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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Erskine Bowles and Victoria Radd from Trey Schroeder. Subject: Line Item Veto Litigation. (1 page)	01/09/1997	P5 1171
002. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss. (32 pages)	01/14/1997	P5 1172
003. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss. [2nd draft of day, incomplete copy] (8 pages)	01/16/1997	P5 1173

COLLECTION:

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FOLDER TITLE:

Line Item Veto - Byrd v. Raines - District Court Pleadings [1]

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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]

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

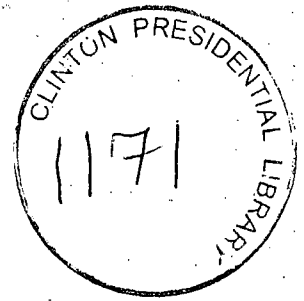
RR. Document will be reviewed upon request.

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]

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January 9, 1997



MEMORANDUM FOR ERSKINE BOWLES
VICTORIA RADD

FROM:

TREY SCHROEDER

SUBJECT:

LINE ITEM VETO ACT LITIGATION

This memorandum responds to your questions regarding the position the Department of Justice intends to take on the issue of the plaintiffs' standing in Senator Robert C. Byrd, et al. v. Franklin D. Raines, et al., the line item veto act case.

The statute expressly provides standing to Members of Congress or "any individual adversely affected." The Department of Justice's first line of reasoning in defending the statute is that, at the moment, no one at all has standing to sue because no one has been injured yet -- the President has not yet used the line item veto, and there are not even any bills currently pending for his signature or veto. But DOJ's argument goes even further: even though Congress purported to give its Members standing to sue regardless of whether they have been injured, Congress cannot simply deem its Members to have met the constitutional requirements of standing, including actual injury. This is a fundamental constitutional issue in two dimensions: first, Congress cannot overcome the Constitution by enacting a statute and second, the Constitution allows the courts to adjudicate only those disputes that are justiciable because, among other criteria, they are presented by proper parties.

A private party that could have standing, for example, would be a community college whose appropriation was struck by use of the line item veto. The community college could sue, and could challenge the constitutionality of the statute, and Members of Congress could participate as intervenors or as amici.

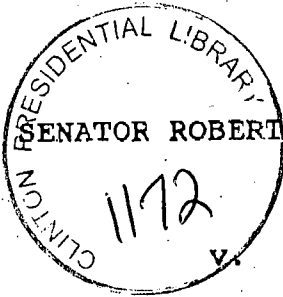
Regarding Congressional standing, it is not yet clear how high DOJ, in its brief, will place the injury bar (i.e., the point at which plaintiffs, from DOJ's perspective, have been injured and, therefore, have standing). DOJ plans to argue, at the very least, that there has been no injury until the vote of a Member of Congress has been nullified, in effect, by the President's exercise of the line item veto. DOJ may go further, however, and argue that nullification will not have occurred until Congress has failed to override the President's veto.

DOJ's motion to dismiss is due next Thursday, January 16. The plaintiffs must respond to that and file a motion for summary judgment on the merits by January 27. DOJ's response to the motion for summary judgment is due February 26, and oral argument is set for March 21.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR ROBERT C. BYRD, et al.,
Plaintiffs,

FRANKLIN D. RAINES, Director,
Office of Management and Budget,
et al.,
Defendants.

Civil Action No. 97-0001 (TPJ)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION AND SUMMARY

[TO BE COMPLETED LATER]

STATEMENT

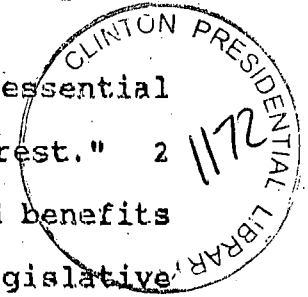
A. The Line Item Veto Act

On April 9, 1996, the President approved the Line Item Veto Act, as enacted by Congress. Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691, et seq. The purpose of the Act is "to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." Id., Preamble. The Line Item Veto Act became effective on January 1, 1997, and it expires on January 1, 2005. 2 U.S.C. 691 note.

Under the Line Item Veto Act, the President is authorized, with respect to any bill or joint resolution signed into law pursuant to Article I, section 7, to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," or any "limited tax benefit," as those terms are defined in the Act, if the President determines that the "cancellation"

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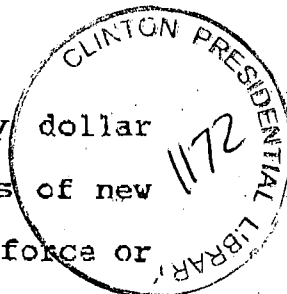
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will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest." 2 U.S.C. 691(a). In identifying dollar amounts, items, and benefits for cancellation, the President must consider the legislative history and purposes of the law containing those dollar amounts, items, or benefits, and any specific sources of information to which the law makes reference, and use the definitions in the Line Item Veto Act. 2 U.S.C. 691(b). The Act also directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides for the inclusion in those bills and joint resolutions of a separate section prohibiting the application of the Act to all but those benefits, if any, specifically identified by the Joint Committee. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).

The President must notify Congress of a cancellation by transmitting a "special message" within five calendar days after enactment of the law to which the cancellation applies. 2 U.S.C. 691(a). The Act specifies the contents of the special message, and requires that it shall be printed in the Federal Register in the first issue published after it is transmitted to Congress. 2 U.S.C. 691a. The cancellation takes effect upon Congress' receipt of the special message, and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2

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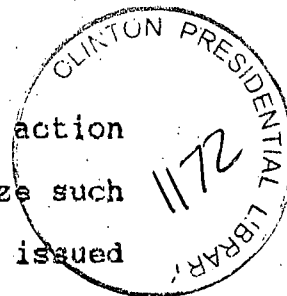


U.S.C. 691b. The cancellation operates to rescind any dollar amount of discretionary budget authority or prevent items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. 691e(4). Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c.

Under the Line Item Veto Act, each special message transmitted by the President is referred to the appropriate congressional committees. During a review period of 30 days following Congress' receipt of the special message, Members of Congress may introduce, and Congress may consider, a "disapproval bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6). If a disapproval bill is enacted into law, then all cancellations disapproved in that law are null and void. 2 U.S.C. 691b(a). The Act does not confer authority on the President to cancel any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in an enacted disapproval bill. 2 U.S.C. 691(c).

The Line Item Veto Act provides that any Member of Congress, and any individual "adversely affected" by the Act, may bring an action in this Court for declaratory and injunctive relief "on the ground that any provision of this part violates the Constitution." 2 U.S.C. 692(a). This provision does not "infringe upon the right

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of the House of Representatives to intervene" in such an action "without the necessity of adopting a resolution to authorize such intervention." 2 U.S.C. 692(a)(3). Any order of this Court issued pursuant to an action brought under the Act "shall be reviewable by appeal directly to the Supreme Court of the United States." 2 U.S.C. 692(b). It is the duty of this Court, and the Supreme Court, to advance on the docket and expedite the disposition of an action brought under the Act. 2 U.S.C. 692(c).

B. This Lawsuit

Plaintiffs, Senator Robert C. Byrd and five other Members of Congress, filed this lawsuit on January 2, 1997, naming the Director of the Office of Management and Budget and the Secretary of Treasury as defendants. All six plaintiffs voted against passage of the Line Item Veto Act. Plaintiffs seek a judicial declaration that the Act is unconstitutional.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

- A. Members of Congress, Like All Other Plaintiffs in Federal Court, Must Allege Actual or Impending Personal Injury, Inflicted by Defendants and Redressable by Judicial Decree, to Have Standing to Sue

Article III of the Constitution limits the judicial power to "Cases" and "Controversies." The terms "cases" or "controversies" were intended to confine the federal courts to resolving disputes that "are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 97 (1968). A central feature of a "case" or controversy" is that the dispute

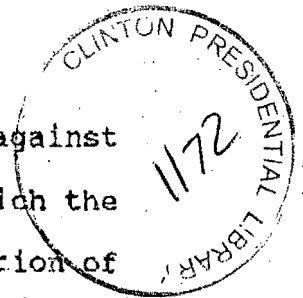
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must be submitted by a "proper and appropriate party." Id., at 102. To be a "proper and appropriate party," the plaintiff must have "standing" to sue by showing he or she "personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that a favorable judgment will redress that injury. United Food & Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996).

The requirement that a plaintiff in federal court allege personal injury that has been inflicted by defendant and is redressable by judicial decree is an "irreducible minimum" under Article III. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Therefore, it applies to members of Congress with no less force than it does to everyone else. Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir.) ("a legislator receives no special consideration in the standing inquiry"), cert. denied, 439 U.S. 997 (1978); Spence v. Clinton, Civil Action No. 96-1671 (D.D.C. Oct. 9, 1996), slip opinion p. 6. Even where, as in the Line Item Veto Act (2 U.S.C. 692(a)(1)), a statute expressly authorizes a member of Congress to sue, the member must satisfy the constitutional requirements of standing, because "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy." U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 389 (1994). *Why not cite Lujan here?*

However, the standing requirement takes on added significance

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in suits, such as the present one, by members of Congress against officers of the Executive Branch. The "basic idea" upon which the law of Article III standing is built is "the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984). The separation of powers component of the doctrine of standing "keeps courts within certain traditional bounds vis-a-vis the other branches." Lewis v. Casey, 116 S. Ct. 2174, 2181 n. 3 (1996). Specifically, it "prevents courts of law from undertaking tasks assigned to the political branches." Id., at 2179. Accordingly, the separation of powers component of the standing doctrine should bar judicial resolution of non-"personal" disputes between officers of the political branches, such as the present suit, which involve conflicting claims over the exercise of governmental power.

As Judge (now Justice) Scalia has written, the federal courts sit "neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances * * * brings forth a result that harms private rights, it is no part of our constitutional province, which is 'solely, to decide on the rights of individuals.'" Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring), cert. denied, 469 U.S. 1106 (1985), quoting from Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)). In other words, because members of the Legislative and Executive branches have no personal or private

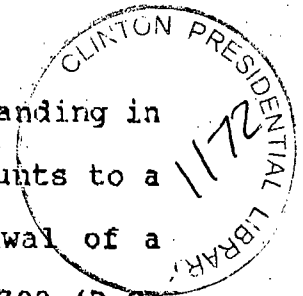
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interest in the governmental powers conferred upon them by the Constitution or by statute, the courts should be precluded by the separation of powers component of the standing doctrine from interfering in their intragovernmental disputes, absent a companion claim by some private entity or individual that they have suffered consequential injury. Id.

Moreover, even if the Legislative Branch could demonstrate a cognizable claim of injury inflicted upon it by the Executive Branch, only the collegial body authorized to speak on behalf of the Legislative Branch -- namely, Congress or one of its Houses -- would have standing to invoke the jurisdiction of a federal court to redress that claim. Individual members of Congress would not. As the Supreme Court observed in Bender v. Williamsport Area School District, 475 U.S. 534, 544 (1986), "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." See United States v. Ballin, 144 U.S. 1, 7 (1892) ("Power is not vested in any one individual, but in the aggregate of the members who compose [the House of Congress] * * * "). This rule best comports with the separation of powers, because it does not enmesh the judiciary in intrusive and essentially political inquiries into whether a particular member is faithfully advancing the considered views of the Legislature.

We are aware, of course, that the District of Columbia Circuit has conferred standing upon congressional plaintiffs in certain suits against the Executive Branch even without claims of consequential injury by private parties. The District of Columbia

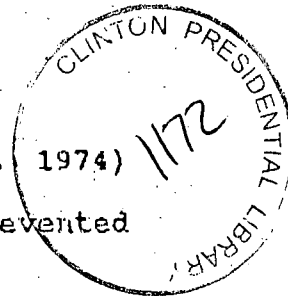
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Circuit has written that congressional plaintiffs have standing in the limited circumstance where their alleged injury "amounts to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.), vacated and remanded on other grounds, 444 U.S. 996 (1979). Thus, it has found standing where legislative or executive action occurred which nullified or diluted the vote of a Member of Congress. See, e.g., Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994) (challenging House rule allowing delegates to vote); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir. 1982), cert. denied, 464 U.S. 823 (1983) (challenging method by which House committee seats are allocated); AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (alleging agency reduction-in-force deprived members of Appropriations Committee of statutory right to approve proposed agency reorganizations); Riegle v. Federal Open Market Comm., 656 F.2d 873, 879 (D.C. Cir.) cert. denied, 454 U.S. 1082 (1981) (alleging designation of members to executive committee denied Senator's constitutional right to confirm Presidential appointments); Goldwater v. Carter, supra (alleging that President's notification of termination of treaty deprived Senate of constitutional right to prevent termination). In this vein, the District of Columbia Circuit has held that legislators have standing to challenge actions that allegedly violate the constitutional provisions governing the enactment of legislation. E.g., Moore v. U.S. House of Representatives, supra (challenging enactment of tax measure which originated in the Senate rather than

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the House); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (alleging that President's "pocket veto" of a bill prevented Congress from voting to override the veto).

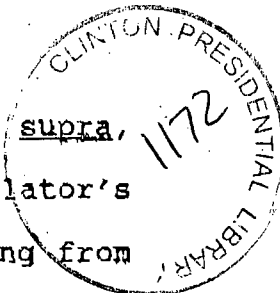


But the Supreme Court -- which is the only court that will review this Court's orders under the Line Item Veto Act -- has not endorsed this line of cases. It "has never found standing to resolve, or reached the merits of, an intra- or inter-branch dispute presented by a federal officer whose only asserted injury was the impairment of his governmental powers (footnote omitted)."¹ Moore v. U.S. House of Representatives, *supra*, at 960-961 (Scalia, J., concurring). Moreover, even under the District of Columbia Circuit's precedents, members of Congress do not have standing to sue officers of the Executive Branch unless they show that those officers have taken, or are about to take, concrete action which "amounts to a disenfranchisement, a complete nullification or

¹ In Coleman v. Miller, 307 U.S. 433 (1939), the Supreme Court, by a 5-4 majority, held that it had jurisdiction to review a decision of the Kansas Supreme Court, denying claims by 20 state senators that their votes against ratification of a proposed amendment to the United States Constitution had been illegally overridden by the state lieutenant governor. Although the Supreme Court said that the state senators had "a plain, direct and adequate interest in maintaining the effectiveness of their votes," 307 U.S. at 438, its holding that this qualified as a cognizable interest in the controversy was grounded on the fact that it was "treated by the state court as a basis for entertaining and deciding the federal questions." *Id.*, at 446. As the dissenting opinion of Justice Frankfurter points out, the state senators were granted standing only because a majority of Justices were willing to accept the state court's determination that the senators' interest was cognizable; "[c]learly" the state senators "would have no standing had [they] brought suit in a federal court." 307 U.S. at 465. Thus, Coleman v. Miller does not support the proposition that members of Congress have standing to sue the Executive Branch over claimed injuries to their governmental powers.

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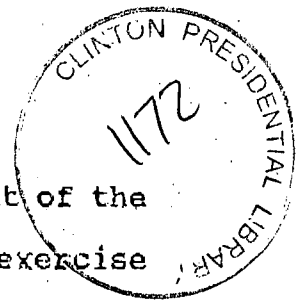
withdrawal of a voting opportunity." Goldwater v. Carter, supra, 617 F.2d at 702.² Mere "diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action," is not enough to support standing, particularly "where the plaintiff-legislator still has power to act through the legislative process to remedy the alleged abuses." Id.

B. Plaintiffs Have Failed to Allege Actual or Impending Personal Injury Inflicted by Defendants Under the Line Item Veto Act

1. The complaint in this case contains only one paragraph addressing the subject of plaintiffs' "injuries," and that paragraph -- paragraph 14 -- is devoid of allegations of actual or impending injury inflicted by defendants upon plaintiffs, personally, or upon any private individuals or entities. Indeed, neither of the named defendants is authorized by the Act to take any action that could affect, much less injure, plaintiffs or anyone else. Defendant Raines, the Director of the Office of Management and Budget, is responsible under the Act only for making designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c. Defendant Rubin, the Secretary of the Treasury, has no responsibilities under the

² It is conceivable that a member of Congress would have standing to challenge legislative or executive action which does not affect the voting power or the legislative process but which, nevertheless, inflicts concrete, personal injury. For example, in Boehner v. Anderson, 30 F.3d 156, 150 (D.C. Cir. 1994), the District of Columbia circuit held that congressional plaintiffs had standing to challenge the constitutionality of a statute that affected their rate of pay. No such claim of personal injury is presented in this lawsuit.

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Act at all.³

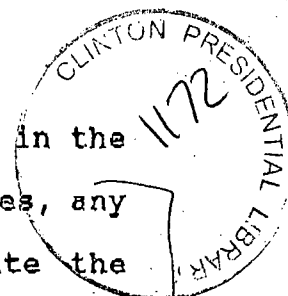
Instead, paragraph 14 describes plaintiffs' assessment of the impact of the enactment of the Line Item Veto Act on their exercise of governmental power and on the distribution of such power between the political branches. This assessment is no substitute for the allegations of personal injury in fact required by Article III.

Thus, in paragraph 14 of the complaint, plaintiffs contend that "the [Line Item Veto] Act," on its face, "directly and concretely injures the plaintiffs, in their official capacities," in three ways. First, plaintiffs claim the Act injures them by "altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items." Complaint, ¶14. Second, plaintiffs claim the Act injures them by "divesting [them] of their constitutional role in the repeal of legislation." Id. Third, plaintiffs claim the Act injures them by "altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress." Id.

These claims are nothing more than subjective conclusions plaintiffs have drawn from the mere existence of the Line Item Veto Act. The difference of opinion defendants have with plaintiffs over these conclusions may make for an interesting debate, but it

³ For this reason, Secretary Rubin should be dismissed summarily as a party defendant.

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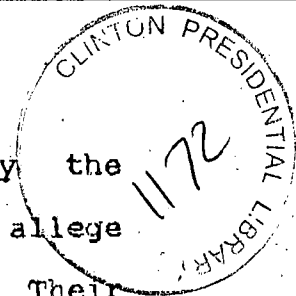
does not make for injury in fact under Article III.⁴ And, in the absence of concrete injury to private individuals or entities, any involvement by the Court in such a debate would violate the separation of powers component of the standing doctrine by enmeshing the Court in theoretical disputes between officers of the political branches over the allocation of governmental power, which properly should be left to the political branches to resolve through the system of checks and balances. See Lewis v. Casey, supra, 116 S. Ct. at 2179; Moore v. U.S. House of Representatives, supra, 733 F.2d at 959 (Scalia, J., concurring).

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Moreover, plaintiffs are in no position to claim that the mere existence of the Line Item Veto Act injures the Legislative Branch. First, the Legislative Branch passed the Line Item Veto Act after considering its constitutionality. It hardly can claim that it injured itself. Second, the Act expressly authorizes the collegial bodies of the Legislative Branch -- the Senate and the House -- to intervene in lawsuits challenging the Act's constitutionality (2 U.S.C. 692(a)(2)). Only those bodies may speak for, and assert injuries on behalf of, the Legislative Branch. ?

⁴ For purposes of ruling on defendants' motion to dismiss, the Court is bound to accept as true plaintiffs' material allegations of fact. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264 (1991) (internal quotations and citations omitted). But "there is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion pp. 14-15. In paragraph 14, plaintiffs have not alleged any facts showing actual injury, and defendants and the Court are not required to accept as correct the conclusions they draw from the enactment of the Line Item Veto Act.

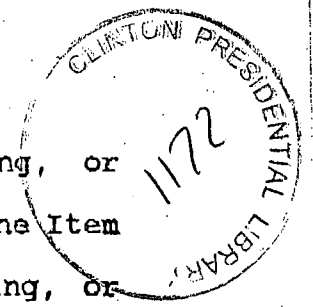
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Consequently, plaintiffs have failed to satisfy the "irreducible minimum" requirement of standing by failing to allege concrete, personal injury inflicted on them by defendants. Their complaint must be dismissed for want of Article III jurisdiction.



2. Even under the District of Columbia Circuit precedents conferring standing upon congressional plaintiffs who allege certain types of injuries, the allegations in paragraph 14 of the complaint are insufficient to support plaintiffs' standing to sue under Article III. Under the District of Columbia Circuit precedents, congressional plaintiffs must allege "a disenfranchisement, a complete nullification or withdrawal of a voting opportunity" to have standing to sue. Goldwater v. Carter, supra, 617 F.2d at 702. Plaintiffs do not allege such an injury.

There are no allegations in paragraph 14 that defendants took, are taking, or certainly will take action under the Line Item Veto Act which has "alter[ed]", is "altering," or certainly will "alter[]" the legal and practical effect of all votes plaintiffs "may" cast on bills containing items subject to presidential cancellation under the Line Item Veto Act. Similarly, there are no allegations that defendants took, are taking, or certainly will take action which has "divest[ed]," is "divesting," or certainly will "divest[]" plaintiffs of their constitutional role in the repeal of legislation, or that defendants took, are taking, or certainly will take action which has "alter[ed]," is "altering," or certainly will "alter[]" the constitutional balance of powers between the political branches of government. In short, plaintiffs

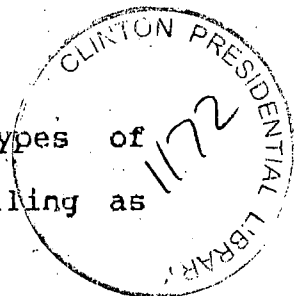


do not allege that the defendants have done, are doing, or certainly will do anything to injure plaintiffs under the Line Item Veto Act, much less that defendants have taken, are taking, or certainly will take action that is tantamount to a "disenfranchisement" or "a complete nullification" of plaintiffs' voting rights. Coldwater v. Carter, supra, 617 F.2d at 702.

The District of Columbia Circuit has insisted that would-be congressional plaintiffs allege "an Executive action that nullifies a specific congressional vote or opportunity to vote," because such allegations are "objectively verifiable" and do not depend on the legislator's assessment of his or her effectiveness, "subjectively judged by him or her." Goldwater v. Carter, supra, 617 F.2d at 702. Only by adhering to such an "objective standard" has the District of Columbia Circuit avoided wholesale intrusion into the province of the political branches.

