of Executive Branch discretion over expenditure of appropriated funds. President historically has had discretion not to obligate the full amount of an appropriation and to determine the specific functions to which funds will be applied.
2. Beginning with Depression, Congress has conferred impoundment authority upon



president. Antideficiency act gave Executive Branch authority to establish reserves, or to withhold appropriated funds. In times when savings was a priority, such as during war, Congress has conferred upon President authority to withhold money. Key to constitutionality of impoundments has been whether CONGRESS INTENDED for the President to have discretion.



3. Line item veto gives President discretion over only three categories of provisions. Limits manner in which discretion can be exercised, e.g., only a whole item may be canceled. Specifies that money cancelled cannot be used for anything else (limit on legislative nature of power).

4. Line item veto specifies findings President must make in order to exercise veto and orders President to consider the legislative history construction, and purposes of the law containing the items as well as any specific sources of information referenced in the law.

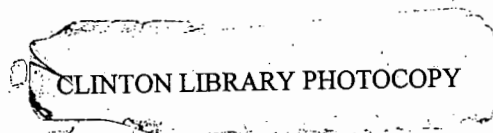
5. Nothing would prevent Congress from exempting any future bill from the provisions of the line item veto.

6. Effect of the Line Item Veto Act is to vest the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has appropriated will in fact be spent. Fully consistent with historical practice. Line item Veto Act places CONSTITUTIONALLY SUFFICIENT LIMITS ON THE PRESIDENT'S EXERCISE OF DISCRETION OVER FEDERAL SPENDING. Not a power to repeal -- it is executive power to suspend, grant exemptions, or modify operation of statutes.

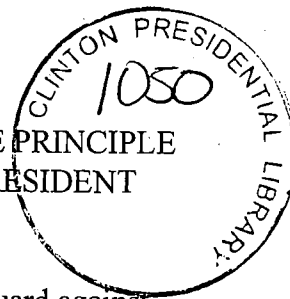
7. Because the LIV Act governs implementation of appropriations statutes after they have become law, Act presents no genuine Presentment Clause issue. Must be scrutinized instead under the standards governing statutory grants of discretion to the Executive Branch in administration of duly enacted laws. Discretion of President over expenditure of appropriated funds has been a recurring practice of Congress. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations imposed by congress.

8. Veto is not exercise of legislative power -- is is carrying out Article II function of faithfully executing the laws. Congress free to leave certain degree of discretion to executive actors in execution of federal laws. Where Congress is alleged to have impermissibly delegated legislative power, focus has been whether degree of generality in authorization is so unacceptably high as to amount to delegation of legislative powers. Nondelegation doctrine ensures that President's executive authority not so broad and unconstrained as to amount to the exercise of legislative power. Sufficient if Congress clearly delineates the general policy, agency which is to apply it, and boundaries of delegated authority. "INTELLIGIBLE PRINCIPLE" is touchstone of nondelegation doctrine analysis. Unclear if this principles applicable to congressional appropriations of money -- e.g., lump-sum appropriations.

OUR POSITION IS THAT WHEN APPROPRIATIONS ARE AT ISSUE, CONGRESS CAN DELEGATE TO PRESIDENT ON BROAD BASIS, SO LONG AS ACTIVITIES ON WHICH

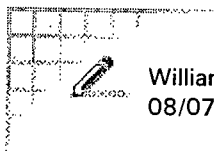


MONEY SPENT ARE AUTHORIZED BY STATUTE. EVEN IF INTELLIGIBLE PRINCIPLE
STANDARD APPLIES, LIV ACT PROVIDES ADEQUATE GUIDANCE TO PRESIDENT
TO BE VALID.

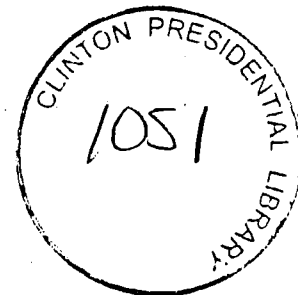


Requirement that President articulate assessment of pertinent criteria is addl. Safeguard against arbitrary action. Also consider limitations that law places on exercise of veto power and various factors that President is required to consider.

9. Veto is not power to repeal. Instead, by making individual items in spending legislation permissive rather than mandatory, gives President discretionary authority over implementation of future appropriations acts.



William P. Marshall
08/07/97 11:10:59 AM



Record Type: Record

To: Charles F. Ruff/WHO/EOP
cc: Lisa A. Hertzler/WHO/EOP
Subject: line item

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.

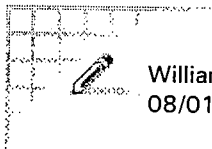
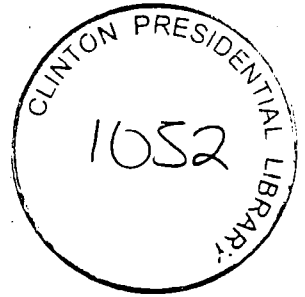
We also think that the Above-the-Line Deduction for State and Local Officials (the Sheriffs' provision) should be included. This is the one that had originally been taken off the table because of Sen. Lott.

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.

THE WHITE HOUSE
WASHINGTON



William P. Marshall
08/01/97 02:48:28 PM

Record Type: Record

To: Charles F. Ruff/WHO/EOP, Lisa A. Hertzner/WHO/EOP

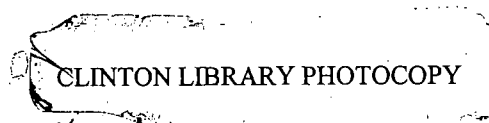
cc: Robert W. Schroeder/WHO/EOP, Robert N. Weiner/WHO/EOP

Subject: line item veto

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.