But plaintiffs in this case have failed to meet that objective standard. The claims in paragraph 14 of their complaint "are really predictions" of what they think will happen once the President uses the authority provided by the Line Item Veto Act, rather than "allegations of facts, either historical or otherwise demonstrable." United Transport. Union v. ICC, 891 F.2d 908, 912 (D.C. Cir. 1989). As the District of Columbia Circuit has written, "[w]hen considering any chain of allegations for standing purposes, [the Courts] may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will

result from present or ongoing actions -- those types of allegations that are not normally susceptible of labelling as 'true' or 'false.'" Id.



3. This case is not comparable to Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986), where this Court held that members of Congress had standing to challenge the constitutionality of the Gramm-Rudman-Hollings Act, which was enacted on December 12, 1985. The congressional plaintiffs in Synar, unlike plaintiffs in this case, did allege a nullification of their votes by action of the Executive Branch.

The Gramm-Rudman-Hollings Act that was challenged in Synar was a self-executing statute. Upon its enactment, Gramm-Rudman immediately suspended all spending increases otherwise provided under existing federal law; the Comptroller General was directed to issue a report to the President by January 20, 1986, specifying budget reductions that would have to be made during the rest of fiscal year 1986; and the President was instructed to issue an "order" by February 1, 1986, which, when effective on March 1, 1986, would permanently suspend spending increases or "sequester" new budget authority that would cause the federal budget to exceed specified levels. By the time this Court issued its decision, the spending increases, including cost-of-living adjustments for federal retirees, had been automatically suspended, the Comptroller General had issued his report, and the President had issued a "sequestration" order. The Court held that members of Congress had

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standing to challenge the constitutionality of Gramm-Rudman because "the automatic deficit reduction process" already had operated "to nullify plaintiffs' votes on [] earlier legislation." 626 F. Supp. at 1382. It also held that the National Treasury Employees Union and several of its members had standing, because the members' already had suffered a suspension of their cost-of-living adjustments. Id., at 1380-1381.

Thus, unlike plaintiffs in the present case, the congressional plaintiffs in Synar challenged a law whose implementation by defendants already had inflicted alleged injuries upon them. The Line Item Veto Act is not self-executing, and neither defendants nor any other federal officers have taken action under it.

Moreover, unlike plaintiffs in the present case, the claims of the congressional plaintiffs in Synar were consolidated for judicial consideration and resolution with the claims of private parties who clearly had suffered concrete, personal injury (the loss of cost-of-living adjustments). It is noteworthy that, on appeal, the Supreme Court in Synar upheld the standing of a member of the National Treasury Employees Union who did not receive a cost-of-living adjustment, but pointedly refused to consider whether the congressional plaintiffs (or the union itself) had standing. 478 U.S. at 721. As we have argued above, supra p. 8, the absence of private claimants in this case is an independent reason for finding that plaintiffs lack standing to sue in their capacity as members of Congress.

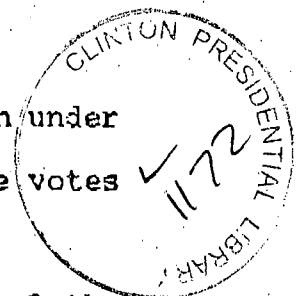
The situation in this case is also far different from the

situation in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), where the District of Columbia Circuit upheld the standing of a member of Congress to challenge the President's veto power. In that case, Senator Edward Kennedy sued the Administrator of the General Services Administration and the Chief of White House Records, who have ministerial duties related to the recording and publication of enacted legislation, to declare invalid President Richard Nixon's "pocket-veto" of a bill called the Family Practice of Medicine Act. Senator Kennedy had voted for that bill and, after it was passed by Congress, President Nixon allowed more than ten days to expire without signing the bill or returning it unsigned. The bill was not recorded or published as a valid law because the Senate went into recess, and the President deemed it an adjournment within the meaning of the Constitution.

Senator Kennedy alleged that the President's action unconstitutionally nullified his right to vote to override the President's "veto." The District of Columbia Circuit held that Senator Kennedy had standing to sue, because he alleged a concrete injury inflicted by the Executive Branch to an interest of the Senator's positively identified by the Constitution, namely, the nullification of his right to vote to override a presidential veto. 511 F.2d at 433, 436.

Thus, in Kennedy v. Sampson the District of Columbia Circuit found standing because the President, by his "pocket veto," and the named defendants, had already acted in a manner that allegedly injured Senator Kennedy by nullifying his vote. Here, in contrast,

neither the defendants nor the President has taken any action under the Line Item Veto Act, much less action which nullifies the votes plaintiffs have cast.⁵

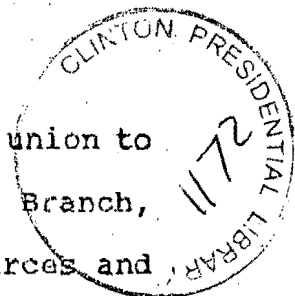


4. Finally, the conclusory claims in paragraph 14 of the complaint, that the mere existence of the Line Item Veto Act alters or divests plaintiffs of their voting power and constitutional role in the legislative process, are precisely the sorts of abstract concerns with constitutional governance which can never satisfy Article III's standing requirement, no matter who raises them. E.g., Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217, 220 (1974) ("the generalized interest of all citizens in constitutional governance * * * is an abstract injury * * * [upon which] standing to sue may not be predicated"). That is why this Court, in NTEU v. United States, 929 F. Supp. 484 (D.D.C.), aff'd, No. 96-5217 (D.C. Cir. Dec. 13, 1996), rejected the standing of a union of federal employees to challenge the constitutionality of the Line Item Veto Act on the basis of abstract injuries.

In NTEU, the National Treasury Employees Union, its president, and two of its members claimed that the Line Item Veto Act violates the Presentment Clause, Art. I, §7, that it unconstitutionally shifts lawmaking power to the Executive Branch, and that it violates Art. I, §5, granting each House of Congress the right to determine its own procedural rules. The NTEU plaintiffs alleged

⁵ Indeed, it is the action of Congress itself, which enacted the legislation in the first instance, which is really the source of plaintiffs' claimed "injury" -- i.e., the bare existence of the statute. That is not enough to confer standing on a congressional plaintiff. Goldwater v. Carter, supra.

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they were "injured" by the Act because it "'required'" the union to redirect limited lobbying resources to the Executive Branch, because it was "'acting as a drain'" on the union's resources and "'directly interfer[ing]'" with the union's ability to accomplish its goals and effectively represent its members, and because it "'unlawfully dilutes the power of their elected representatives [in Congress] over spending measures and over the procedural rules of their legislative Houses, in turn diluting the effectiveness of plaintiffs' votes.'" 929 F. Supp. at 487-488.

This Court held that the injuries the NTEU plaintiffs alleged "are too speculative and remote to constitute an injury sufficient to confer standing on the plaintiffs." 929 F. Supp. at 488. Focusing on plaintiffs' allegation "that their votes have been diluted by virtue of the transfer of power to the Executive," the Court held that "this injury is shared by the citizenry at large and is not sufficiently particularized to satisfy Article III." Id. Furthermore, the Court observed that, even if the President exercised the cancellation authority provided by the Line Item Veto Act to the detriment of the union's members, Congress could pass a disapproval bill which the President might sign, or it could override the President's veto of a disapproval bill. Id., at 489. Accordingly, said the Court, "the plaintiffs' ultimate concerns will be realized only in the event that the President exercises the cancellation authority with respect to a particular appropriation affecting them and one of these alternatives is ultimately unsuccessful." Id. For these reasons, the Court concluded that

the NTEU plaintiffs had only "identif[ied] some way in which the challenged action hypothetically affects them," and had failed to demonstrate that they "have suffered an injury." Id., at 490.

Here, as in NTEU, plaintiffs have failed to demonstrate that they have "suffered an injury."⁶ Rather, they have identified ways in which the Line Item Veto Act, if implemented, allegedly will affect the distribution of governmental powers between the political branches. That is insufficient to support standing under Article III.

Plaintiffs' allegations about the impact of the unexercised cancellation power conferred on the President by the Line Item Veto Act also are not comparable to the allegations about an unexercised veto power which the Supreme Court sustained for purposes of standing in Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). In Metropolitan, the Supreme Court held that a private citizens group had standing to challenge the constitutionality of Congress' delegation to a board of review the power to veto airport planning decisions made by the board of directors of the Metropolitan Washington Airports Authority. The Supreme Court reasoned that the group was injured because of the increase in noise, pollution, and the danger of accidents caused by the challenged scheme.

⁶ The NTEU suit was filed after the Line Item Veto Act was approved by the President but before it became effective. However, the fact that the NTEU plaintiffs were alleging injury before the Act was effective was not material to this Court's holding that they lacked standing. Therefore, the Court's holding in NTEU is relevant here, despite the fact that plaintiffs sued after the Act became effective.

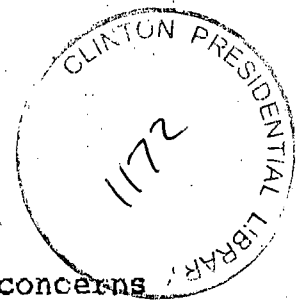
As the District of Columbia Circuit noted in affirming this Court's decision in the NTEU case, "[i]t is important to note that it was not the mere existence of the unconstitutional veto power in Metropolitan that constituted the 'injury in fact,' but rather the increased (or at least not decreased) noise, activity, and danger that resulted from the unconstitutional veto power." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion at p. 10. "As the [Supreme] Court explained the next term in Lujan v. Defenders of Wildlife, [504 U.S. 555 (1992)], a 'procedural injury' is inadequate to establish standing absent an alleged 'discrete injury' flowing from the procedural violation." Id., at pp. 10-11.

Plaintiffs in this case are alleging injury on the basis of the "mere existence" of the Line Item Veto Act and the unexercised authority it confers on the President. Plaintiffs do not allege they have suffered any "discrete injury" flowing from that Act. Consequently, plaintiffs in this case, unlike the plaintiffs in Metropolitan, lack standing to sue.

In sum, plaintiffs seek to invoke the jurisdiction of this Court on the basis of a generalized grievance about the implications of the Line Item Veto Act, unaccompanied by allegations of personal injury to themselves or private entities. None of plaintiffs' votes has been affected, much less nullified, by the Act, and no action has been taken against them or private entities by defendants or any other federal officers under the Act. Therefore, plaintiffs' complaint should be dismissed for lack of

standing under Article III.

II. THE CONSTITUTIONAL ISSUES PLAINTIFFS SEEK TO
RAISE ARE NOT "RIPE" FOR JUDICIAL RESOLUTION



As the Supreme Court has written, "[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." Renne v. Geary, 501 U.S. 312, 320 (1991). The "appropriate timing" of judicial intervention -- that is, whether the issues presented are "ripe" for judicial review -- "involve[s], at least in part, the existence of a live 'Case or Controversy.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974).

In that respect "the ripeness doctrine is drawn from * * * Article III limitations on judicial power," Reno v. Catholic Social Services, 509 U.S. 43, 67 n. 18 (1993), and it "shares the constitutional requirement of standing that an injury in fact be certainly impending." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion pp. 7-8. Furthermore, the policy of the federal courts has long been to defer consideration of constitutional issues until their resolution is absolutely necessary. United States v. NTEU, 115 S. Ct. 1003, 1019 (1995); Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). Therefore, unless plaintiffs have alleged an actual or imminent application of the Line Item Veto Act requiring an immediate resolution of the constitutional issues they seek to raise, those issues are not ripe and may not be considered by the Court at the present time. Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994) (dismissing challenge by Member of Congress to

congressional pay statute calling for adjustments scheduled to occur in 1999 because it was "far from ripe").

The issues plaintiffs seek to raise are not ripe because plaintiffs do not allege an actual or imminent application of the Line Item Veto Act. Instead, they mount a facial challenge to the Act, and seek the immediate resolution of novel and complex constitutional claims which are remote and speculative.

To date, Congress has not passed any bills containing any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit that is subject to cancellation by the President under the Line Item Veto Act. The President has not exercised the authority provided by the Line Item Veto Act to cancel any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit contained in any bills passed by Congress. And Congress has not passed any disapproval bills which, if enacted, would render null and void any cancellations by the President under the Line Item Veto Act. When any of these events will occur in the future is a matter of pure speculation.

The absence of an actual or imminent application of the Line Item Veto Act is not simply a technical deficiency in the pleadings. It robs the Court of an indispensable factual context within which to evaluate plaintiffs' constitutional claims.

For example, the Act specifies that a presidential cancellation does not take effect until Congress receives a "special message" from the President, notifying Congress of the

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cancellation and incorporating required determinations that the cancellation will reduce the federal budget deficit, not impair essential government functions, and not harm the national interest, (2 U.S.C. 691(a), 691a(b), 691b(a)). Furthermore, the Act contains elaborate definitions of the terms "dollar amount of discretionary budget authority," "item of new direct spending," and "limited tax benefit" (2 U.S.C. 691e(7)-(9)). These definitions incorporate by reference not only provisions in future appropriations and tax laws, but also future statements of bill managers and governing committee reports (Id.). The President is required to use these definitions and consider these legislative materials in exercising the Act's cancellation authority (2 U.S.C. 691(b)). The Act also charges the congressional Joint Committee on Taxation with the responsibility of identifying bills that contain a "limited tax benefit" (2 U.S.C. 691f(a)), and restricts the President's power to cancel limited tax benefits when they have been so identified (2 U.S.C. 691f(c)). Thus, the Act preserves important prerogatives of Congress in the budget process, and its delegation of cancellation authority to the President is strictly controlled.

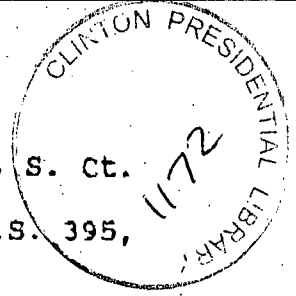
The Court cannot effectively evaluate plaintiffs' claims, in paragraph 14 of the complaint, that the President's exercise of the cancellation authority provided by the Line Item Veto Act alters the effect of their votes on appropriations and tax bills, and alters the balance of power between the Legislative and Executive Branches, without reviewing the President's compliance with the Act's commands in the context of an actual cancellation. If the

President's full compliance with these statutory commands were undisputed, arguments about an alleged diminution of congressional votes or an alleged shifting of governmental power would lose much of their force. On the other hand, those arguments might be enhanced if the degree of presidential compliance with the Act's commands were disputed.

Similarly, the Court cannot effectively evaluate plaintiffs' claim, in paragraph 14 of the complaint, that the Line Item Veto Act alters their constitutional role in the repeal of legislation until the President exercises the cancellation authority provided by the Act and Congress attempts to override it by passing a disapproval bill. As this Court suggested in NTEU v. United States, supra, 929 F. Supp. at 489, the enactment of a disapproval bill would moot claims that the Act diminishes the role of members of Congress in the repeal of appropriations and tax legislation.

At bottom, by calling upon the Court to consider and resolve their constitutional claims right now, in a factual vacuum, plaintiffs are asking the Court for an advisory opinion about the constitutionality of the Line Item Veto Act. From the time the Framers rejected Randolph's proposed Council of Revision, which would have passed upon the legitimacy of all legislation before it became effective, the notion that federal courts should render such advisory opinions has been anathema under our system of government. See United States v. Richardson, 418 U.S. 166, 189-191 (1974) (Powell, J., concurring). As the Supreme Court has said: "'a federal court [lacks] the power to render advisory opinions.'"

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U.S. Nat'l Bank of Oregon v. Independent Ins. Agents, 113 S. Ct. 2173, 2179 (1993), quoting from Preiser v. Newkirk, 422 U.S. 395, 401 (1975). The reasons for this are well known:

The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches.

United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).

Therefore, the constitutional issues plaintiffs seek to litigate are not ripe within the meaning of Article III, and the Court lacks power to consider or resolve them at the present time. For this additional reason, plaintiffs' lawsuit should be dismissed for lack of jurisdiction.

III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED
UNDER THE DOCTRINE OF REMEDIAL DISCRETION
BECAUSE PLAINTIFFS MAY OBTAIN THE RELIEF
THEY SEEK THROUGH THE LEGISLATIVE PROCESS

Even if the Court finds that plaintiffs have standing and the issues they seek to raise are justiciable under Article III,

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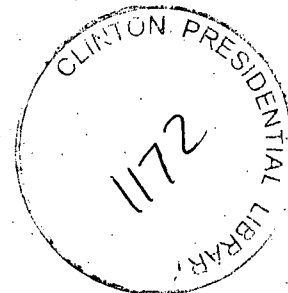
the Court should exercise its remedial (or equitable) discretion to dismiss this lawsuit. The District of Columbia Circuit has recognized that declaratory relief is discretionary and may be denied on the basis of prudential considerations. Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985). "Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, th[e] court should exercise its equitable discretion to dismiss the legislator's action." Riegle v. Federal Open Market Committee, 656 F.2d 873, 881 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). In the present case, plaintiffs may obtain substantial relief for their alleged injuries from their fellow legislators in a variety of ways. Therefore, their suit should be dismissed.⁷

As this Court previously has recognized, the doctrine of remedial discretion, as applied to congressional lawsuits, is founded upon separation of powers concerns. Skaggs v. Carle, 898 F.Supp. 1, 2 (D.D.C. 1995), appeal docketed, No. 95-5323 (D.C. Cir. Sept. 25, 1995). "Federal courts should generally refrain, as a matter of policy, from intruding in the name of the Constitution upon the internal affairs of Congress at the behest of lawmakers who have failed to prevail in the political process." Id. In such

⁷ Although the Line Item Veto Act, at 2 U.S.C. 692(a)(1), authorizes a suit by any Member of Congress challenging its constitutionality, we do not construe that authority to mandate the grant of declaratory relief in circumstances where the courts determine that, for reasons of equity jurisprudence, such relief should be withheld. Contra, Synar v. United States, supra, 626 F. Supp. at 1382.

cases of intra-branch conflict,

separation-of-powers concerns are most acute. Judges are presented not with a chance to mediate between two political branches, but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking. 'This meddling with the internal decisionmaking processes of one of the political branches extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.'



Riegle v. Federal Open Market Committee, supra, 656 F.2d at 292.⁸

In Riegle, a Senator challenged the manner of appointment, under the Federal Reserve Act, 12 U.S.C. 221 et seq., of several of the members of the Federal Open Market Committee, five of whom were selected by the presidents and vice presidents of the various Federal Reserve Banks. Senator Riegle contended that, because those five members were not nominated by the President or confirmed by the Senate, the procedures established in the Federal Reserve Act violated the Appointments Clause of the Constitution. The District of Columbia Circuit noted that legislation had been introduced on several occasions to amend the Act to provide for appointment of all members of the Committee with the advice and consent of the Senate, but that the legislative efforts at amendment had been unsuccessful. 656 F.2d at 876. According to the District of Columbia Circuit, Senator Riegle's lawsuit was "yet

⁸ In Riegle and subsequent cases, the D.C. Circuit stated its view that the standing, political question and ripeness doctrines were inadequate to satisfy the prudential concerns arising in congressional plaintiff cases. See Riegle v. Federal Open Market Committee, supra, 656 F.2d at 880-881.

another skirmish" over issues repeatedly addressed by Congress.

Riegle v. Federal Open Market Committee, supra, 656 F.2d at 882.

"It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle." Id."

Similarly, in Moore v. U.S. House of Representatives, supra, 10 members of the House of Representatives challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 ["TEFRA"]. The legislators alleged that TEFRA was enacted pursuant to an unconstitutional procedure because it originated in the Senate, contrary to Article I, section 7, clause 1 of the Constitution, which provides that all "bills for raising revenue" shall originate in the House. Although the District of Columbia upheld the legislators' standing to sue, it nonetheless determined that the separation of powers doctrine "affect[ed] the proper exercise of judicial discretion to grant or withhold declaratory relief." 733 F.2d at 954. According to the District of Columbia Circuit, lawsuits reflecting internal congressional disputes involve "a real danger of misuse of the courts by members of Congress whose actual dispute is with their fellow legislators. We are reluctant to meddle in the internal affairs of the legislative

⁹ In Melcher v. Federal Open Market Committee, 836 F.2d 561 (D.C. Cir. 1987), legislators again challenged the manner of appointment of Open Market Committee members. The court reaffirmed its decision in Riegle and restated the basis for the equitable discretion doctrine: where legislators are attempting to win in court what they had sought and failed to obtain from their colleagues in the Congress, the court should abstain from involving itself. See 836 F.2d at 563.

branch * * * ." 733 F.2d at 956. Because the dispute over TEFRA was a dispute between members of Congress, the District of Columbia circuit held that the exercise of remedial discretion to withhold declaratory relief was proper. Id.

Since Riegle, the courts in the District of Columbia Circuit consistently have applied the remedial discretion doctrine in cases in which members of Congress raise constitutional challenges to legislative acts which they could not defeat in the legislative process. See Skaggs v. Carle, supra, 898 F. Supp. at 2.¹⁰ The doctrine has been applied regardless of whether the legislators challenged the constitutionality of internal rules of procedure, Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) (challenging rules governing publication of the Congressional Record); Skaggs v. Carle, supra (challenging rules requiring a supermajority); the

¹⁰ As this Court recognized in Skaggs v. Carle, supra, 898 F. Supp. at 2, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994), may be the single exception to the rule. In Michel, the District of Columbia Circuit decided on the merits a challenge to a House Rule granting delegates from the territories and the District of Columbia the right to vote in the House Committee of the Whole. The District of Columbia Circuit noted, however, that it was unnecessary to address the equitable discretion doctrine because there were private-party plaintiffs, in addition to the legislators, to whom the doctrine did not apply. 14 F.3d at 330.

The equitable discretion doctrine is not without its detractors. See, e.g., Moore v. U.S. House of Representatives, 733 F.2d at 130-134 (Scalia, J., concurring). In Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988), the District of Columbia Circuit acknowledged that the "newly minted" equitable discretion doctrine had not been "addressed, much less endorsed, by the Supreme Court," and that several members of the District of Columbia Circuit disfavored the doctrine, but felt "bound faithfully to follow" the precedent in the circuit. 848 F.2d at 214. In any event, as this Court previously has stated, the doctrine "has commanded the deference of too many circuit judges to be ignored." Skaggs v. Carle, supra, 898 F. Supp. at 2.

method in which legislation was enacted, Moore v. U.S. House of Representatives, supra (challenging procedure under which TEFRA was adopted), or the validity of the legislation itself. Riegle v. Federal Open Market Committee, supra (challenging procedures established by Federal Reserve Act); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988) (challenging practices established by Federal Salary Act of 1967 for setting congressional salaries). In each of these situations, judicial intervention was inappropriate because the dispute was one among legislators and because the legislators had an "in-house" remedy to resolve their dispute with their colleagues. See Humphrey v. Baker, supra, 848 F.2d at 214.

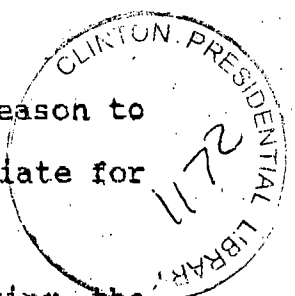
This case does not involve a constitutional impasse between the political branches; rather, it is exactly the type of internecine conflict that the judiciary should avoid. Plaintiffs are legislators who voted against the Line Item Veto Act when it was before Congress, and who, having failed to defeat it in the legislative arena, now seek relief from this Court. However, if they are dissatisfied with the results of the democratic process, plaintiffs are "free to attempt to persuade [their] fellow legislators of the wisdom of [their] views" in a variety of ways. Riegle v. Federal Open Market Committee, supra, 656 F.2d at 882.

First, plaintiffs may persuade their colleagues to override a presidential cancellation under the Line Item Veto Act by passing a disapproval bill. Such a bill requires only a majority vote, and may be signed into law by the President. If the President vetoes such a disapproval bill, plaintiffs may persuade their colleagues

to override the veto by a two-thirds majority vote. Second, plaintiffs may persuade their colleagues to exempt particular bills or joint resolutions from the operation of the Line Item Veto Act by the insertion of express exemption language in those bills. The Act itself provides for the insertion of such exemption language with respect to limited tax benefits. 2 U.S.C. 691f(b). Third, plaintiffs may persuade their colleagues to amend or repeal the Line Item Veto Act.

The legislator-plaintiffs should be required to exercise their powers in these ways, rather than involve the judiciary in a dispute with their colleagues. As this Court has recognized, the remedial discretion doctrine applies regardless of whether its exercise would mean that a constitutional question went unreviewed. Skaggs v. Carle, supra, 898 F. Supp. at 2. Of course, it is conceivable that some or all of the constitutional issues plaintiffs seek to raise may be raised by private plaintiffs who suffer actual injury due to the exercise of the President's cancellation authority under the Line Item Veto Act. See, e.g., Moore v. U.S. House of Representatives, supra, 733 F.2d at 125 (noting that private parties had standing to raise the same claims as the legislators). But as the District of Columbia Circuit held in Melcher v. Federal Open Market Committee, 836 F.2d 561, 564 (D.C. Cir. 1987), cert. denied, 486 U.S. 1042 (1988), "the separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit," and the unavailability of a

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private plaintiff to pursue constitutional claims is no reason to entertain a suit brought by legislators which is inappropriate for judicial consideration. Id., at 564.

As this Court has recognized, the policy underlying the remedial discretion doctrine "is as cogent today as it was when it was first articulated." Skaggs v. Carle, supra, 898 F.Supp. at 2. Accordingly, this Court should exercise its remedial discretion and dismiss this suit.

CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss the complaint.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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SENATOR ROBERT C. BYRD, et al.,

Plaintiffs,

v.

FRANKLIN D. RAINES, Director,
Office of Management and
Budget, et al.,

Defendants.

Civil Action No. 97-0001 (TPJ)

1/16 Draft
2nd Day

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

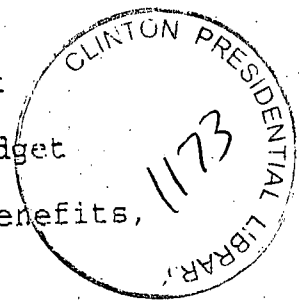
INTRODUCTION

Plaintiffs, six Members of Congress who voted against passage of the Line Item Veto Act, filed this lawsuit challenging the constitutionality of the Act one day after it became effective. The Act authorizes the President to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," and any "limited tax benefit," as those terms are defined in the Act, which are contained in any bill or joint resolution that has been duly enacted into law, provided the President determines that the cancellation will reduce the federal budget deficit. Under the Act, Congress may override a presidential cancellation by passing a "disapproval bill" which the President may sign into law.

Defendant Franklin D. Raines, Director of the Office of Management and Budget, is required under the Act to make certain estimates and reports if the President exercises the cancellation authority. Defendant Robert E. Rubin, Secretary of the Treasury, has no responsibilities under the Act.

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As of now, Congress has not passed any bills or joint resolutions containing dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits, which would be subject to cancellation under the Act.



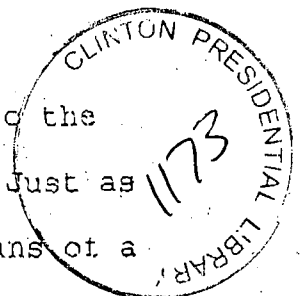
Consequently, the President has not exercised the cancellation authority provided by the Act, and, of course, Congress has had no occasion to attempt to override a cancellation by passing a disapproval bill. In short, nothing has happened under the Act.

Furthermore, plaintiffs do not allege that the named defendants have taken any action under the Act which has injured them or which will injure them. In the single paragraph of the complaint that describes their alleged "injuries," plaintiffs claim only that the mere existence of the Act alters the legal and practical effect of their votes on bills containing items subject to the Act, divests them of their constitutional role in the repeal of legislation, and alters the balance of power between the political branches.

As we shall demonstrate, plaintiffs' complaint does not present a justiciable "case" or "controversy" under Article III. Plaintiffs lack standing to sue because they have not alleged personal injury in fact, which has been or necessarily will be inflicted on them by defendants, and which is redressable by judicial decree. Instead, they have asserted a generalized grievance about the impact of the Line Item Veto Act on the distribution of governmental power between the political branches. Plaintiffs' abstract concern for constitutional

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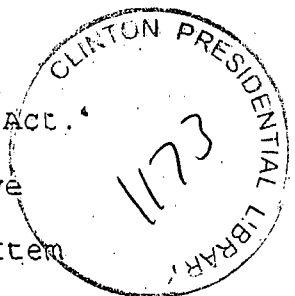
only one way: bicameral passage followed by presentment to the President." INS v. Chadha, supra, 462 U.S. at 954-955. Just as Congress cannot overrule Executive action directly by means of a legislative veto, Congress and its Members cannot accomplish the same result indirectly by invoking the assistance of the federal courts to resolve a dispute with the Executive Branch or among its Members.

Neither the President nor Congress (or its Members) could unilaterally obtain an advisory opinion from the federal courts with respect to the constitutionality of the Line Item Veto Act. See Correspondence of the Justices, reprinted in 3 The Correspondence and Public Papers of John Jay 486-489 (H. Johnston ed. 1891); Muskrat v. United States, supra, 219 U.S. at 354. That issue is no more suitable for judicial resolution in its present posture merely because six Members of Congress have put their request in the form of a complaint and named as defendants two officials of the Executive Branch who they presume take a contrary view of the constitutional issues. The Framers did not contemplate that the federal courts would, in this manner, step directly between the other branches to settle disputes, presented in the abstract, about powers of governance.

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We are aware that the District of Columbia Circuit has conferred standing upon congressional plaintiffs in certain suits against the Executive Branch even without claims of consequential injury by private parties. In its only en banc opinion on the subject (albeit an opinion that was vacated on other grounds by

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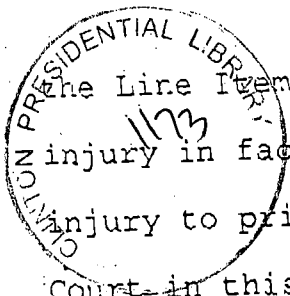


have drawn from the bare provisions of the Line Item Veto Act.⁴ There are no allegations in paragraph 14 that any Executive Branch officers took or are taking action under the Line Item Veto Act which has "alter[ed]" or is "altering" the legal and practical effect of all votes plaintiffs "may" cast on bills containing items subject to presidential cancellation under the Line Item Veto Act, or that such action by Executive Branch officers is "certainly impending." Similarly, there are no allegations that any Executive Branch officers took or are taking action which has "divest[ed]" or is "divesting" plaintiffs of their constitutional role in the repeal of legislation, that they took or are taking action which has "alter[ed]" or is "altering" the constitutional balance of powers between the political branches of government, or that such action by Executive Branch officers is "certainly impending." In short, plaintiffs do not allege that Executive Branch officers have done or are doing anything to injure plaintiffs under the Line Item Veto Act, or that such injury is "certainly impending."

Plaintiffs apparently disagree with the bare provisions of

⁴ For purposes of ruling on defendants' motion to dismiss, the Court is bound to accept as true plaintiffs' material allegations of fact. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264 (1991) (internal quotations and citations omitted). But "there is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion pp. 14-15. In paragraph 14, plaintiffs have not alleged any facts showing actual injury, and defendants and the Court are not required to accept as correct the conclusions they draw from the enactment of the Line Item Veto Act.

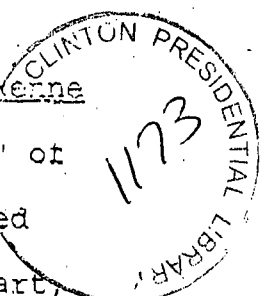
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the Line Item Veto Act. But this disagreement does not make for injury in fact under Article III. In the absence of concrete injury to private individuals or entities, any involvement by the Court in this disagreement would violate the separation of powers component of the standing doctrine by enmeshing the Court in theoretical disputes between officers of the political branches over the allocation of governmental power, which properly should be left to the political branches to resolve through the system of checks and balances. See Lewis v. Casey, *supra*, 116 S. Ct. at 2179; Moore v. U.S. House of Representatives, *supra*, 733 F.2d at 959 (Scalia, J., concurring).

Plaintiffs' failure to allege that the named defendants have injured them or will injure them is also fatal to their standing to sue. Although plaintiffs refer in paragraph 11 of the complaint to the fact that defendant Raines, Director of the Office of Management and Budget, is required by the Line Item Veto Act to make certain estimates and reports if the President exercises the cancellation authority provided by the Act, they nowhere allege that the Director's fulfillment of these duties has injured them or can injure them. And notwithstanding plaintiffs' recitation in paragraph 12 of the complaint, defendant Rubin, Secretary of the Treasury, has no duties at all under the Line Item Veto Act. Clearly, plaintiffs have no standing to sue these defendants.

2. Even under the District of Columbia Circuit precedents conferring standing upon congressional plaintiffs who allege



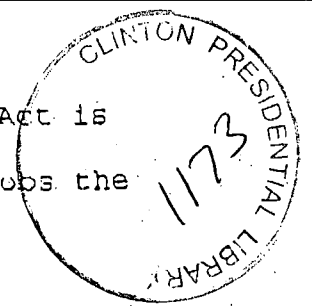
but also the appropriate timing of judicial intervention." Rehne
v. Geary, 501 U.S. 312, 320 (1991). The "appropriate timing" of
judicial intervention -- that is, whether the issues presented
are "ripe" for judicial review -- "involve[s], at least in part,
the existence of a live 'Case or Controversy.'" Regional Rail
Reorganization Act Cases, 419 U.S. 102, 130 (1974). Thus, the
ripeness doctrine "shares the constitutional requirement of
standing that an injury in fact be certainly impending." NTEU v.
United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip
opinion pp. 7-8.

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But the ripeness doctrine "is drawn both from Article III
limitations on judicial power and from prudential reasons for
refusing to exercise jurisdiction." Feno v. Catholic Social
Services, 509 U.S. 43, 67 n.18 (1993). One of those reasons for
refusing to exercise jurisdiction is the long-standing policy of
the federal courts to defer consideration of constitutional
issues until their resolution is absolutely necessary. United
States v. NTEU, 115 S. Ct. 1003, 1019 (1995); Ashwander v. TVA,
297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). This
policy is based on the Mr. Justice Holmes' observation that
passing on the constitutionality of Acts of Congress "is the
gravest and most delicate duty that [the Supreme] Court is called
on to perform." Blodgett v. Holden, 275 U.S. 142, 148 (1927)
(Opinion of Holmes, J.). Therefore, unless plaintiffs have
alleged an application of the Line Item Veto Act requiring an
immediate resolution of the constitutional issues they seek to

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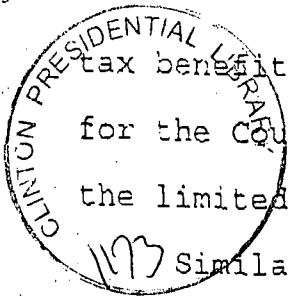
The absence of an application of the Line Item Veto Act is not simply a technical deficiency in the pleadings. It robs the Court of an indispensable factual context within which to evaluate plaintiffs' constitutional claims.

For example, the Act directs the congressional Joint Committee on Taxation to identify the "limited tax benefits" contained in any bill or joint resolution, or to declare that the bill or joint resolution does not contain any "limited tax benefits" (2 U.S.C. 691f(a)). In its discretion, Congress may include a separate section in the bill or resolution stating that the Line Item Veto Act shall apply only to the limited tax benefits identified by the Joint Committee on Taxation, or, if the Committee has declared that the bill or resolution does not contain any limited tax benefits, stating that the Line Item Veto Act shall not apply to any of the provisions in the bill or resolution (2 U.S.C. 691f(b)). If a bill or resolution has been enacted into law with such a separate section, the President's authority under the Line Item Veto Act is confined to cancelling only those limited tax benefits, if any, identified in that separate section (2 U.S.C. 691f(c)). The Act does not permit judicial review of the congressional identification of "limited tax benefits" (2 U.S.C. 691f(d)).

Therefore, it is completely within Congress' power to make operative the provision authorizing the President to cancel limited tax benefits or to make it inoperative. As a result, no one knows whether the President will be able to cancel limited

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tax benefits under the Line Item Veto Act, and it would be futile for the Court now to attempt to evaluate plaintiffs' challenge to the limited tax benefits provision of the Act.

1173 Similarly, the Court cannot effectively evaluate plaintiffs' claim, in paragraph 14 of the complaint, that the Line Item Veto Act alters their constitutional role in the repeal of legislation until the President exercises the cancellation authority provided by the Act and Congress attempts to override it by passing a disapproval bill. As this Court suggested in NTEU v. United States, supra, 929 F. Supp. at 489, the enactment of a disapproval bill would moot claims that the Act diminishes the role of members of Congress in the repeal of appropriations and tax legislation.

Finally, the Line Item Veto Act is simply a statute. If Congress wants to make the Act inapplicable to any particular bill or provisions, it may accomplish this by enacting a law that does so. Consequently, it is premature for the Court to resolve plaintiffs' constitutional claims now.

At bottom, by calling upon the Court to consider and resolve their constitutional claims right now, in a factual vacuum, plaintiffs are asking the Court for an advisory opinion about the constitutionality of the Line Item Veto Act. From the time the Framers rejected Randolph's proposed Council of Revision, which would have passed upon the legitimacy of all legislation before it became effective, the notion that federal courts should render such advisory opinions has been anathema under our system of

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001. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss. (34 pages)	01/16/1997	P5 1174

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FOLDER TITLE:

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2007-0624-F
vz1232

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]

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).

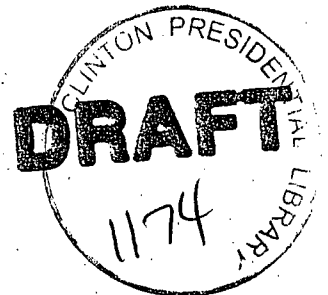
RR. Document will be reviewed upon request.

- 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]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



SENATOR ROBERT C. BYRD, et al.,

Plaintiffs,

v.

FRANKLIN D. RAINES, Director,
Office of Management and
Budget, et al.,

Defendants.

Civil Action No. 97-0001 (TPJ)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs, six Members of Congress who voted against passage of the Line Item Veto Act, filed this lawsuit challenging the constitutionality of the Act one day after it became effective. The Act authorizes the President to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," and any "limited tax benefit," as those terms are defined in the Act, which are contained in any bill or joint resolution that has been duly enacted into law, provided the President determines that the cancellation will reduce the federal budget deficit. Under the Act, Congress may override a presidential cancellation by passing a "disapproval bill" which the President may sign into law.

Defendant Franklin D. Raines, Director of the Office of Management and Budget, is required under the Act to make certain estimates and reports if the President exercises the cancellation authority. Defendant Robert E. Rubin, Secretary of the Treasury, has no responsibilities under the Act.

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As of now, Congress has not passed any bills or joint resolutions containing dollar amounts of discretionary budget authority, items of new direct spending, or limited tax benefits which would be subject to cancellation under the Act.

Consequently, the President has not exercised the cancellation authority provided by the Act, and, of course, Congress has had no occasion to attempt to override a cancellation by passing a disapproval bill. In short, nothing has happened under the Act.

Furthermore, plaintiffs do not allege that the named defendants have taken, or have threatened to take, any action under the Act which has injured them or which will injure them. In the single paragraph of the complaint that describes their alleged "injuries," plaintiffs claim only that the mere existence of the Act alters the legal and practical effect of their votes on bills containing items subject to the Act, divests them of their constitutional role in the repeal of legislation, and alters the balance of power between the political branches.

As we shall demonstrate, plaintiffs' complaint fails every known test of justiciability under Article III. Plaintiffs lack standing to sue because they have not alleged personal injury in fact, which has been or necessarily will be inflicted on them by defendants, and which is redressable by judicial decree. Instead, they have asserted a generalized grievance about the impact of the Line Item Veto Act on the distribution of governmental power between the political branches. Plaintiffs' abstract concern for constitutional governance is a classic

example of an interest which is not judicially cognizable injury.

Moreover, the constitutional issues plaintiffs seek to raise in this lawsuit are not "ripe" for consideration by a federal court at the present time. They are remote and speculative. The Line Item Veto Act itself provides that Congress, in the exercise of its legislative discretion, may neutralize the President's authority to cancel limited tax benefits. The Act also enables Congress to render any cancellation null and void by passing a disapproval bill which may be enacted into law. And, since it is only a statute, the Act may be rendered inapplicable to particular appropriations by the express terms of those appropriations. Thus, pending future legislative developments, it is premature for the Court to evaluate plaintiffs' constitutional claims now.

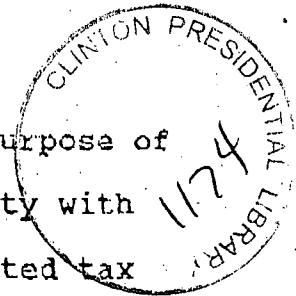
Finally, under the doctrine of equitable or remedial discretion, plaintiffs' lawsuit should be dismissed because they have an effective "in-house" remedy in Congress. They may persuade their colleagues to exempt particular appropriations from the operation of the Line Item Veto Act. They may persuade their colleagues to override a presidential cancellation by passing a disapproval bill, which may be enacted into law. And they may persuade their colleagues to amend or repeal the Act.

STATEMENT

A. The Line Item Veto Act

On April 9, 1996, the President approved the Line Item Veto Act, as passed by Congress. Pub. L. No. 104-130, 110 Stat. 1200,

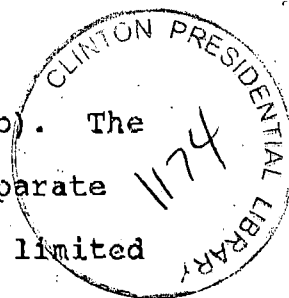
to be codified at 2 U.S.C. 681 note, 691, et seq. The purpose of the Act is "to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." Id., Preamble. The Line Item Veto Act became effective on January 1, 1997, and it expires on January 1, 2005. 2 U.S.C. 691 note.



Under the Line Item Veto Act, the President is authorized, with respect to any bill or joint resolution signed into law pursuant to Article I, section 7, to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," or any "limited tax benefit," as those terms are defined in the Act, if the President determines that the "cancellation" will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest." 2 U.S.C. 691(a). In identifying dollar amounts, items, and benefits for cancellation, the President must consider the legislative history and purposes of the law containing those dollar amounts, items, or benefits, and any specific sources of information to which the law makes reference, and use the definitions in the Line Item Veto Act. 2 U.S.C. 691(b). The Act also directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides that those bills and joint resolutions may include a separate section prohibiting the application of the Act to any provisions but those specifically enumerated in the separate section and identified by the Joint

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Committee as limited tax benefits. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).



The President must notify Congress of a cancellation by transmitting a "special message" within five calendar days after enactment of the law to which the cancellation applies. 2 U.S.C. 691(a). The Act specifies the contents of the special message, and requires that it shall be printed in the Federal Register in the first issue published after it is transmitted to Congress. 2 U.S.C. 691a. The cancellation takes effect upon Congress' receipt of the special message, and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. 691b. The cancellation operates to rescind any dollar amount of discretionary budget authority or prevent items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. 691e(4). Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c.

Under the Line Item Veto Act, each special message transmitted by the President is referred to the appropriate congressional committees. During a review period of 30 days following Congress' receipt of the special message, Members of Congress may introduce, and Congress may consider, a "disapproval

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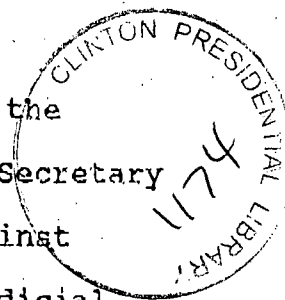
bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6). If a disapproval bill is enacted into law, then all cancellations disapproved in that law are null and void. 2 U.S.C. 691b(a). The Act does not confer authority on the President to cancel any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in an enacted disapproval bill. 2 U.S.C. 691(c).