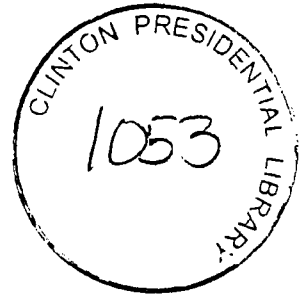
Please let me know if you have any questions. Jason Goldberg has assured me that Lisa and I will be notified of any meeting.





Robert N. Weiner

08/01/97 03:16:54 PM



Record Type: Record

To: William P. Marshall/WHO/EOP

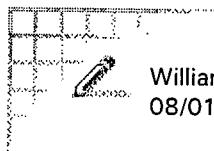
cc: Charles F. Ruff/WHO/EOP, Lisa A. Hertzner/WHO/EOP, Robert W. Schroeder/WHO/EOP

Subject: Re: line item veto

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.



William P. Marshall
08/01/97 03:50:26 PM



Record Type: Record

To: Robert N. Weiner/WHO/EOP

cc: Charles F. Ruff/WHO/EOP, Lisa A. Hertzner/WHO/EOP, Robert W. Schroeder/WHO/EOP

Subject: Re: line item veto 

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 restrictions against taxpayers gaining declaratory or injunctive 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.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Walter Dellinger from Malcolm Stewart. Subject: Line Item Veto Act. (2 pages)	08/06/1997	P5 1055
002. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 ~~1055~~ 1056 - Dup
003. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 ~~1055~~ 1057 - Dup
004. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 ~~1055~~ 1058 - Dup
005. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 1059 - Dup
006. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 1060 - Dup
007. memo	Duplicate of 001. (2 pages)	08/06/1997	P5 1061 - Dup

All
Dups of
#1

COLLECTION:

Clinton Presidential Records
Counsel's Office
Lisa Hertzner (Schertler)
OA/Box Number: 11581

FOLDER TITLE:

Line Item Veto: Special Message

Van Zbinden
2007-0624-F
vz1201

RESTRICTION CODES

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

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

- 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]

- 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]

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).

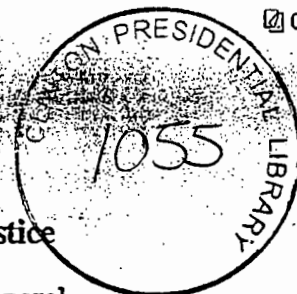
RR. Document will be reviewed upon request.

CLINTON LIBRARY PHOTOCOPY



U. S. Department of Justice

Office of the Solicitor General



Washington, D.C. 20530

August 6, 1997

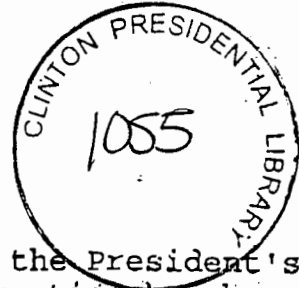
To: Walter Dellinger
Solicitor General

From: Malcolm L. Stewart *mls*
Assistant to the Solicitor General

Re: Line Item Veto Act

Under the Line Item Veto Act, the President is authorized to cancel tax and spending items if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A). Opposing parties in any future challenge to the constitutionality of the Act can be expected to argue (as did the plaintiffs in Raines v. Byrd) that those required determinations provide the President with no meaningful guidance in deciding what items should be cancelled. In meeting any such challenge, we will want to be able to show that the cancellation of a particular item rests not on a presidential whim, but on accumulated executive branch expertise.

In addition to the determinations specified above, the Line Item Veto Act requires the President to transmit to Congress a "special message" explaining his decision to cancel any tax or spending item pursuant to the Act. The Act further requires that the special message must "specify," inter alia, "all facts, circumstances and considerations relating to or bearing upon the cancellation, and to the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided." ICA § 1022(b)(1)(E). As that language suggests, projects for which federal funds are appropriated typically do not exist in a vacuum. They are instead intended to serve the purposes of some larger government program -- a program that will, in the nature of things, be administered by executive branch officials. Those officials will have specialized expertise directly relevant to the question whether a particular item is suitable for cancellation.



2

Our litigation prospects will be enhanced if the President's special message demonstrates that the relevant expertise has been brought to bear. Thus, the special message should make clear that the appropriate officials within the executive branch have been consulted regarding the propriety of cancelling a particular item. The special message should also explain, with some degree of precision, why the cancelled item either is inconsistent with the existing government program or contributes so insubstantially to it as not to be worth the cost.¹ With respect to any cancelled tax benefit, the special message should explain why the benefit departs without justification from some articulable tax policy that can be derived from the Internal Revenue Code and/or IRS regulations.

I would also note that the Line Item Veto Act identifies in some detail the subjects that a special message is required to address. See ICA § 1022(a) and (b). It may be advisable for the Office of Legal Counsel to assist in the review of any special message if and when the President cancels a tax or spending item.

¹ In Raines v. Byrd, our opponents acknowledged that some statutory grants of authority to administrative agencies -- e.g., the "public convenience, interest, or necessity" standard governing the FCC's power to grant radio licenses -- are extremely broad. They argued, however, that those broad grants of power were less problematic than the President's cancellation authority because "such delegations are constrained by the historical context and policies of the substantive statute." Br. 47. In defending an actual exercise of the President's cancellation authority, we should be able to demonstrate that the same is true of cancellation under the Line Item Veto Act -- the President's decision to cancel a particular item is not made in a vacuum, but is guided by an understanding of the statutory and regulatory framework governing the substantive program for which the appropriation is made. Similarly with respect to limited tax benefits, any cancellation will rest not on an abstract finding that a particular group of beneficiaries is "unworthy," but on a determination that the benefit is incompatible with federal tax policy as reflected in the Code and regulations.