The Line Item Veto Act provides that any Member of Congress, and any individual "adversely affected" by the Act, may bring an action in this Court for declaratory and injunctive relief "on the ground that any provision of this part violates the Constitution." 2 U.S.C. 692(a). This provision does not "infringe upon the right of the House of Representatives to intervene" in such an action "without the necessity of adopting a resolution to authorize such intervention." 2 U.S.C. 692(a)(3). Any order of this Court issued pursuant to an action brought under the Act "shall be reviewable by appeal directly to the Supreme Court of the United States." 2 U.S.C. 692(b). It is the duty of this Court, and the Supreme Court, to advance on the docket and expedite the disposition of an action brought under the Act. 2 U.S.C. 692(c).

B. This Lawsuit

Plaintiffs, Senator Robert C. Byrd and five other Members of

Congress,¹ filed this lawsuit on January 2, 1997, naming the Director of the Office of Management and Budget and the Secretary of Treasury as defendants. All six plaintiffs voted against passage of the Line Item Veto Act. Plaintiffs seek a judicial declaration that the Act is unconstitutional.



ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

- A. Members of Congress, Like All Other Plaintiffs in Federal Court, Must Allege Actual or Impending Personal Injury, Inflicted by Defendants and Redressable by Judicial Decree, to Have Standing to Sue

Article III of the Constitution limits the judicial power to "Cases" and "Controversies." The terms "cases" or "controversies" were intended to confine the federal courts to resolving disputes that "are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 97 (1968). A central feature of a "case" or "controversy" is that the dispute must be submitted by a "proper and appropriate party." Id., at 102. To be a "proper and appropriate party," the plaintiff must have "standing" to sue by showing he or she "personally has suffered some actual or threatened injury as a result of the putative illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that a favorable judgment will redress that injury. United Food & Commercial Workers v. Brown Group,

¹ One of the plaintiffs, Senator Mark O. Hatfield, is no longer a Member of Congress.

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116 S. Ct. 1529, 1533 (1996).

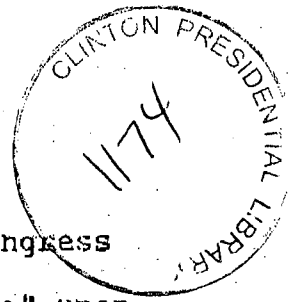
The Supreme Court has repeatedly held emphasized that allegations of speculative injury are insufficient to support standing under Article III. "Allegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be 'certainly impending' to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990).

The requirement that a plaintiff in federal court allege (1) personal injury, (2) that has been inflicted by defendant or that is "certainly impending," and (3) that is redressable by judicial decree, is an "irreducible minimum" under Article III. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). It therefore applies to members of Congress just as it does to everyone else. Reuss v. Balles, 584 F.2d 461, 466 (D.C. Cir.) ("a legislator receives no special consideration in the standing inquiry"), cert. denied, 439 U.S. 997 (1978); Spence v. Clinton, Civil Action No. 96-1671 (D.D.C. Oct. 9, 1996), slip opinion p. 6. Even where, as in the Line Item Veto Act (2 U.S.C. 692(a)(1)), a statute expressly authorizes a member of Congress to sue, the member must satisfy the constitutional requirements of standing, because "no statute could authorize a federal court to decide the merits of a legal question not posed in an Article III case or controversy." U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, 115 S. Ct. 386, 389 (1994). Accord, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-578 (1992); Muskraat v.

United States, 219 U.S. 346, 361-362 (1911).

However, the standing requirement takes on added significance in suits, such as this one, by members of Congress against officers of the Executive Branch. The "basic idea" upon which the law of Article III standing is built is "the idea of separation of powers." Allen v. Wright, 468 U.S. 737, 752 (1984). The separation of powers component of the doctrine of standing "prevents courts of law from undertaking tasks assigned to the political branches." Lewis v. Casey, 116 S. Ct. 2174, 2179 (1996). Accordingly, it should bar judicial resolution of non-"personal" disputes between officers of the political branches, such as the present suit, which involve conflicting claims over the exercise of governmental power.

As Judge (now Justice) Scalia has written, the federal courts sit "neither to supervise the internal workings of the executive and legislative branches nor to umpire disputes between those branches regarding their respective powers. Unless and until those internal workings, or the resolution of those inter-branch disputes through the system of checks and balances * * * brings forth a result that harms private rights, it is no part of our constitutional province, which is 'solely, to decide on the rights of individuals.'" Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring), cert. denied, 469 U.S. 1106 (1985), quoting from Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)). In other words, because members of the Legislative and Executive Branches have no



personal or private interest in the governmental powers conferred upon them by the Constitution or by statute, the courts should be precluded by the separation of powers component of the standing doctrine from interfering in their intragovernmental disputes, absent a companion claim by some private entity or individual that they have suffered consequential injury. Id.; Vander Jagt v. O'Neill, 699 F.2d 1166, 1179-1182 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983).²

There are, moreover, special factors defining the role of Congress under the Constitution that support an application of the standing doctrine which bars judicial interference in the intragovernmental disputes of the political branches. In providing for the separation of powers and a system of checks and balances, the Framers sought "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." INS v. Chadha, 462 U.S. 919, 951 (1983). Congress' assigned responsibility is to pass laws. Congress' "[d]isagreement" with the Executive Branch therefore "involves determinations of policy that Congress can implement in

² A member of Congress may have standing to challenge legislative or executive action which does not affect the voting power or the legislative process but which, nevertheless, inflicts concrete, personal injury. For example, in Boehner v. Anderson, 30 F.3d 156, 160 (D.C. Cir. 1994), the District of Columbia Circuit held that congressional plaintiffs had standing to challenge the constitutionality of a statute that affected their rate of pay. Similarly, in Powell v. McCormack, 395 U.S. 486 (1969) the Supreme Court sustained the justiciability of a lawsuit filed by a member of the House of Representatives whose seat in Congress had been denied him by a House resolution. No such claims of personal injury are presented here, however.

only one way: bicameral passage followed by presentment to the President." INS v. Chadha, supra, 462 U.S. at 954-955. Just as Congress cannot overrule Executive action directly by means of a legislative veto, Congress and its Members cannot accomplish the same result indirectly by invoking the assistance of the federal courts to resolve a dispute with the Executive Branch.

We are aware, of course, that the District of Columbia Circuit has conferred standing upon congressional plaintiffs in certain suits against the Executive Branch even without claims of consequential injury by private parties. In its only en banc opinion on the subject (albeit an opinion that was vacated on other grounds by the Supreme Court), the District of Columbia Circuit held that congressional plaintiffs have standing in the limited circumstance where their alleged injury "amounts to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." Goldwater v. Carter, 617 F.2d 697, 702 (D.C. Cir.) (en banc), vacated and remanded on other grounds, 444 U.S. 996 (1979). In other cases, the District of Columbia Circuit has found standing where legislative or executive action occurred which either nullified or diluted the vote of a Member of Congress. See, e.g., Michel v. Anderson, 14 F.3d 623, 625 (D.C. Cir. 1994) (challenging House rule allowing delegates to vote); Vander Jagt v. O'Neill, supra (challenging method by which House committee seats are allocated); AFGE v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (alleging agency reduction-in-force deprived members of Appropriations Committee of statutory right to approve

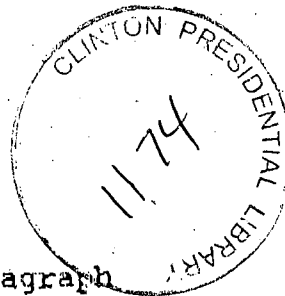
proposed agency reorganizations); Riegle v. Federal Open Market Committee, 656 F.2d 873, 879 (D.C. Cir.) cert. denied, 454 U.S. 1082 (1981) (alleging designation of members to executive committee denied Senator's constitutional right to confirm Presidential appointments).

In this vein, too, the District of Columbia Circuit has held that legislators have standing to challenge actions that allegedly violate the constitutional provisions governing the enactment of legislation. E.g., Moore v. U.S. House of Representatives, supra (challenging enactment of tax measure which originated in the Senate rather than the House); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (alleging that President's "pocket veto" of a bill prevented Congress from voting to override the veto).

But the Supreme Court -- which is the only court that will review this Court's orders under the Line Item Veto Act -- has not endorsed this line of cases. It "has never found standing to resolve, or reached the merits of, an intra- or inter-branch dispute presented by a federal officer whose only asserted injury was the impairment of his governmental powers (footnote omitted)." Moore v. U.S. House of Representatives, supra, at 960-961 (Scalia, J., concurring).³

³ In Coleman v. Miller, 307 U.S. 433 (1939), the Supreme Court, by a 5-4 majority, held that it had jurisdiction to review a decision of the Kansas Supreme Court, denying claims by 20 state senators that their votes against ratification of a proposed amendment to the United States Constitution had been illegally overridden by the state lieutenant governor. Although the Supreme Court said that the state senators had "a plain,

B. Plaintiffs Have Failed to Allege Actual or Impending Personal Injury Inflicted by Defendants Under the Line Item Veto Act



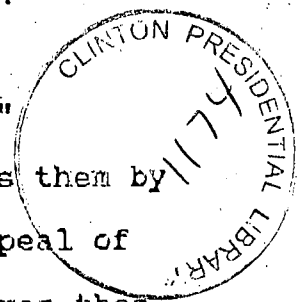
1. The complaint in this case contains only one paragraph addressing the subject of plaintiffs' "injuries." That paragraph -- paragraph 14 -- is devoid of allegations of actual injury or "certainly impending" injury (Whitmore v. Arkansas, supra, 495 U.S. at 158) inflicted upon plaintiffs, personally, or upon any private individuals or entities. Instead, paragraph 14 describes plaintiffs' assessment of the impact of the enactment of the Line Item Veto Act on their exercise of governmental power and on the distribution of such power between the political branches. This assessment is no substitute for the allegations of personal injury in fact required by Article III.

Thus, in paragraph 14 of the complaint, plaintiffs contend that "the [Line Item Veto] Act," on its face, "directly and concretely injures the plaintiffs, in their official capacities," in three ways. First, plaintiffs claim the Act injures them by "altering the legal and practical effect of all votes they may

direct and adequate interest in maintaining the effectiveness of their votes," 307 U.S. at 438, its holding that this qualified as a cognizable interest in the controversy was grounded on the fact that it was "treated by the state court as a basis for entertaining and deciding the federal questions." Id., at 446. As Justice Frankfurter pointed out, the state senators were granted standing only because a majority of Justices were willing to accept the state court's determination that the senators' interest was cognizable; "[c]learly" the state senators "would have no standing had [they] brought suit in a federal court." 307 U.S. at 465 (Frankfurter, J., dissenting). Thus, Coleman v. Miller does not support the proposition that members of Congress have standing to sue the Executive Branch over claimed injuries to their governmental powers.

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cast on bills containing such separately vetoable items." Complaint, ¶14. Second, plaintiffs claim the Act injures them by "divesting [them] of their constitutional role in the repeal of legislation." Id. Third, plaintiffs claim the Act injures them by "altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress." Id.



These claims are nothing more than conclusions plaintiffs have drawn from the bare provisions of the Line Item Veto Act. There are no allegations in paragraph 14 that any Executive Branch officers took or are taking action under the Line Item Veto Act which has "alter[ed]" or is "altering" the legal and practical effect of all votes plaintiffs "may" cast on bills containing items subject to presidential cancellation under the Line Item Veto Act, or that such action by Executive Branch officers is "certainly impending." Similarly, there are no allegations that any Executive Branch officers took or are taking action which has "divest[ed]" or is "divesting" plaintiffs of their constitutional role in the repeal of legislation, that they took or are taking action which has "alter[ed]" or is "altering" the constitutional balance of powers between the political branches of government, or that such action by Executive Branch officers is "certainly impending." In short, plaintiffs do not allege that Executive Branch officers have done or are doing anything to injure plaintiffs under the Line Item Veto Act, or

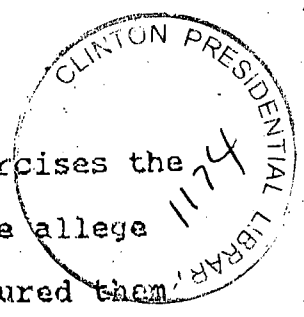
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that such injury is "certainly impending."

Defendants happen not to agree with the conclusions plaintiffs have drawn from the bare provisions of the Line Item Veto Act.⁴ But this disagreement does not make for injury in fact under Article III. In the absence of concrete injury to private individuals or entities, any involvement by the Court in this disagreement would violate the separation of powers component of the standing doctrine by enmeshing the Court in theoretical disputes between officers of the political branches over the allocation of governmental power, which properly should be left to the political branches to resolve through the system of checks and balances. See Lewis v. Casey, supra, 116 S. Ct. at 2179; Moore v. U.S. House of Representatives, supra, 733 F.2d at 959 (Scalia, J., concurring).

Plaintiffs' failure to allege that the named defendants have injured them or will injure them is also fatal to their standing to sue. Although plaintiffs recite in paragraph - of the complaint that defendant Raines, Director of the Office of Management and Budget, is required by the Line Item Veto Act to

⁴ For purposes of ruling on defendants' motion to dismiss, the Court is bound to accept as true plaintiffs' material allegations of fact. Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 264 (1991) (internal quotations and citations omitted). But "there is a difference between accepting a plaintiff's allegations of fact as true and accepting as correct the conclusions plaintiff would draw from such facts." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion pp. 14-15. In paragraph 14, plaintiffs have not alleged any facts showing actual injury, and defendants and the Court are not required to accept as correct the conclusions they draw from the enactment of the Line Item Veto Act.

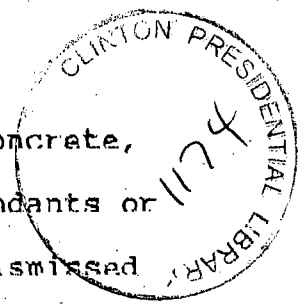


make certain estimates and reports if the President exercises the cancellation authority provided by the Act, they nowhere allege that the Director's fulfillment of these duties has injured them or can injure them. And notwithstanding plaintiffs' recitation in paragraph -- of the complaint, defendant Rubin, Secretary of the Treasury, has no duties at all under the Line Item Veto Act. Clearly, plaintiffs have no standing to sue these defendants.

Even under the District of Columbia Circuit precedents conferring standing upon congressional plaintiffs who allege certain types of injuries, plaintiffs lack standing to sue. Plaintiffs have not alleged that Executive Branch officers have taken action to disenfranchise them, to nullify their votes, or to diminish their legislative powers. While plaintiffs may believe that a future exercise by the President of the cancellation authority provided by the Line Item Veto Act will have one or more of those results, such a belief is purely speculative at the present time. As the District of Columbia Circuit has written, "[w]hen considering any chain of allegations for standing purposes, [the Courts] may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions -- those types of allegations that are not normally susceptible of labelling as 'true' or 'false.'" United Transport. Union v. ICC, 891 F.2d 908, 912 (D.C. Cir. 1989).

In sum, plaintiffs have failed to satisfy the "irreducible

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minimum" requirement of standing by failing to allege concrete, personal injury that has been inflicted on them by defendants or that is "certainly impending." Their lawsuit must be dismissed for lack of subject matter jurisdiction under Article III

2. This case is not comparable to Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986), where this Court held that members of Congress had standing to challenge the constitutionality of the Gramm-Rudman-Hollings Act, which was enacted on December 12, 1985. The congressional plaintiffs in Synar, unlike plaintiffs in this case, alleged a nullification of their votes by action of the Executive Branch.

The Gramm-Rudman-Hollings Act that was challenged in Synar was a self-executing statute. Upon its enactment, Gramm-Rudman immediately suspended all spending increases otherwise provided under existing federal law; the Comptroller General was directed to issue a report to the President by January 20, 1986, specifying budget reductions that would have to be made during the rest of fiscal year 1986; and the President was instructed to issue an "order" by February 1, 1986, which, when effective on March 1, 1986, would permanently suspend spending increases or "sequester" new budget authority that would cause the federal budget to exceed specified levels. By the time this Court issued its decision, the spending increases, including cost-of-living adjustments for federal retirees, had been automatically suspended, the Comptroller General had issued his report, and the

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President had issued a "sequestration" order. The Court held that members of Congress had standing to challenge the constitutionality of Gramm-Rudman because "the automatic deficit reduction process" already had operated "to nullify plaintiffs' votes on [] earlier legislation." 626 F. Supp. at 1382. It also held that the National Treasury Employees Union and several of its members had standing, because the members' already had suffered a suspension of their cost-of-living adjustments. *Id.*, at 1380-1381.

Thus, unlike plaintiffs in the present case, the congressional plaintiffs in Synar challenged a law whose implementation by defendants already had inflicted alleged injuries upon them. By contrast, the Line Item Veto Act is not self-executing, and plaintiffs have not suffered any injuries because of the Act. The only action authorized by the Act that could injure plaintiffs is a presidential cancellation, and that has not happened yet.

Moreover, unlike plaintiffs in the present case, the claims of the congressional plaintiffs in Synar were consolidated for judicial consideration and resolution with the claims of private parties who clearly had suffered concrete, personal injury (the loss of cost-of-living adjustments). It is noteworthy that, on appeal, the Supreme Court in Synar upheld the standing of a member of the National Treasury Employees Union who did not receive a cost-of-living adjustment, but pointedly refused to consider whether the congressional plaintiffs (or the union

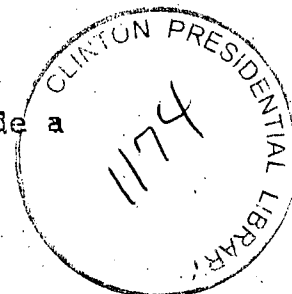
itself) had standing. 478 U.S. at 721. As we have argued above, supra p. 12, the absence of private claimants in this case is an independent reason for finding that plaintiffs lack standing to sue in their capacity as members of Congress.

The situation in this case is also far different from the situation in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), where the District of Columbia Circuit upheld the standing of a member of Congress to challenge the President's veto power. In that case, Senator Edward Kennedy sued the Administrator of the General Services Administration and the Chief of White House Records, who have ministerial duties related to the recording and publication of enacted legislation, to declare invalid President Richard Nixon's "pocket-veto" of a bill called the Family Practice of Medicine Act. Senator Kennedy had voted for that bill and, after it was passed by Congress, President Nixon allowed more than ten days to expire without signing the bill or returning it unsigned. The bill was not recorded or published as a valid law because the Senate went into recess, and the President deemed it an adjournment within the meaning of the Constitution.

Senator Kennedy alleged that the President's action unconstitutionally nullified his right to vote to override the President's "veto." The District of Columbia Circuit held that Senator Kennedy had standing to sue, because he alleged a concrete injury inflicted by the Executive Branch to an interest of the Senator's positively identified by the Constitution,

namely, the nullification of his right to vote to override a presidential veto.

511 F.2d at 433, 436.

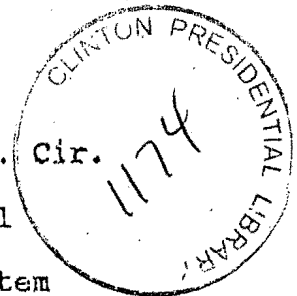


Thus, in Kennedy v. Sampson the District of Columbia Circuit found standing because the President, by his "pocket veto," and the named defendants, had already acted in a manner that allegedly injured Senator Kennedy by nullifying his vote. Here, in contrast, no action has been taken under the Line Item Veto Act that nullifies the votes plaintiffs have cast.⁵

3. Finally, the conclusory claims in paragraph 14 of the complaint, that the mere existence of the Line Item Veto Act alters or divests plaintiffs of their voting power and constitutional role in the legislative process, are precisely the sorts of abstract concerns with constitutional governance which can never satisfy Article III's standing requirement, no matter who raises them. E.g., Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217, 220 (1974) ("the generalized interest of all citizens in constitutional governance * * * is an abstract injury * * * [upon which] standing to sue may not be predicated"); Allen v. Wright, supra, 468 U.S. at 754 ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"). That is why this Court, in NTEU v. United

⁵ Indeed, it is the action of Congress itself, which passed the Act in the first instance, which is really the source of plaintiffs' claimed "injury" -- i.e., the bare existence of the statute. Under the District of Columbia Circuit precedents, that is not enough to confer standing on a congressional plaintiff.

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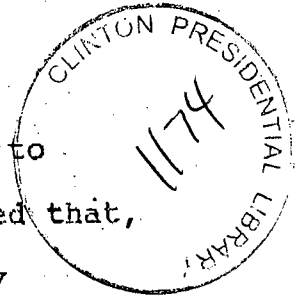


States, 929 F. Supp. 484 (D.D.C.), aff'd, No. 96-5217 (D.C. Cir. Dec. 13, 1996), rejected the standing of a union of federal employees to challenge the constitutionality of the Line Item Veto Act on the basis of abstract injuries.

In NTEU, the National Treasury Employees Union, its president, and two of its members claimed that the Line Item Veto Act violates the Presentment Clause, Art. I, §7, that it unconstitutionally shifts lawmaking power to the Executive Branch, and that it violates Art. I, §5, granting each House of Congress the right to determine its own procedural rules. The NTEU plaintiffs alleged they were "injured" by the Act because it "'required'" the union to redirect limited lobbying resources to the Executive Branch, because it was "'acting as a drain'" on the union's resources and "'directly interfer[ing]'" with the union's ability to accomplish its goals and effectively represent its members, and because it "'unlawfully dilutes the power of their elected representatives [in Congress] over spending measures and over the procedural rules of their legislative Houses, in turn diluting the effectiveness of plaintiffs' votes.'" 929 F. Supp. at 487-488.

This Court held that the injuries the NTEU plaintiffs alleged "are too speculative and remote to constitute an injury sufficient to confer standing on the plaintiffs." 929 F. Supp. at 488. Focusing on plaintiffs' allegation "that their votes have been diluted by virtue of the transfer of power to the Executive," the Court held that "this injury is shared by the

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citizenry at large and is not sufficiently particularized to satisfy Article III." Id. Furthermore, the Court observed that, even if the President exercised the cancellation authority provided by the Line Item Veto Act to the detriment of the union's members, Congress could pass a disapproval bill which the President might sign, or it could override the President's veto of a disapproval bill. Id., at 489. Accordingly, said the Court, "the plaintiffs' ultimate concerns will be realized only in the event that the President exercises the cancellation authority with respect to a particular appropriation affecting them and one of these alternatives is ultimately unsuccessful." Id. For these reasons, the Court concluded that the NTEU plaintiffs had only "identif[ied] some way in which the challenged action hypothetically affects them," and had failed to demonstrate that they "have suffered an injury." Id., at 490.

Here, as in NTEU, plaintiffs have failed to demonstrate that they have "suffered an injury."⁶ Rather, they have identified ways in which the Line Item Veto Act, if implemented, allegedly will affect the distribution of governmental powers between the political branches. That is insufficient to support standing under Article III.

Plaintiffs' allegations about the impact of the unexercised

⁶ The NTEU suit was filed after the Line Item Veto Act was approved by the President but before it became effective. However, the fact that the NTEU plaintiffs were alleging injury before the Act was effective was not material to this Court's holding that they lacked standing. Therefore, the Court's holding in NTEU is relevant here, despite the fact that plaintiffs sued after the Act became effective.

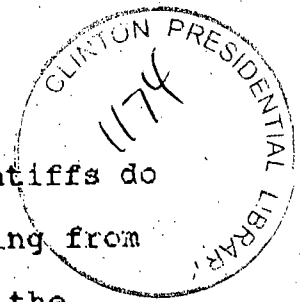
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cancellation power conferred on the President by the Line Item Veto Act also are not comparable to the allegations about an unexercised veto power which the Supreme Court sustained for purposes of standing in Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). In Metropolitan, the Supreme Court held that a private citizens group had standing to challenge the constitutionality of Congress' delegation to a board of review the power to veto airport planning decisions made by the board of directors of the Metropolitan Washington Airports Authority. The Supreme Court reasoned that the group was injured because of the increase in noise, pollution, and the danger of accidents caused by the challenged scheme.

As the District of Columbia Circuit noted in affirming this Court's decision in the NTEU case, "[i]t is important to note that it was not the mere existence of the unconstitutional veto power in Metropolitan that constituted the 'injury in fact,' but rather the increased (or at least not decreased) noise, activity, and danger that resulted from the unconstitutional veto power." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion at p. 10. "As the [Supreme] Court explained the next term in Lujan v. Defenders of Wildlife, [504 U.S. 555 (1992)], a 'procedural injury' is inadequate to establish standing absent an alleged 'discrete injury' flowing from the procedural violation." Id., at pp. 10-11.

Plaintiffs in this case are alleging injury on the basis of

the "mere existence" of the Line Item Veto Act and the unexercised authority it confers on the President. Plaintiffs do not allege they have suffered any "discrete injury" flowing from that Act. Consequently, plaintiffs in this case, unlike the plaintiffs in Metropolitan, lack standing to sue.



II. THE CONSTITUTIONAL ISSUES PLAINTIFFS SEEK TO RAISE ARE NOT "RIPE" FOR JUDICIAL RESOLUTION

As the Supreme Court has written, "[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." Renne v. Geary, 501 U.S. 312, 320 (1991). The "appropriate timing" of judicial intervention -- that is, whether the issues presented are "ripe" for judicial review -- "involve[s], at least in part, the existence of a live 'Case or Controversy.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 138 (1974).

In that respect "the ripeness doctrine is drawn from * * * Article III limitations on judicial power," Reno v. Catholic Social Services, 509 U.S. 43, 67 n. 18 (1993), and it "shares the constitutional requirement of standing that an injury in fact be certainly impending." NTEU v. United States, No. 96-5217 (D.C. Cir. Dec. 13, 1996), slip opinion pp. 7-8. Therefore, unless plaintiffs have alleged an application of the Line Item Veto Act requiring an immediate resolution of the constitutional issues they seek to raise, those issues are not ripe and may not be considered by the Court at the present time. Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994) (dismissing as "far from ripe" a challenge by Member of Congress to congressional pay

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statute calling for adjustments scheduled to occur in 1999.

The issues plaintiffs seek to raise are not ripe because plaintiffs do not allege an application of the Line Item Veto Act. Instead, they mount a facial challenge to the Act, and seek the immediate resolution of novel and complex constitutional claims which are remote and speculative.

To date, Congress has not passed in 1997 any bills containing any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit that is subject to cancellation by the President under the Line Item Veto Act. The President has not exercised the authority provided by the Line Item Veto Act to cancel any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit contained in any bills passed by Congress. Defendant Raines, the Director of the Office of Management and Budget, has not made any of the estimates or reports he is required to make if and when the President exercises the cancellation authority provided by the Act. And Congress has not passed any disapproval bills which, if enacted, would render null and void any cancellations by the President under the Act. When any of these events will occur in the future is a matter of pure speculation.

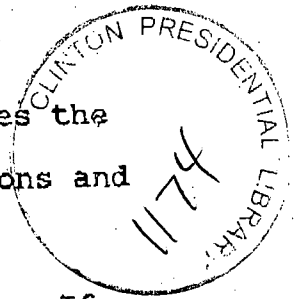
The absence of an application of the Line Item Veto Act is not simply a technical deficiency in the pleadings. It robs the Court of an indispensable factual context within which to evaluate plaintiffs' constitutional claims.

For example, the Act authorizes the congressional Joint Committee on Taxation to identify the "limited tax benefits" contained in any bill or joint resolution, or to declare that the bill or joint resolution does not contain any "limited tax benefits" (2 U.S.C. 691f(a)). If Congress exercises its discretion to include a separate section in the bill or resolution listing the limited tax benefits so identified, or declaring that there are no limited tax benefits in the bill or resolution (2 U.S.C. 691f(b)), the President's authority is confined respectively to cancelling the limited tax benefits so identified or not cancelling any of them (2 U.S.C. 691f(c)). The Act does not permit judicial review of the congressional identification of "limited tax benefits" (2 U.S.C. 691f(d)). Therefore, it is completely within Congress' power to make operative the provision authorizing the President to cancel limited tax benefits or to make it inoperative. As a result, no one knows whether the President will be able to cancel limited tax benefits under the Line Item Veto Act, and it would be futile for the Court now to attempt to evaluate plaintiffs' challenge to the limited tax benefits provision of the Act.

Similarly, the Court cannot effectively evaluate plaintiffs' claim, in paragraph 14 of the complaint, that the Line Item Veto Act alters their constitutional role in the repeal of legislation until the President exercises the cancellation authority provided by the Act and Congress attempts to override it by passing a disapproval bill. As this Court suggested in NTEU v. United

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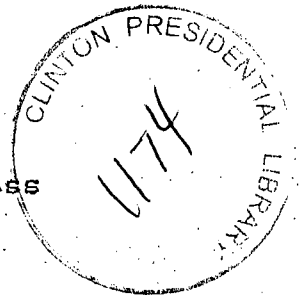
States, supra, 929 F. Supp. at 489, the enactment of a disapproval bill would moot claims that the Act diminishes the role of members of Congress in the repeal of appropriations and tax legislation.



Finally, the Line Item Veto Act is simply a statute. If Congress wants to make it inapplicable, by legislation, to any particular appropriation, and the President acquiesces, it may do so whenever it wishes. Consequently, until the Court has before it the language of an enacted bill or joint resolution containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits, it is premature for the Court to resolve plaintiffs' constitutional claims.

At bottom, by calling upon the Court to consider and resolve their constitutional claims right now, in a factual vacuum, plaintiffs are asking the Court for an advisory opinion about the constitutionality of the Line Item Veto Act. From the time the Framers rejected Randolph's proposed Council of Revision, which would have passed upon the legitimacy of all legislation before it became effective, the notion that federal courts should render such advisory opinions has been anathema under our system of government. See United States v. Richardson, 418 U.S. 166, 189-191 (1974) (Powell, J., concurring). As the Supreme Court has said: "'a federal court [lacks] the power to render advisory opinions.'" U.S. Nat'l Bank of Oregon v. Independent Ins. Agents, 113 S. Ct. 2173, 2179 (1993), quoting from Preiser v. Newkirk, 422 U.S. 395, 401 (1975). The reasons for this are well

known:



The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination. Judicial exposition upon political proposals is permissible only when necessary to decide definite issues between litigants. When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches.

United Public Workers v. Mitchell, 330 U.S. 75, 90-91 (1947).

Therefore, the constitutional issues plaintiffs seek to litigate are not ripe within the meaning of Article III, and the Court lacks power to consider or resolve them at the present time. For this additional reason, plaintiffs' lawsuit should be dismissed for lack of jurisdiction.

III. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED
UNDER THE DOCTRINE OF REMEDIAL DISCRETION
BECAUSE PLAINTIFFS MAY OBTAIN THE RELIEF
THEY SEEK THROUGH THE LEGISLATIVE PROCESS

Even if the Court finds that plaintiffs have standing and the issues they seek to raise are ripe under Article III, the Court should exercise its equitable discretion to dismiss this lawsuit. The District of Columbia Circuit has held that,

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"[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, th[e] court should exercise its equitable discretion to dismiss the legislator's action." Riegle v. Federal Open Market Committee, 656 F.2d 873, 881 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). As this Court has observed, the doctrine of equitable (or "remedial") discretion, as applied to congressional lawsuits, is founded upon separation of powers concerns. Skaggs v. Carle, 898 F.Supp. 1, 2 (D.D.C. 1995), appeal docketed, No. 95-5323 (D.C. Cir. Sept. 25, 1995).

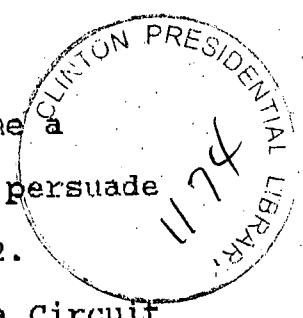
"Federal courts should generally refrain, as a matter of policy, from intruding in the name of the Constitution upon the internal affairs of Congress at the behest of lawmakers who have failed to prevail in the political process." Id. In such cases of intra-branch conflict,

separation-of-powers concerns are most acute. Judges are presented not with a chance to mediate between two political branches, but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking. 'This meddling with the internal decisionmaking processes of one of the political branches extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power.'

Riegle v. Federal Open Market Committee, supra, 656 F.2d at 881.'

⁷ In Riegle and subsequent cases, the District of Columbia Circuit stated its view that the standing and ripeness doctrines were inadequate to satisfy the policy concerns arising in congressional plaintiff cases. See Riegle v. Federal Open Market Committee, supra, 656 F.2d at 880-881.

"It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle." *Id.*, at 882.



Since Riegle, the courts in the District of Columbia Circuit consistently have applied the remedial discretion doctrine in cases in which members of Congress raise constitutional challenges to legislative acts which they could not defeat in the legislative process. See Skaggs v. Carle, *supra*, 898 F. Supp. at 2.⁸ The doctrine has been applied regardless of whether the legislators challenged the constitutionality of internal rules of procedure, Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985) (challenging rules governing publication of the Congressional Record); Skaggs v. Carle, *supra* (challenging rules requiring a supermajority); the method in which legislation was enacted,

⁸ As this Court recognized in Skaggs v. Carle, *supra*, 898 F. Supp. at 2, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994), may be the single exception to the rule. In Michel, the District of Columbia Circuit decided on the merits a challenge to a House Rule granting delegates from the territories and the District of Columbia the right to vote in the House Committee of the Whole. The District of Columbia Circuit noted, however, that it was unnecessary to address the equitable discretion doctrine because there were private-party plaintiffs, in addition to the legislators, to whom the doctrine did not apply. 14 F.3d at 330.

The equitable discretion doctrine is not without its detractors. See, e.g., Moore v. U.S. House of Representatives, 733 F.2d at 130-134 (Scalia, J., concurring). In Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988), the District of Columbia Circuit acknowledged that the "newly minted" equitable discretion doctrine had not been "addressed, much less endorsed, by the Supreme Court," and that several members of the District of Columbia circuit disfavored the doctrine, but felt "bound faithfully to follow" the precedent in the circuit. 848 F.2d at 214. In any event, as this Court previously has stated, the doctrine "has commanded the deference of too many circuit judges to be ignored." Skaggs v. Carle, *supra*, 898 F. Supp. at 2.

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Moore v. U.S. House of Representatives, supra (challenging procedure under which TEFRA was adopted), or the validity of the legislation itself. Riegle v. Federal Open Market Committee, supra (challenging procedures established by Federal Reserve Act); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir. 1988) (challenging practices established by Federal Salary Act of 1967 for setting congressional salaries). In each of these situations, judicial intervention was inappropriate because the dispute was one among legislators and because the legislators had an "in-house" remedy to resolve their dispute with their colleagues. See Humphrey v. Baker, supra, 848 F.2d at 214.⁹

This case does not involve a constitutional impasse between the political branches; rather, it is exactly the type of internecine conflict that the judiciary should avoid. Plaintiffs are legislators who voted against the Line Item Veto Act when it was before Congress, and who, having failed to defeat it in the legislative arena, now seek relief from this Court. However, if they are dissatisfied with the results of the democratic process, plaintiffs are "free to attempt to persuade [their] fellow

⁹ Boehner v. Anderson, 30 F.3d 156 (D.C. Cir. 1994) does not require a different result. In Boehner, the District of Columbia Circuit sustained a congressman's standing to raise his claim that a statute unconstitutionally affected his pay, reasoning that "Mr. Boehner is not only a Member of Congress; * * * he is also an employee of the United States Government." Id., at 160. As such, his personal interests were directly affected by the statute. See id. The District of Columbia Circuit declined to exercise its equitable discretion to dismiss his claim because "Mr. Boehner asserts an individualized injury no different in kind from the injury that an unelected employee of the House might assert, and we surely would not remit such a plaintiff to the legislative process for redress." Id., at 161.

legislators of the wisdom of [their] views" in a variety of ways.
Riegle v. Federal Open Market Committee, supra, 656 F.2d at 882.

First, plaintiffs may persuade their colleagues to exempt particular bills or joint resolutions from the operation of the Line Item Veto Act by the insertion of express exemption language in those bills. Second, plaintiffs may persuade their colleagues to override a presidential cancellation under the Line Item Veto Act by passing a disapproval bill. Such a bill requires only a majority vote, and may be signed into law by the President. If the President vetoes such a disapproval bill, plaintiffs may persuade their colleagues to override the veto by a two-thirds majority vote. Third, plaintiffs may persuade their colleagues to amend or repeal the Line Item Veto Act.

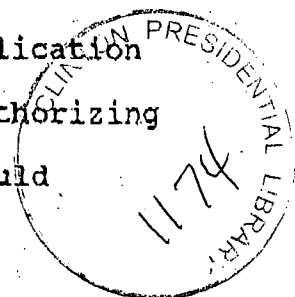
The legislator-plaintiffs should be required to exercise their powers in these ways, rather than involve the judiciary in a dispute with their colleagues. As this Court has recognized, the remedial discretion doctrine applies regardless of whether its exercise would mean that a constitutional question went unreviewed. Skaggs v. Carle, supra, 898 F. Supp. at 2. Of course, it is conceivable that some or all of the constitutional issues plaintiffs seek to raise may be raised by private plaintiffs who suffer actual injury due to the exercise of the President's cancellation authority under the Line Item Veto Act. See, e.g., Moore v. U.S. House of Representatives, supra, 733 F.2d at 125 (noting that private parties had standing to raise the same claims as the legislators). But as the District of

Columbia Circuit held in Melcher v. Federal Open Market Committee, 836 F.2d 561, 564 (D.C. Cir. 1987), cert. denied, 486 U.S. 1042 (1988), "the separation-of-powers concerns informing the doctrine of equitable discretion are, upon reflection, entirely unaffected by the ability of a private plaintiff to bring suit," and the unavailability of a private plaintiff to pursue constitutional claims is no reason to entertain a suit brought by legislators which is inappropriate for judicial consideration. Id., at 564.

The policy underlying the remedial discretion doctrine "is as cogent today as it was when it was first articulated." Skaggs v. Carle, supra, 898 F.Supp. at 2.¹⁰ We do not construe the provision in the Line Item Veto Act authorizing Members of Congress to bring an action for declaratory or injunctive relief on the ground that the Act is unconstitutional (2 U.S.C. 692(a)(1)) to vitiate the Court's equitable power to apply the remedial discretion doctrine and withhold such relief when, for reasons of equity jurisprudence, such relief should be withheld. Equitable relief is discretionary regardless whether a court has jurisdiction to grant the relief requested. Brillhart v. Excess Insurance Co. of America, 316 U.S. 491, 494 (1942). See also Moore v. U.S. House of Representatives, supra, 733 F.2d at 955 (discussing Brillhart). But see Synar v. United States, supra.

¹⁰ It is also consistent with the long-standing policy of the federal courts to defer consideration of constitutional issues until their resolution is absolutely necessary. United States v. NTEU, 115 S. Ct. 1003, 1019 (1995); Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

626 F. Supp. at 1382 (summarily refusing to consider application of "remedial discretion" doctrine in light of statute authorizing Member of Congress to sue). Accordingly, this Court should exercise its remedial discretion and dismiss this suit.



CONCLUSION

For the foregoing reasons, the Court should grant defendants' motion to dismiss the complaint.

Respectfully submitted,

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	For Chuck Konigsburg from Dawn Johnsen. Subject: Proposed Change in Line Item Veto Legislation. (1 page)	12/14/1995	P5 1175
001b. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Legislation/H.R.2. (3 pages)	06/13/1995	P5 1176
002a. memo	For Charles Ruff and Cheryl Mills from Trey Schroeder. (1 page)	02/20/1997	P5 1177
002b. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Opposition to the Plaintiffs' Motion for Summary Judgement and in Support of Defendants' Motion for Summary Judgement. (32 pages)	02/20/1997	P5 1178

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Counsel's Office
Trey Schroeder
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Van Zbinden
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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]

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.

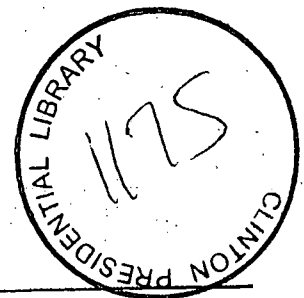
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or 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]

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U. S. Department of Justice

Office of Legal Counsel



Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

December 14, 1995

MEMORANDUM FOR CHUCK KONIGSBERG, OMB

From: Dawn Johnsen *DJ*
Deputy Assistant Attorney General

Re: Proposed Change in Line Item Veto Legislation

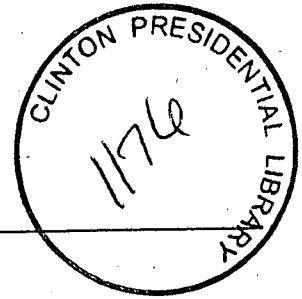
For the reasons discussed in our memorandum of June 13, 1995 (copy attached), we continue to believe that substituting the word "cancel," rather than "suspend," for "veto" would not eliminate our concerns about the constitutionality of the bill. We also continue to believe that a permanent, rather than a temporary, suspension renders the bill vulnerable to constitutional attack. The courts are more likely to invalidate a cancellation or permanent suspension that appears to be the functional equivalent of a veto of a line item. If the line item in question remains on the books as a potentially operative provision, albeit one that has been suspended, we believe that the legislation is likely to be sustained by the courts.

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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 PRESIDENT**

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

From: Walter Dellinger
Assistant Attorney General

Re: 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.

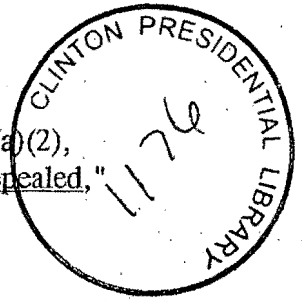
I. Overview of H.R. 2

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

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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.

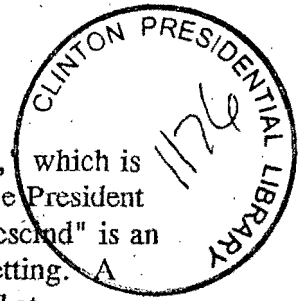
In short, H.R. 2 provides the President with a recognizable tool -- a delegation of power -- to cut government spending. As such, it stands on far more secure constitutional footing than the novel approach to curbing spending that is contained in the line item veto legislation that has passed the Senate. 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"

not
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

February 20, 1997



✓
Chuck and Cheryl --

Attached is a draft of Justice's proposed brief in Byrd v. Raines, the line item veto act case. The brief is due Wednesday, February 26. Bill Marshall is helping me on this, and we will work with Bob Damus' office to coordinate any comments or suggestions.

As background, Justice's first line of reasoning in defending the statute is that no one at all has standing to sue because no one has been injured yet -- the President has not yet used the line item veto, and there are not even any bills currently pending for his signature or veto. Justice, in its motion to dismiss filed on January 16, went further, however. It argued that even though Congress purported to give its Members standing to sue regardless of whether they have been injured, Congress cannot simply deem its Members to have met the constitutional requirements of standing, including actual injury.

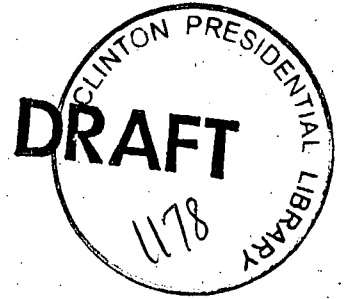
As to the substantive issue -- the subject of the current brief -- the general argument advanced by Justice, simply put, is that enactment of the line item veto was the result of an evolutionary, not revolutionary, process, and merely the next logical step in over 200 years of executive action, congressional legislation, and court rulings related to budgetary authority. This position may be viewed by some as inconsistent with White House statements that have characterized this new Presidential power more dramatically. Bill believes that Justice's litigation strategy in minimizing the new authority is exactly correct.

I wanted to make you aware of this and to ask for any comments you may have.

-- Trey

I made some editorial comments. My major substantive concern is with the delegation argument. Without having read the TE's brief, I was struck by the fact that, if the delegation cases cited, none involved delegation to the Executive of the power to overturn a Congressional determination that a specific act should be performed or a specific sum be expended.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR ROBERT C. BYRD, et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 97-0001 (TFJ)
)
FRANKLIN D. RAINES, Director,)
Office of Management and)
Budget, et al.,)
)
Defendants.)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

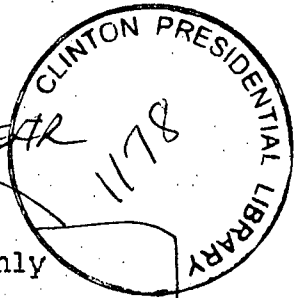
INTRODUCTION

On April 9, 1996, the President approved the Line Item Veto Act. Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691, et seq. The Act amends title X of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.), which authorizes the President to propose a "rescission" of budget authority, but gives the proposal no effect unless it becomes law by Act of Congress within 45 days. The amendment reverses the onus, and authorizes the President to rescind ("cancel in whole"), within five days of their enactment by Congress, any "dollar amount of discretionary budget authority," any "item of new direct spending," and any "limited tax benefit," under specified terms and conditions, which is effective unless disapproved by an Act of Congress.

*not clear
what the
reference
is.*

Contrary to plaintiffs' principal contention, the Line Item Veto Act does not authorize the President to take action which violates Article I, §7, cl. 2 (the "Presentment Clause") or the

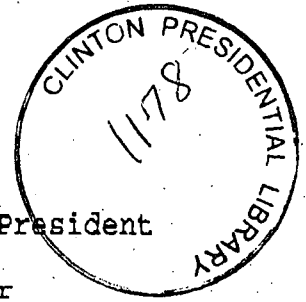
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Constitution. The Act permits the President to cancel only designated dollar amounts, items, and limited tax benefits contained in future spending and tax laws that have been passed by both Houses of Congress, and presented to and approved by the President, in accordance with the Presentment Clause. Nor does the Act permit the President to revise or repeal any laws. Rather, the Act makes permissive and not mandatory, at least for a five-day period, the expenditure of designated funds or the grant of designated tax benefits contained in duly enacted spending and tax laws, and delegates to the President authority, in the execution of those laws, to determine whether the funds should be spent or the benefits should be granted.

There is no constitutional principle that says Congress must mandate spending in appropriation laws. On the contrary, the courts repeatedly have held that the question of whether spending is mandatory or permissive is one of legislative intent and statutory construction. E.g., Train v. City of New York, 420 U.S. 35, 41 (1975); Decatur v. Paulding, 39 U.S. (12 Pet.) 497, 516 (1840); State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1089, 1109 (8th Cir. 1973); Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900-901 (D.D.C. 1973). In granting discretion to the President to determine whether to spend permissive appropriations or grant permissive tax benefits, Congress is constrained only by the flexible requirements of the delegation doctrine.

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Congress' vesting of cancellation authority in the President under the Line Item Veto Act fully satisfies the test for permissible delegations articulated by the Supreme Court. Mistretta v. United States, 488 U.S. 361 (1989). In the Act, Congress has provided intelligible principles to guide the President in the exercise of this cancellation authority while retaining its legislative prerogatives. ~~Therefore~~ the delegation of authority under the Act is similar to other delegations which been sustained by the Supreme Court without exception over the past 60 years.

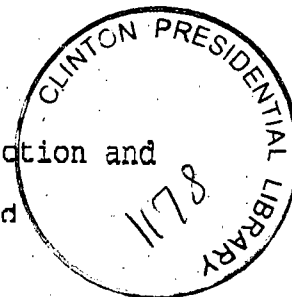
Moreover, the Line Item Veto Act does not violate the principle of separation of powers. The Act is the logical outgrowth of executive action, congressional legislation, and court rulings spanning nearly two centuries, which have created a system of interdependent and shared responsibilities between the two political branches of government on the matter of controlling federal spending. Placed in historical context, the Act is evolutionary, not revolutionary, and it does not impermissibly transfer the "power of the purse" to the President.

STATEMENT

A. Historical Background

The Line Item Veto Act was enacted against a background of evolving cooperation and interdependence between the Legislative and Executive Branches on the matter of controlling federal spending. The relationship between the two political branches on this matter has been in flux from the earliest days of the

Republic. It has been made manifest through executive action and congressional legislation, and it has been influenced and affected by decisions of the Judicial Branch.



1. 19th century experience. Presidents, at least since Thomas Jefferson, have asserted that the Executive Branch has some discretion to control the expenditure of funds appropriated by Congress. S. Rep. No. 104-9, at 2 (1995). In 1803, President Jefferson made the first significant "impoundment" of appropriated funds by refusing to spend \$50,000 appropriated by Congress for the operation of gun boats on the Mississippi River because he thought their use was unnecessary. Id., at 23; see Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1 ["Executive Impoundment"].

In 1838, the Supreme Court decided Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), holding that the President could not refuse to make a payment mandated by Act of Congress on a contract for the delivery of mail. But two years later, in Decatur v. Pauling, 39 U.S. (12 Pet.) 497 (1840), the Supreme Court denied a writ of mandamus to compel the Secretary of the Navy to pay a claim based on a congressional resolution. The Supreme Court distinguished Kendall on the ground that the duty imposed by Congress there was "merely ministerial," while the duty imposed by Congress in the case before it "required the exercise of judgment and discretion." 39 U.S. at 516.

In 1876, President Grant notified Congress that he did not intend to spend the full amount appropriated for harbor and river

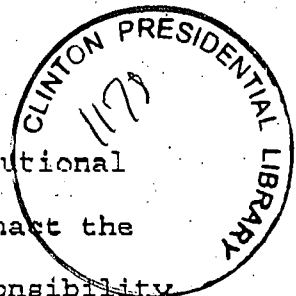
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improvements, because they were of a private or local interest rather than in the national interest. S. Rep. No. 104-9, at 3. Congress did not challenge President Grant's impoundment. *Id.*

In the years following President Grant's action, Attorneys General stated in formal opinions that, in addition to statutory language, congressional intent had to be considered in determining whether Congress was mandating an expenditure of funds or simply permitting the President to spend them. *Id.*

2. Early 20th century developments. Congress delegated a measure of budgetary and fiscal discretion to the President in the Anti-Deficiency Acts of 1905 and 1906. Act of Feb. 27, 1906, ch. 510, §3, 34 Stat. 48; Act of March 3, 1905, ch. 1484, §4, 33 Stat. 1257. In addition to requiring the "apportionment" of annual appropriations to avoid the need for supplemental appropriations later in the fiscal year, these Acts allowed the President to waive spending appropriated funds in the event of "some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment." Act of Feb. 27, 1906, supra.

In 1921, Congress established a national budget system in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, repealed by Pub. L. No. 97-258, 96 Stat. 877 (1982). In section 201 of the Act, Congress delegated some of its budget-making power to the Executive Branch by establishing the Bureau of the Budget (now the Office of Management and Budget), and requiring the President to submit a budget to Congress annually for its



consideration and approval.¹ In keeping with its constitutional role to make the laws, Congress retained authority to enact the budget. Id. However, by this Act Congress shared responsibility for budget preparation with the President.

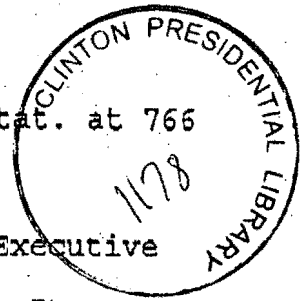
President Roosevelt used the waiver authority provided by the Anti-Deficiency Acts during the Depression and World War II. S. Rep. No. 104-9, at 3. He also impounded funds for flood control projects, which evoked a legislative response from Congress in 1943 to prohibit any agency or official (except the Commissioner of Public Roads) from impounding funds appropriated for highway construction. Id.

3. The amended Anti-Deficiency Act. In 1950, Congress amended the Anti-Deficiency Act to delegate to the President limited authority to establish "reserves" (that is, to withhold appropriated funds) "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date [of appropriation]." General Appropriation Act of 1951, ch. 896, §1211(c)(2), 64 Stat. 595, 765 (current version at 31 U.S.C. 1512(c)(1)).² The amendments also authorized the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the

¹ Presently, 31 U.S.C. 1105 contains a similar requirement for submission of an executive budget proposal.

² Congress deleted the "other developments" language in 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §1002, 88 Stat. 332, 367, 1002.

purposes of the appropriation concerned." Id., 64 Stat. at 766 (current version at 31 U.S.C. 1512(c)(2)).

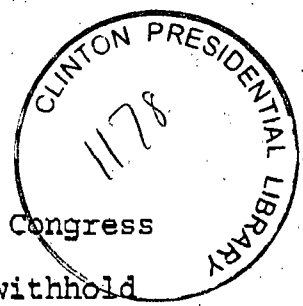


The enactment of these amendments provided the Executive Branch with its first express impoundment authority. It represented a narrowly circumscribed, yet unhindered, delegation of Congress' "power of the purse" to the Executive Branch. Executive Impoundment, at 11; Cathy S. Neuren, Note, Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974, 63 Tex. L. Rev. 693, 699 (1984).

4. Impoundments in the 1970s. President Nixon's extensive use of impoundment during the early 1970s gave rise to a flurry of litigation and legislation. See City of New Haven v. United States, 634 F. Supp. 1449, 1454-1455 (D.D.C. 1986), aff'd, 809 F.2d 900 (D.C. Cir. 1987). Numerous lawsuits were filed in which plaintiffs challenged Executive Branch action withholding funds appropriated by Congress for reasons of economic policy.³ The courts in these cases generally framed the issue as one of

³ Several district courts that addressed the extent of the President's constitutional authority to impound funds appropriated by Congress generally held that the President had no "inherent" impoundment power. E.g., Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 77 (D.D.C. 1973). However, it was plain that the constitutional inquiry for those courts was whether the President could act contrary to the legislative will of Congress. See Local 2677, AFGE v. Phillips, supra, 358 F. Supp. at 77 ("if the power sought here were found valid, no barrier would remain to the executive ignoring any and all Congressional authorizations.") They did not rule whether an express delegation of impoundment authority would violate the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, supra, 343 U.S. at 635-636 (Jackson, J., concurring).

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statutory construction and examined the language of the particular legislation in question to determine whether Congress had provided the President with discretion to delay or withhold appropriations. Most of the courts addressing presidential impoundments found that there was no such discretion in those cases. See City of New Haven v. United States, supra, 634 F. Supp. at 1454 n. 6 (citing cases).

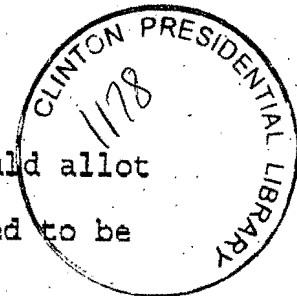
For example, in State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), the Eighth Circuit examined whether the Secretary of Transportation had discretion to defer authority to obligate highway funds previously apportioned to the State of Missouri under the Federal Aid-Highway Act of 1956.

"[A]ssuming the proposition to be true * * * that a general appropriation act is deemed permissive in nature as far as it constitutes a mandate to expend funds," the Eighth Circuit ruled that "only an analysis of the statute itself can dictate the latitude of the questioned discretion." 479 F.2d at 1109.

Therefore, the Eighth Circuit said that "[t]he fundamental issue is whether the Secretary possesses direct or implied authority to exercise contract controls for the reason advanced. Id., at 1111. After reviewing the Federal Aid-Highway Act, the Eighth Circuit held that the Secretary's discretion to determine whether funds are made available was limited to certain program related statutory criteria. Id., at 1113-1114 & n. 16.

Similarly, in Train v. City of New York, 420 U.S. 35 (1975), the question before the Supreme Court was whether the

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Administrator of the Environmental Protection Agency could allot to states less than the entire amount of funds authorized to be appropriated by the Federal Water Pollution Control Act Amendments of 1972. The Supreme Court said the question turned on "the proper construction of Act," 420 U.S. at 41, and after examining the relevant language and legislative history, it concluded that Congress intended to mandate allotment to the states of the full amount authorized to be appropriated.

5. The Impoundment Control Act. In response to President Nixon's impoundment actions, Congress, in 1974, enacted the Impoundment Control Act ["ICA"], title X of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332, to "mark the limits of Congressional and Presidential power in the matter of impoundments." City of New Haven v. United States, supra, 634 F. Supp. at 1455. The ICA recognizes two types of impoundment: "deferral" and "rescission."

A deferral is "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities" or "any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority * * * ." 2 U.S.C. 682(1). Deferrals are permissible only (1) for contingencies, (2) to effect savings achieved through changes or efficiency, or (3) as specifically provided by law. 2 U.S.C. 684(b). The ICA authorizes the President and officers of the Executive Branch to propose a deferral by transmitting a special

message to both Houses of Congress containing statutorily specified information regarding the deferral. 2 U.S.C. 684(a).

A deferral becomes effective upon transmission of the special message, but it may not extend beyond the end of the fiscal year during which the special message was transmitted. Id.⁴

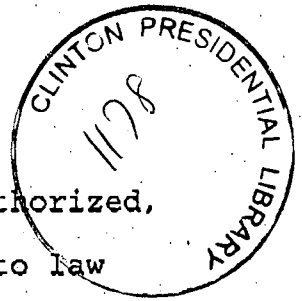
A rescission is the cancellation of budget authority. 2 U.S.C. 682(3). Under the ICA, the President may propose a rescission of all or part of any budget authority whenever the President determines that it "will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons * * * ." 2 U.S.C. 683(a). The ICA authorizes the President to propose a rescission by transmitting a special message to both Houses of Congress containing statutorily specified information regarding the rescission. Id. However, under the ICA the amount proposed to be rescinded must be made available for obligation unless, within 45 days after the special message has been transmitted, Congress passes a bill rescinding all or part of the amount proposed. 2 U.S.C. 683(b).

⁴ As originally enacted, the ICA provided that a proposed deferral was automatically effective unless either House of Congress passed an "impoundment resolution" disapproving the deferral. 88 Stat. at 335. Subsequently, in light of INS v. Chadha, 462 U.S. 919 (1983), the one-House veto provision was held unconstitutional. City of New Haven v. Pierce, 809 F.2d 900 (D.C. Cir. 1987). In response, Congress amended the ICA to eliminate the legislative veto provision. Pub.L. 100-119, Title II, § 206(a), Sept. 29, 1987, 101 Stat. 785. Congress did not retain a formal check on deferrals, but it authorized the Comptroller General to bring a civil action to require that budget authority be made available for obligation whenever it is required to be made available for obligation. 2 U.S.C. 687.] 7

B. The Line Item Veto Act

Under the Line Item Veto Act, the President is authorized, with respect to any bill or joint resolution signed into law pursuant to Article I, section 7, to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," or any "limited tax benefit," as those terms are defined in the Act, if the President determines that the "cancellation" will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest." 2 U.S.C. 691(a). In identifying dollar amounts, items, and benefits for cancellation, the President must consider the legislative history and purposes of the law containing those dollar amounts, items, or benefits, any specific sources of information to which the law makes reference, and the definitions in the Line Item Veto Act. 2 U.S.C. 691(b).

The Act also directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides that those bills and joint resolutions may include a separate section prohibiting the application of the Act to any provisions but those specifically enumerated in the separate section and identified by the Joint Committee as limited tax benefits. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).

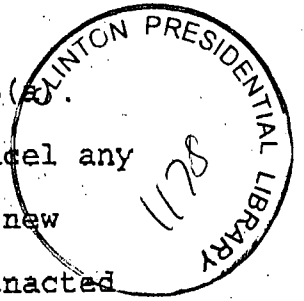


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The President must notify Congress of a cancellation by transmitting a "special message" within five calendar days after enactment of the law to which the cancellation applies. 2 U.S.C. 691(a). The Act specifies the contents of the special message, and requires that it shall be printed in the Federal Register in the first issue published after it is transmitted to Congress. 2 U.S.C. 691a. The cancellation takes effect upon Congress' receipt of the special message, and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. 691b. The cancellation operates to rescind any dollar amount of discretionary budget authority or prevent items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. 691e(4). Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c.

Under the Line Item Veto Act, each special message transmitted by the President is referred to the appropriate congressional committees. During a review period of 30 days following Congress' receipt of the special message, Members of Congress may introduce, and Congress may consider, a "disapproval bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6). If a disapproval bill is enacted into law, then all cancellations

disapproved in that law are null and void. 2 U.S.C. 691b(2).
The Act does not confer authority on the President to cancel any
dollar amount of discretionary budget authority, item of new
direct spending, or limited tax benefit contained in an enacted
disapproval bill. 2 U.S.C. 691(c).



The Line Item Veto Act became effective on January 1, 1997.
It expires on January 1, 2005. 2 U.S.C. 691 note.

ARGUMENT

I. THE LINE ITEM VETO ACT DOES NOT AUTHORIZE THE PRESIDENT TO VIOLATE THE PRESENTMENT CLAUSE

A. The Act Confers Discretion on the President to Spend Funds or Grant Limited Tax Benefits Whose Expenditure or Grant the Act Makes Permissive

In the wake of the Line Item Veto Act, laws containing
dollar amounts of discretionary budget authority, items of new
direct spending, and limited tax benefits will be passed by both
Houses of Congress, and presented to the President for approval
or return, just as they always have been. We agree with the
plaintiffs that, under the Presentment Clause, the President must
sign or veto the "whole bill," "in toto." See Plaintiffs'
Memorandum in Opposition to Defendants' Motion to Dismiss and in
Support of Plaintiffs' Motion for Summary Judgment ["Pl. Memo"],
pp. 28-32. If the President signs it, the bill becomes law and
the President must faithfully execute it.

What is new about the Line Item Veto Act is that, in effect,
it makes future laws containing dollar amounts of discretionary
budget authority, items of new direct spending, and limited tax
benefits permissive and not mandatory, at least for a five-day

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period, by conferring discretion upon the President to cancel them. In other words, Congress has delegated authority to the President, in the execution of duly enacted future spending and tax laws, to determine whether particular funds should be spent or particular tax benefits should be granted.⁵ This determination must be made within five days after enactment of those laws, utilizing the standards set forth in the Line Item Veto Act. In making this determination, the President does not revise or repeal any laws. The President simply exercises the discretion that Congress validly has conferred to determine whether to spend funds or grant benefits that, for a limited time, are permitted but not required to be spent or granted.⁶

⁵ The language of the Appropriations Clause of the Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Article I, §9, cl. 7) suggests a bias against spending. It constrains the President from expenditures unless and until Congress appropriates funds. OPM v. Richmond, 496 U.S. 414, 424-425 (1990). But this Clause in no way suggests the converse; that the President must spend money that Congress appropriates, at least in the absence of some legislative intent to mandate that result. Decatur v. Paulding, supra, 37 U.S. at 516.

⁶ Plaintiffs contend that this explanation "is on its face inapplicable to 'limited tax benefits,' such as a deduction available to only a few taxpayers, which do not involve spending." Pl. Memo, p. 39. They also claim "it is obvious that cancellation of a limited tax benefit is changing the law." Id.

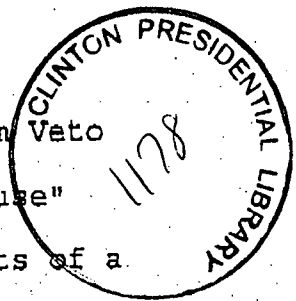
Plaintiffs are wrong. Congress may, if it chooses, make the grant of a limited tax benefit permissive, and not mandatory, just as it may, if it chooses, make the expenditure of dollar amounts of discretionary budget authority or items of new direct spending permissive, and not mandatory. By exercising the discretion conferred by Congress not to grant limited tax benefits which are permitted, but not required, to be granted for at least an initial five day period under a duly enacted tax law, the President is executing that law consistent with congressional instructions, not "changing" it.

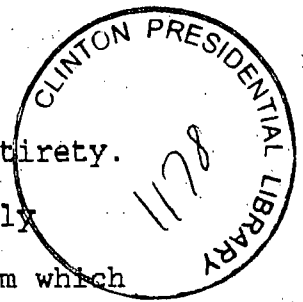
Accordingly, plaintiffs' argument that the Line Item Veto Act "evade[s] the central purpose of the Presentment Clause" because it gives the President "the power to approve parts of a bill and reject others," and the "power to repeal provisions of law that became law between one instant and five days earlier when the President signed the bill" (Pl. Memo, pp. 32, 34, 36), is based on a false premise. The Act does not allow the President to "approve parts of a bill and reject others" or to "repeal" any laws.⁷ Instead, it confers discretion upon the President in respect only of dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits contained in duly enacted spending and tax laws that have been signed, in toto, by the President.⁸

Indeed, in passing the Line Item Veto Act Congress made clear that it was not attempting to "evade() the central purpose of the Presentment Clause," as plaintiffs contend. As the conferees on the Act noted, Congress "specifically include[d] the requirement that a bill or joint resolution must have been signed into law, in order to clarify that the cancellation authority only becomes effective after the President has exercised the

⁷ Contrary to plaintiffs' suggestions (Pl. Memo, pp. 26, 34), the appearance of the word "veto" in the Act's title has no operational significance, because the actual provisions of the Act nowhere mention a presidential "veto." More importantly, the Act does not authorize a veto in the commonly understood sense of nullification of a law.

⁸ Plaintiffs concede that, under the Act, the President "physically signs the whole bill," and the bill "becomes law for a scintilla juris" before the President exercises the discretion conferred by the Act. Pl. Memo, pp. 34, 35.





constitutional authority to enact legislation in its entirety. This requirement ensures that the President affirmatively demonstrates support for the underlying legislation from which specific cancellations are then permitted." H.R. Conf. Rep. No. 104-491, at 20 (1996). Furthermore, "[t]he cancellation authority does not permit the President to rewrite the underlying law, nor to change any provision of that law, * * * including any restriction, limitation or condition on the expenditure of budget authority, or any other requirement of the law." Id.⁹

Congress could achieve the same result it achieved under the Line Item Veto Act by inserting the words of the Act in every future spending and tax law. For example, both Houses of Congress could pass a bill appropriating \$1 million for the construction of a Lawrence Welk Museum, but authorizing the President to cancel that expenditure within five days of enactment if the President determined the cancellation would reduce the federal budget deficit. If this bill were presented to and signed by the President, it would become law even though the expenditure of the \$1 million was made permissive, and not mandatory, for the first five days after its enactment. If the President then determined that cancelling this \$1 million

⁹ Thus, in defining the term "dollar amount of discretionary budget authority," Congress specified that this term "does not include * * * any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure." 2 U.S.C. 691e(7)(B)(iv).

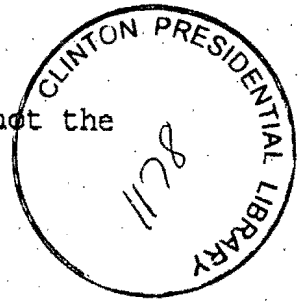
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expenditure would reduce the federal budget deficit, and the President cancelled it within five days of enactment of the law, the President would not be revising or repealing the law. The President merely would be exercising discretion and executing the law consistent with Congress' instructions. Therefore, the President's exercise of the cancellation authority in this example would not violate the Presentment Clause.

It makes no constitutional difference that Congress chose the less cumbersome route of enacting a single, free-standing Line Item Veto Act that will put an interpretive gloss on future spending and tax laws. The President's exercise of the discretionary cancellation authority conferred by the Act does not implicate or violate the Presentment Clause because it applies only to spending and tax laws that have been duly enacted in accordance with that Clause.

To be sure, Congress is precluded by the separation of powers principle of our tripartite system of government from delegating its legislative power to the Executive or Judicial Branches. Field v. Clark, 143 U.S. 649, 692 (1892). Therefore, the instructions Congress has given the President under the Line Item Veto Act for executing spending and tax laws may not be so unbounded as to delegate legislative power to the President. But that means that the constitutionality of the President's exercise of the cancellation authority conferred by the Line Item Veto Act

involves primarily a question of delegation doctrine, not the Presentment Clause, as plaintiffs contend.¹⁰



B. The Line Item Veto Act Does Not
Unconstitutionally Delegate
Legislative Power to the President

1. Congress has broad power to delegate. The Supreme Court has observed that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." Mistretta v. United States, 488 U.S. 361, 372 (1989). The test the Supreme Court has used to decide whether Congress has sought too much assistance from another branch is well-settled. "In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must

¹⁰ Plaintiffs also contend that, in its definition of "dollar amount of discretionary budget authority," the Act violates INS v. Chadha, supra, and American Fed. of Gov't Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982). Pl. Memo, pp. 38-39 n. 23. The Act, at 2 U.S.C. 691e(7)(ii), defines that phrase to include amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." Plaintiffs contend that the Act thus impermissibly gives these tables, charts, and explanatory texts, which are the product of congressional committees, "the force of law."

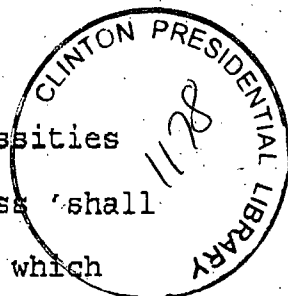
However, nothing in the Line Item Veto Act gives any committee tables, charts, and explanatory texts "the force of law." The Act merely recognizes that in future spending laws Congress, expressly or by implication, may incorporate by reference and give "the force of law" to tables, charts, and explanatory texts which may contain dollar amounts subject to cancellation under the Act. If that happens, the Act authorizes the President to cancel those dollar amounts. Moreover, the authority granted the President to cancel amounts in charts, tables, and explanatory texts reinforces the fact that the President does not repeal any law when doing so, but rather exercises discretion delegated by Congress not to spend amounts that are permitted, but not required, to be spent.

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be fixed according to common sense and the inherent necessities of the government co-ordination. * * * So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation.'" Mistretta v. United States, *supra*, quoting from J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928).

Applying this "common sense" test to the "inherent necessities" of government, the Supreme Court has not struck down a challenged statute on delegation grounds in over 60 years. Indeed, except for invalidating two statutes as excessive delegations in 1935, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the Supreme Court has not struck down a single challenged statute on delegation grounds.

At the same time, the Supreme Court consistently has sustained Congress' delegation of sweeping discretionary powers to the Executive Branch, including powers that relate directly to the Nation's fisc. For example, the Supreme Court has held that Congress may authorize the President and other Executive Branch officials to raise or lower tariffs (J.W. Hampton, Jr. & Co. v. United States, *supra*), establish a minimum wage for industry (Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941)), determine just and reasonable power rates (FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)), fix fair and equitable commodities prices

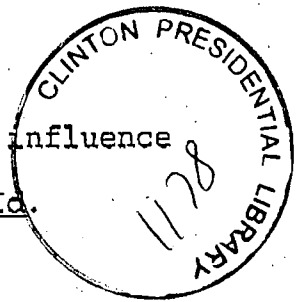


(Yakus v. United States, 321 U.S. 414 (1944)), define and recover excessive wartime profits (Lichter v. United States, 334 U.S. 742 (1948)), raise license fees on imports (FEA v. Algonquin SNC Inc., 426 U.S. 548 (1976)), and establish and collect pipeline safety user fees or taxes (Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989)).

These decisions have been "driven by a practical understanding that, in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives," Mistretta v. United States, *supra*, 488 U.S. at 372. Nevertheless, delegations of power by Congress to the Executive Branch also have been sustained where the reason for the delegation was not concern about Congress' ability to deal with complex and technical problems, but concern about its members' inclination to promote the narrow economic interests of their constituents over wider, national economic interests.

A good example of this is the series of enactments which conferred broad authority on the Secretary of Defense to close military bases without specifying which bases should be closed. Throughout the 1960s and 1970s, the President attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, at 1-1 (1991). But these efforts often were thwarted by members of Congress, who feared the economic impact

of the closures on their constituents and suspected the influence of political motivation in the President's decisions. Id.



Beginning in 1977, Congress tried to deal with the parochial tactics of its own members by enacting legislation which conferred authority on the Secretary of Defense unilaterally to close military bases, subject to override by Act of Congress. Under the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623, enacted in 1988, Congress created an independent commission and authorized it to recommend bases for closure or realignment. The commission presented its recommendation to the Secretary of Defense, who had the power to approve or disapprove the entire group of recommendations. If the Secretary of Defense approved, Congress had 45 days to override the approval.

This legislation was challenged in National Fed. of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990), on the ground, among others, that it amounted to "an excessive delegation of legislative discretion in violation of the constitutionally based non-delegation doctrine." 905 F.2d at 404. The District of Columbia Circuit rejected this challenge. It noted that the test applied by the Supreme Court in delegation cases "has not been a tough one." Id. It then concluded that the 1988 act incorporated an intelligible standard to constrain administrative discretion, and that it was "well within the bounds of lawful delegation." Id.

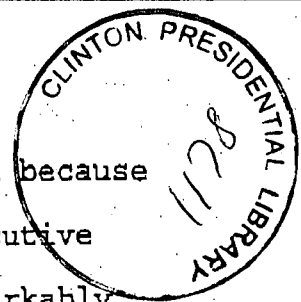
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This decision is instructive for the present case because the motivation for the delegation of power to the Executive Branch under the 1988 base closure legislation is remarkably similar to the motivation for the delegation of power to the President under the Line Item Veto Act. As the Senate Committee on Governmental Affairs reported, the purpose of the Line Item Veto Act was "to confront the serious problem of pork-barrel spending." S. Rep. No. 104-13, at 2 (1995).

Each year wasteful and parochial projects -- unlikely to pass on their own merits -- are tucked into omnibus bills. Often these projects are not germane to the bill. They may be nothing more than extraneous and indefensible riders that hope to make it to safety in the company of a larger bill. They are added routinely as part of the price for getting a bill out of committee or passing it on the floor.

Id.

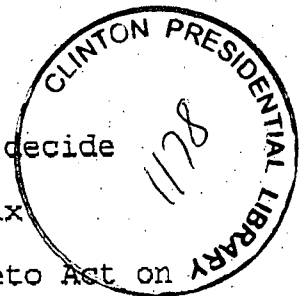
By delegating to the President the authority to decide whether to spend funds or grant limited tax benefits which are permitted but not required to be spent or granted, subject to legislative disapproval, Congress is enabling itself to address, as an institution, the specific merits of "pork-barrel" and other projects which may impede a reduction in the federal budget deficit. Whether appropriations are permissive or mandatory is a matter of statutory interpretation. E.g., Train v. City of New York, supra; Decatur v. Paulding, supra; State Highway Comm'n of Missouri v. Volpe, supra; Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, supra. But no court has ever suggested that Congress may not leave it to the President's



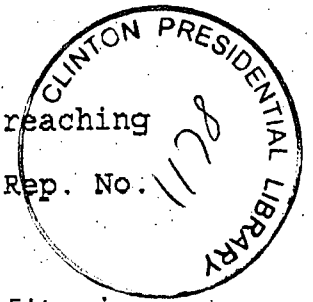
discretion, with whatever guidelines are necessary, to decide whether to spend appropriated funds or grant limited tax benefits. The discretion conferred by the Line Item Veto Act on the President, like the discretion conferred on the Executive Branch by the base closing legislation, is well within the bounds of lawful delegation.

2. The Line Item Veto Act has more than ample standards to be a valid delegation. As the Supreme Court reiterated in Mistretta v. United States, supra, 488 U.S. at 372, congressional delegations of power to the Executive Branch will be upheld if Congress lays down an "intelligible principle" to which the person or body authorized to exercise that power must conform. Congress was satisfied that the Line Item Veto Act included ample intelligible principles, and there is no basis for plaintiffs' contention that the Court should second-guess that judgment.

First, the President may exercise the cancellation authority conferred by the Act only if the President determines that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest," and only if the President notifies Congress of the cancellation by transmitting a special message within five days after enactment of a the law containing the dollar amounts, items, or benefits to be cancelled. 2 U.S.C. 691(a). The cancellation authority "is not separable from the President's duties to comply with these restrictions," so that, if the President "reaches beyond these limits to expand the



application of this new authority, the President will be reaching beyond the delegation of these authorities." H.R. Conf. Rep. No. 104-491, at 19 (1996).

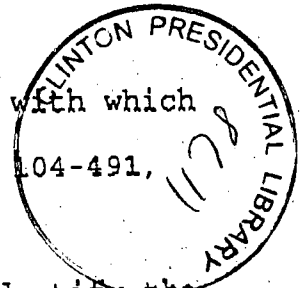


The President's authority to cancel limited tax benefits is particularly constrained. Under the Act, the President must comply with the separate sections, if any, of bills and joint resolutions prohibiting the application of the Line Item Veto Act to any provisions but those specifically enumerated and identified by the Joint Committee on Taxation as limited tax benefits. 2 U.S.C. 691f.

Second, in identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President must "(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits; (2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and (3) use the definitions contained in [the Act] in applying this part to the specific provisions of such law." 2 U.S.C. 691(b). The President's special message to Congress must include relevant supporting material about each cancellation, including the reasons for the cancellation and, to the maximum extent practicable, its estimated fiscal, economic, and budgetary impact. 2 U.S.C. 691a(b). This helps to cabin the delegation to the President, because it requires an explanation of the President's action. It also serves "to ensure that the

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Congress and the public receive sufficient information with which to judge the President's action." H.R. Conf. Rep. No. 104-491, at 21 (1996).



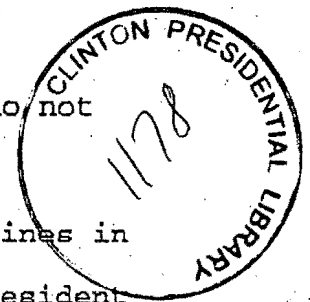
Where applicable, the special message must also identify the states and congressional districts affected by the cancellation, and the total number of cancellations imposed during the current session of Congress on those states and districts. 2 U.S.C. 691a(b)(2)(B-C). This is "to ensure that the Congress has information to determine if there is a disproportionate impact on a particular state or congressional district." H.R. Conf. Rep. No. 104-491, at 21 (1996).

Third, the Act incorporates a "lockbox" provision, requiring the Office of Management and Budget to take prescribed accounting steps to guarantee that any credit for money not spent or tax benefits not granted is dedicated to deficit reduction. 2 U.S.C. 691c(a-b). "This ensures that the President does not simply cancel a particular dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit in order to increase spending in other areas." H.R. Conf. Rep. No. 104-491, at 20-21 (1996).

Plaintiffs characterize these intelligible principles, to which the President must conform in exercising the cancellation authority conferred by the Line Item Veto Act, as "an illusion." Pl. Memo, p. 40. They claim that the determinations the President is required to make "tell the President only that he

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should exercise the same judgment a lawmaker would, and do not constrain his authority at all." Id., pp. 40-41.



That is demonstrably not so. The legislative guidelines in the Line Item Veto Act, especially those requiring the President to exercise the cancellation authority within five days after enactment of the relevant spending or tax laws, to transmit a special message demonstrating compliance with Congress' instructions, and to comply with the "lockbox" requirement, meaningfully constrain the President's discretion. Those provisions deny the President a roving charter to cancel, at any time as the President sees fit, a particular spending or tax relief measure simply because the President disagrees with its purposes. These guidelines are no more illusory than the guidelines in those laws delegating power to the Executive Branch to decide whether to increase or decrease tariffs (see J.W. Hampton, Jr. & Co. v. United States, supra),¹¹ to fix fair and equitable commodities prices (see Yakus v. United States, supra), to define and recover excessive wartime profits (see Lichter v. United States, supra), and to close military bases (see National Fed. of Federal Employees v. United States, supra), all of which were upheld against a delegation challenge.¹²

¹¹ This delegation is remarkably similar to the delegation to the President under the Line Item Veto Act of the authority to cancel "limited tax benefits."

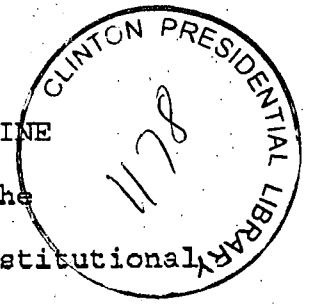
¹² In Skinner v. Mid-America Pipeline Co., supra, the Supreme Court held that Congress' delegation of discretionary authority under the taxing power "is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." 490 U.S. at 223. Therefore, the cited cases upholding delegation guidelines plainly apply to the delegation of spending and taxing authority under the Line Item Veto Act.

Finally, because the Line Item Veto Act provides that, by a simple majority of both Houses, Congress may pass disapproval legislation that overturns a presidential cancellation, 2 U.S.C. 691d, Congress has retained a sufficient degree of its legislative prerogative. Congress' reservation of the power to examine and override the exercise of delegated power is frequently employed "to make sure that the action under the delegation squares with the Congressional purpose." Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941).

Plaintiffs presume that all disapproval bills would require a two-thirds vote of each House of Congress to secure passage, because, they imply, the President would not sign a disapproval bill containing provisions he had cancelled. Pl. Memo, p. 11. However, the President may decide to sign a disapproval bill when a specific item has garnered the support of a majority of Congress on its own merits, rather than made a "rider" to a larger appropriations measure. See Nat'l Treasury Employees Union v. United States, 929 F. Supp. 484, 489 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996).

Congress' reservation of the power to disapprove a presidential cancellation under the Line Item Veto Act is an additional safeguard against the exercise of cancellation authority in a manner that would preclude Congress from "accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). This provides further support for Act's delegation of authority.

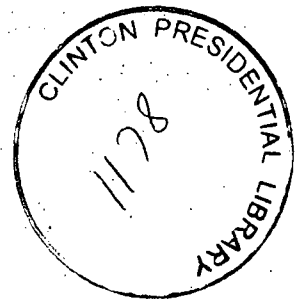
III. THE LINE ITEM VETO ACT DOES NOT
VIOLATE THE SEPARATION OF POWERS DOCTRINE



Plaintiffs also argue that the role assigned to the President under the Line Item Veto Act exceeds the constitutional limit of Executive Branch power and encroaches upon the Legislative Branch, in violation of the separation of powers doctrine. Pl. Memo, pp. 31-32, 39-40, 42-43. However, plaintiffs appear to misapprehend the separation of powers doctrine and ignore the history of evolving interdependence and cooperation between the Legislative and Executive Branches on budgetary matters. Placed in this historical context, the Line Item Veto Act does not violate the separation of powers doctrine.

In the words of James Madison, separation of powers "d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, at 325-326 (James Madison) (Cooke ed. 1961). Accordingly, "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" Mistretta v. United States, supra, 488 U.S. at 380 (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)). As Justice Jackson wrote:

The 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. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.



Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)
(Jackson, J., concurring).

Although the Constitution, in Article I, §9, entrusts the "power of the purse" to Congress ("no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), the expenditure of funds pursuant to congressional authorization is an executive function, consistent with the President's obligation under Article II, §3 to "take Care that the Laws be faithfully executed." We showed earlier (supra, pp. 3-12) that the Line Item Veto Act is the latest step in a nearly 200 year cooperative effort by the two political branches to control federal spending. In particular, the Act is a logical outgrowth and refinement of the Impoundment Control Act ["ICA"].

The various committees of Congress that reviewed the ICA found that it was "overly restrictive." S. Rep. No. 104-13, at 1 (1995). See H.R. Conf. Rep. No. 104-491, at 15-16 (1996); S. Rep. No. 104-9, at 1 (1995). In particular, Congress found that the "[t]he statutory procedures for rescission are too stringent to achieve significant savings." S. Rep. No. 104-13, at 2

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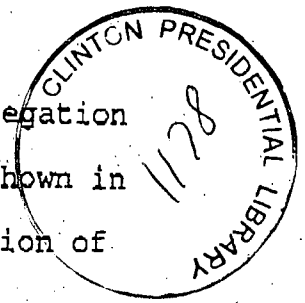
(1995). From 1974 and forward, Presidents (both Democrats and Republicans) had recommended \$72.8 billion in rescissions, but Congress passed legislation rescinding only \$22.9 billion. Id.; H.R. Conf. Rep. No. 104-491, at 16 (1996); S. Rep. No. 104-9, at 5 (1995). Congress decided it should "reverse the burden by adopting a procedure called 'enhanced rescission.'" S. Rep. No. 104-13, at 2 (1995). Under "enhanced rescission," as authorized in the Line Item Veto Act, budget savings will be achieved "by placing the onus on Congress to overturn the President's cancellation of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996).

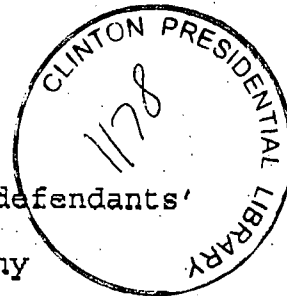
It is clear from the legislative history that the Line Item Veto Act is an evolutionary, rather than a revolutionary, step in the on-going and interdependent effort by the Legislative and Executive Branches to manage the federal budget and federal spending. The President has been involved for many years in controlling federal spending. This "precedent and practice" is powerful evidence that there is "no separation-of-powers impediment" to the role assigned to the President under the Act. See Mistretta v. United States, supra, 488 U.S. at 390.

Undoubtedly, the cancellation authority conferred on the President by the Line Item Veto Act is quite broad. Discretionary budget authority makes up a significant portion of the total federal budget. Given both the dollar amounts involved and the functions and programs at issue, the Act is an expansive delegation to the President. Nonetheless, as we have shown in

the first section of this Argument, the Act meets the delegation test articulated by the Supreme Court. And, as we have shown in this second section, the Act does not violate the separation of powers doctrine. Instead, it fulfills Justice Jackson's expectation that "practice will integrate the dispersed powers into a workable government" consistent with the dictates of the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

As the Supreme Court has observed, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." Mistretta v. United States, supra, 488 U.S. at 384). The Line Item Veto Act has been carefully considered by both Houses of Congress and the President, and it is designed to confront the serious national problem of the federal budget deficit. The Act passes constitutional muster and should be sustained.





CONCLUSION

For the foregoing reasons the Court should grant defendants' motion to dismiss. Alternatively, the Court should deny plaintiffs' motion for summary judgment and grant defendants' motion for summary judgment.

Respectfully submitted,

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Charles Ruff and Cheryl Mills from Trey Schroeder. Subject: Draft Brief. (1 page)	02/20/1997	P5 1179
002. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgement and in Support of Defendants' Motion for Summary Judgement. (32 pages)	02/25/1997	P5 1180
003. draft	Duplicate of 002. (32 pages)	02/25/1997	P5 1181 Dup 1180

COLLECTION:

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Counsel's Office
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FOLDER TITLE:

Line Item Veto [2]

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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).

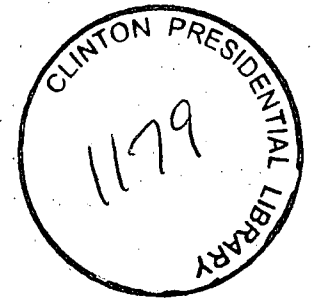
RR. Document will be reviewed upon request.

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]

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February 20, 1997



Chuck and Cheryl --

Attached is a draft of Justice's proposed brief in Byrd v. Raines, the line item veto act case. The brief is due Wednesday, February 26. Bill Marshall is helping me on this, and we will work with Bob Damus' office to coordinate any comments or suggestions.

As background, Justice's first line of reasoning in defending the statute is that no one at all has standing to sue because no one has been injured yet -- the President has not yet used the line item veto, and there are not even any bills currently pending for his signature or veto. Justice, in its motion to dismiss filed on January 16, went further, however. It argued that even though Congress purported to give its Members standing to sue regardless of whether they have been injured, Congress cannot simply deem its Members to have met the constitutional requirements of standing, including actual injury.

As to the substantive issue -- the subject of the current brief -- the general argument advanced by Justice, simply put, is that enactment of the line item veto was the result of an evolutionary, not revolutionary, process, and merely the next logical step in over 200 years of executive action, congressional legislation, and court rulings related to budgetary authority. This position may be viewed by some as inconsistent with White House statements that have characterized this new Presidential power more dramatically. Bill believes that Justice's litigation strategy in minimizing the new authority is exactly correct.

I wanted to make you aware of this and to ask for any comments you may have.

-- Trey

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR ROBERT C. BYRD, et al.,)
Plaintiffs,)
v.) Civil Action No. 97-0001 (TFJ)
FRANKLIN D. RAINES, Director,)
Office of Management and)
Budget, et al.,)
Defendants.)

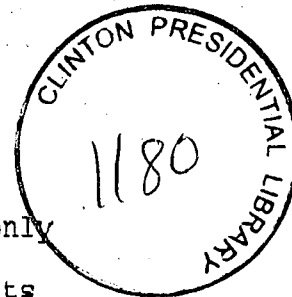
MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On April 9, 1996, the President approved the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691, et seq. The Act amends title X of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.), which authorizes the President to propose a "recession" of budget authority, but gives the proposal no effect unless it becomes law by Act of Congress within 45 days. The amendment reverses the onus, and authorizes the President to rescind ("cancel in whole"), within five days of their enactment by Congress, any "dollar amount of discretionary budget authority," any "item of new direct spending," and any "limited tax benefit," under specified terms and conditions, which is effective unless disapproved by an Act of Congress.

Contrary to plaintiffs' principal contention, the Line Item Veto Act does not authorize the President to take action which violates Article I, §7, cl. 2 (the "Presentment Clause") or the

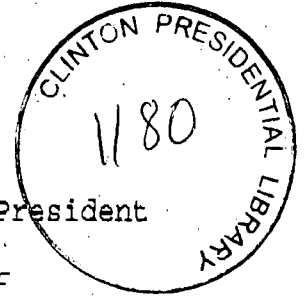
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Constitution. The Act permits the President to cancel only designated dollar amounts, items, and limited tax benefits contained in future spending and tax laws that have been passed by both Houses of Congress, and presented to and approved by the President, in accordance with the Presentment Clause. Nor does the Act permit the President to revise or repeal any laws. Rather, the Act makes permissive and not mandatory, at least for a five-day period, the expenditure of designated funds or the grant of designated tax benefits contained in duly enacted spending and tax laws, and delegates to the President authority, in the execution of those laws, to determine whether the funds should be spent or the benefits should be granted.

There is no constitutional principle that says Congress must mandate spending in appropriation laws. On the contrary, the courts repeatedly have held that the question of whether spending is mandatory or permissive is one of legislative intent and statutory construction. E.g., Train v. City of New York, 420 U.S. 35, 41 (1975); Decatur v. Paulding, 39 U.S. (12 Pet.) 497, 516 (1840); State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099, 1109 (8th Cir. 1973); Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900-901 (D.D.C. 1973). In granting discretion to the President to determine whether to spend permissive appropriations or grant permissive tax benefits, Congress is constrained only by the flexible requirements of the delegation doctrine.

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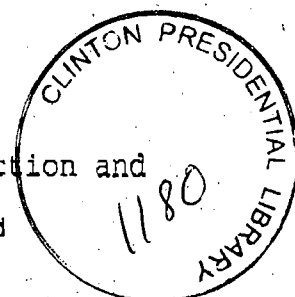
Congress' vesting of cancellation authority in the President under the Line Item Veto Act fully satisfies the test for permissible delegations articulated by the Supreme Court. Mistretta v. United States, 488 U.S. 361 (1989). In the Act, Congress has provided intelligible principles to guide the President in the exercise of this cancellation authority while retaining its legislative prerogatives. Therefore, the delegation of authority under the Act is similar to other delegations which have been sustained by the Supreme Court without exception over the past 60 years.

Moreover, the Line Item Veto Act does not violate the principle of separation of powers. The Act is the logical outgrowth of executive action, congressional legislation, and court rulings spanning nearly two centuries, which have created a system of interdependent and shared responsibilities between the two political branches of government on the matter of controlling federal spending. Placed in historical context, the Act is evolutionary, not revolutionary, and it does not impermissibly transfer the "power of the purse" to the President.

STATEMENT

A. Historical Background

The Line Item Veto Act was enacted against a background of evolving cooperation and interdependence between the Legislative and Executive Branches on the matter of controlling federal spending. The relationship between the two political branches on this matter has been in flux from the earliest days of the



Republic. It has been made manifest through executive action and congressional legislation, and it has been influenced and affected by decisions of the Judicial Branch.

1. 19th century experience. Presidents, at least since Thomas Jefferson, have asserted that the Executive Branch has some discretion to control the expenditure of funds appropriated by Congress. S. Rep. No. 104-9, at 2 (1995). In 1803, President Jefferson made the first significant "impoundment" of appropriated funds by refusing to spend \$50,000 appropriated by Congress for the operation of gun boats on the Mississippi River because he thought their use was unnecessary. Id., at 23; see Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1 ["Executive Impoundment"].

In 1838, the Supreme Court decided Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), holding that the President could not refuse to make a payment mandated by Act of Congress on a contract for the delivery of mail. But two years later, in Decatur v. Pauling, 39 U.S. (12 Pet.) 497 (1840), the Supreme Court denied a writ of mandamus to compel the Secretary of the Navy to pay a claim based on a congressional resolution. The Supreme Court distinguished Kendall on the ground that the duty imposed by Congress there was "merely ministerial," while the duty imposed by Congress in the case before it "required the exercise of judgment and discretion." 39 U.S. at 516.

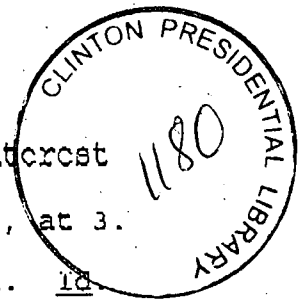
In 1876, President Grant notified Congress that he did not intend to spend the full amount appropriated for harbor and river

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improvements, because they were of a private or local interest rather than in the national interest. S. Rep. No. 104-9, at 3. Congress did not challenge President Grant's impoundment. Id. in the years following President Grant's action, Attorneys General stated in formal opinions that, in addition to statutory language, congressional intent had to be considered in determining whether Congress was mandating an expenditure of funds or simply permitting the President to spend them. Id.

2. Early 20th century developments. Congress delegated a measure of budgetary and fiscal discretion to the President in the Anti-Deficiency Acts of 1905 and 1906. Act of Feb. 27, 1906, ch. 510, §3, 34 Stat. 48; Act of March 3, 1905, ch. 1484, §4, 33 Stat. 1257. In addition to requiring the "apportionment" of annual appropriations to avoid the need for supplemental appropriations later in the fiscal year, these Acts allowed the President to waive spending appropriated funds in the event of "some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment." Act of Feb. 27, 1906, supra.

In 1921, Congress established a national budget system in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, repealed by Pub. L. No. 97-258, 96 Stat. 877 (1982). In section 201 of the Act, Congress delegated some of its budget-making power to the Executive Branch by establishing the Bureau of the Budget (now the Office of Management and Budget), and requiring the President to submit a budget to Congress annually for its



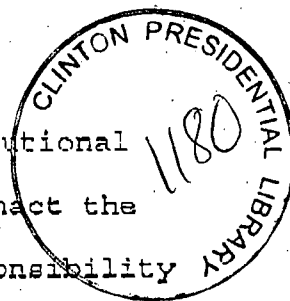
consideration and approval.¹ In keeping with its constitutional role to make the laws, Congress retained authority to enact the budget. Id. However, by this Act Congress shared responsibility for budget preparation with the President.

President Roosevelt used the waiver authority provided by the Anti-Deficiency Acts during the Depression and World War II. S. Rep. No. 104-9, at 3. He also impounded funds for flood control projects, which evoked a legislative response from Congress in 1943 to prohibit any agency or official (except the Commissioner of Public Roads) from impounding funds appropriated for highway construction. Id.

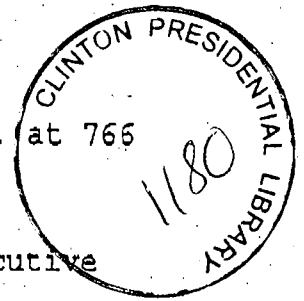
3. The amended Anti-Deficiency Act. In 1950, Congress amended the Anti-Deficiency Act to delegate to the President limited authority to establish "reserves" (that is, to withhold appropriated funds) "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date [of appropriation]." General Appropriation Act of 1951, ch. 896, §1211(c)(2), 64 Stat. 595, 765 (current version at 31 U.S.C. 1512(c)(1)).² The amendments also authorized the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the

¹ Presently, 31 U.S.C. 1105 contains a similar requirement for submission of an executive budget proposal.

² Congress deleted the "other developments" language in 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §1002, 88 Stat. 332, 367, 1002.



purposes of the appropriation concerned." Id., 64 Stat. at 766
(current version at 31 U.S.C. 1512(c)(2)).

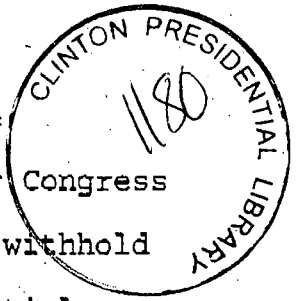


The enactment of these amendments provided the Executive Branch with its first express impoundment authority. It represented a narrowly circumscribed, yet unhindered, delegation of Congress' "power of the purse" to the Executive Branch. Executive Impoundment, at 11; Cathy S. Neuren, Note, Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974, 63 Tex. L. Rev. 693, 699 (1984).

4. Impoundments in the 1970s. President Nixon's extensive use of impoundment during the early 1970s gave rise to a flurry of litigation and legislation. See City of New Haven v. United States, 634 F. Supp. 1449, 1454-1455 (D.D.C. 1986), aff'd, 809 F.2d 900 (D.C. Cir. 1987). Numerous lawsuits were filed in which plaintiffs challenged Executive Branch action withholding funds appropriated by Congress for reasons of economic policy.³ The courts in these cases generally framed the issue as one of

³ Several district courts that addressed the extent of the President's constitutional authority to impound funds appropriated by Congress generally held that the President had no "inherent" impoundment power. E.g., Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 77 (D.D.C. 1973). However, it was plain that the constitutional inquiry for those courts was whether the President could act contrary to the legislative will of Congress. See Local 2677, AFGE v. Phillips, supra, 358 F. Supp. at 77 ("if the power sought here were found valid, no barrier would remain to the executive ignoring any and all Congressional authorizations.") They did not rule whether an express delegation of impoundment authority would violate the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, supra, 343 U.S. at 635-636 (Jackson, J., concurring).

statutory construction and examined the language of the particular legislation in question to determine whether Congress had provided the President with discretion to delay or withhold appropriations. Most of the courts addressing presidential impoundments found that there was no such discretion in those cases. See City of New Haven v. United States, *supra*, 634 F. Supp. at 1454 n. 6 (citing cases).

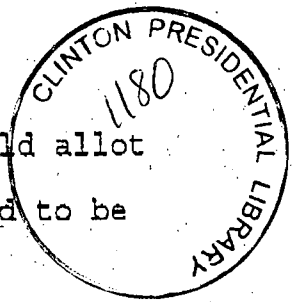


For example, in State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), the Eighth Circuit examined whether the Secretary of Transportation had discretion to defer authority to obligate highway funds previously apportioned to the State of Missouri under the Federal Aid-Highway Act of 1956.

"[A]ssuming the proposition to be true * * * that a general appropriation act is deemed permissive in nature as far as it constitutes a mandate to expend funds," the Eighth Circuit ruled that "only an analysis of the statute itself can dictate the latitude of the questioned discretion." 479 F.2d at 1109. Therefore, the Eighth Circuit said that "[t]he fundamental issue is whether the Secretary possesses direct or implied authority to exercise contract controls for the reason advanced. *Id.*, at 1111. After reviewing the Federal Aid-Highway Act, the Eighth Circuit held that the Secretary's discretion to determine whether funds are made available was limited to certain program related statutory criteria. *Id.*, at 1113-1114 & n. 16.

Similarly, in Train v. City of New York, 420 U.S. 35 (1975), the question before the Supreme Court was whether the

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Administrator of the Environmental Protection Agency could allot to states less than the entire amount of funds authorized to be appropriated by the Federal Water Pollution Control Act Amendments of 1972. The Supreme Court said the question turned on "the proper construction of Act," 420 U.S. at 41, and after examining the relevant language and legislative history, it concluded that Congress intended to mandate allotment to the states of the full amount authorized to be appropriated.

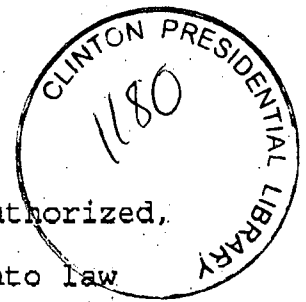
5. The Impoundment Control Act. In response to President Nixon's impoundment actions, Congress, in 1974, enacted the Impoundment Control Act ["ICA"], title X of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332, to "mark the limits of Congressional and Presidential power in the matter of impoundments." City of New Haven v. United States, supra, 634 F. Supp. at 1455. The ICA recognizes two types of impoundment: "deferral" and "rescission."

A deferral is "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities" or "any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority * * * ." 2 U.S.C. 682(1). Deferrals are permissible only (1) for contingencies, (2) to effect savings achieved through changes or efficiency, or (3) as specifically provided by law. 2 U.S.C. 684(b). The ICA authorizes the President and officers of the Executive Branch to propose a deferral by transmitting a special

message to both Houses of Congress containing statutorily specified information regarding the deferral. 2 U.S.C. 684(a). A deferral becomes effective upon transmission of the special message, but it may not extend beyond the end of the fiscal year during which the special message was transmitted. Id.⁴

A rescission is the cancellation of budget authority. 2 U.S.C. 682(3). Under the ICA, the President may propose a rescission of all or part of any budget authority whenever the President determines that it "will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons * * * ." 2 U.S.C. 683(a). The ICA authorizes the President to propose a rescission by transmitting a special message to both Houses of Congress containing statutorily specified information regarding the rescission. Id. However, under the ICA the amount proposed to be rescinded must be made available for obligation unless, within 45 days after the special message has been transmitted, Congress passes a bill rescinding all or part of the amount proposed. 2 U.S.C. 683(b).

⁴ As originally enacted, the ICA provided that a proposed deferral was automatically effective unless either House of Congress passed an "impoundment resolution" disapproving the deferral. 88 Stat. at 335. Subsequently, in light of INS v. Chadha, 462 U.S. 919 (1983), the one-House veto provision was held unconstitutional. City of New Haven v. Pierce, 809 F.2d 900 (D.C. Cir. 1987). In response, Congress amended the ICA to eliminate the legislative veto provision. Pub.L. 100-119, Title II, § 206(a), Sept. 29, 1987, 101 Stat. 785. Congress did not retain a formal check on deferrals, but it authorized the Comptroller General to bring a civil action to require that budget authority be made available for obligation whenever it is required to be made available for obligation. 2 U.S.C. 687.



B. The Line Item Veto Act

Under the Line Item Veto Act, the President is authorized, with respect to any bill or joint resolution signed into law pursuant to Article I, section 7, to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," or any "limited tax benefit," as those terms are defined in the Act, if the President determines that the "cancellation" will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest." 2 U.S.C. 691(a). In identifying dollar amounts, items, and benefits for cancellation, the President must consider the legislative history and purposes of the law containing those dollar amounts, items, or benefits, any specific sources of information to which the law makes reference, and the definitions in the Line Item Veto Act. 2 U.S.C. 691(b).

The Act also directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides that those bills and joint resolutions may include a separate section prohibiting the application of the Act to any provisions but those specifically enumerated in the separate section and identified by the Joint Committee as limited tax benefits. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).

The President must notify Congress of a cancellation by transmitting a "special message" within five calendar days after enactment of the law to which the cancellation applies. 2 U.S.C. 691(a). The Act specifies the contents of the special message, and requires that it shall be printed in the Federal Register in the first issue published after it is transmitted to Congress. 2 U.S.C. 691a. The cancellation takes effect upon Congress' receipt of the special message, and, in the case of a cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. 691b. The cancellation operates to rescind any dollar amount of discretionary budget authority or prevent items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. 691e(4). Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c.

Under the Line Item Veto Act, each special message transmitted by the President is referred to the appropriate congressional committees. During a review period of 30 days following Congress' receipt of the special message, Members of Congress may introduce, and Congress may consider, a "disapproval bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6). If a disapproval bill is enacted into law, then all cancellations

disapproved in that law are null and void. 2 U.S.C. 691b(a). 1180
The Act does not confer authority on the President to cancel any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in an enacted disapproval bill. 2 U.S.C. 691(c).

The Line Item Veto Act became effective on January 1, 1997. It expires on January 1, 2005. 2 U.S.C. 691 note.

ARGUMENT

I. THE LINE ITEM VETO ACT DOES NOT AUTHORIZE THE PRESIDENT TO VIOLATE THE PRESENTMENT CLAUSE

A. The Act Confers Discretion on the President to Spend Funds or Grant Limited Tax Benefits Whose Expenditure or Grant the Act Makes Permissive

In the wake of the Line Item Veto Act, laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits will be passed by both Houses of Congress, and presented to the President for approval or return, just as they always have been. We agree with the plaintiffs that, under the Presentment Clause, the President must sign or veto the "whole bill," "in toto." See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment ["Pl. Memo"], pp. 28-32. If the President signs it, the bill becomes law and the President must faithfully execute it.

What is new about the Line Item Veto Act is that, in effect, it makes future laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits permissive and not mandatory, at least for a five-day

period, by conferring discretion upon the President to cancel them. In other words, Congress has delegated authority to the President, in the execution of duly enacted future spending and tax laws, to determine whether particular funds should be spent or particular tax benefits should be granted.⁵ This determination must be made within five days after enactment of those laws, utilizing the standards set forth in the Line Item Veto Act. In making this determination, the President does not revise or repeal any laws. The President simply exercises the discretion that Congress validly has conferred to determine whether to spend funds or grant benefits that, for a limited time, are permitted but not required to be spent or granted.⁶

* The language of the Appropriations Clause of the Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Article I, §9, cl. 7) suggests a bias against spending. It constrains the President from expenditures unless and until Congress appropriates funds. OPM v. Richmond, 496 U.S. 414, 424-425 (1990). But this Clause in no way suggests the converse; that the President must spend money that Congress appropriates, at least in the absence of some legislative intent to mandate that result. Decatur v. Paulding, supra, 37 U.S. at 516.

⁶ Plaintiffs contend that this explanation "is on its face inapplicable to 'limited tax benefits,' such as a deduction available to only a few taxpayers, which do not involve spending." Pl. Memo, p. 39. They also claim "it is obvious that cancellation of a limited tax benefit is changing the law." Id.

Plaintiffs are wrong. Congress may, if it chooses, make the grant of a limited tax benefit permissive, and not mandatory, just as it may, if it chooses, make the expenditure of dollar amounts of discretionary budget authority or items of new direct spending permissive, and not mandatory. By exercising the discretion conferred by Congress not to grant limited tax benefits which are permitted, but not required, to be granted for at least an initial five day period under a duly enacted tax law, the President is executing that law consistent with congressional instructions, not "changing" it.

Accordingly, plaintiffs' argument that the Line Item Veto Act "evade[s] the central purpose of the Presentment Clause" because it gives the President "the power to approve parts of a bill and reject others," and the "power to repeal provisions of law that became law between one instant and five days earlier when the President signed the bill" (Pl. Memo, pp. 32, 34, 36), is based on a false premise. The Act does not allow the President to "approve parts of a bill and reject others" or to "repeal" any laws.⁷ Instead, it confers discretion upon the President in respect only of dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits contained in duly enacted spending and tax laws that have been signed, in toto, by the President.⁸

Indeed, in passing the Line Item Veto Act Congress made clear that it was not attempting to "evade() the central purpose of the Presentment Clause," as plaintiffs contend. As the conferees on the Act noted, Congress "specifically include[d] the requirement that a bill or joint resolution must have been signed into law, in order to clarify that the cancellation authority only becomes effective after the President has exercised the

⁷ Contrary to plaintiffs' suggestions (Pl. Memo, pp. 26, 34), the appearance of the word "veto" in the Act's title has no operational significance, because the actual provisions of the Act nowhere mention a presidential "veto." More importantly, the Act does not authorize a veto in the commonly understood sense of nullification of a law.

⁸ Plaintiffs concede that, under the Act, the President "physically signs the whole bill," and the bill "becomes law for a scintilla juris" before the President exercises the discretion conferred by the Act. Pl. Memo, pp. 34, 35.

constitutional authority to enact legislation in its entirety. This requirement ensures that the President affirmatively demonstrates support for the underlying legislation from which specific cancellations are then permitted." H.R. Conf. Rep. No. 104-491, at 20 (1996). Furthermore, "[t]he cancellation authority does not permit the President to rewrite the underlying law, nor to change any provision of that law, * * * including any restriction, limitation or condition on the expenditure of budget authority, or any other requirement of the law." Id.⁹

Congress could achieve the same result it achieved under the Line Item Veto Act by inserting the words of the Act in every future spending and tax law. For example, both Houses of Congress could pass a bill appropriating \$1 million for the construction of a Lawrence Welk Museum, but authorizing the President to cancel that expenditure within five days of enactment if the President determined the cancellation would reduce the federal budget deficit. If this bill were presented to and signed by the President, it would become law even though the expenditure of the \$1 million was made permissive, and not mandatory, for the first five days after its enactment. If the President then determined that cancelling this \$1 million

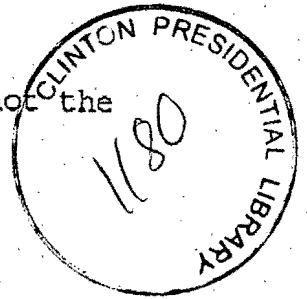
⁹ Thus, in defining the term "dollar amount of discretionary budget authority," Congress specified that this term "does not include * * * any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure." 2 U.S.C. 691e(7)(B)(iv).

expenditure would reduce the federal budget deficit, and the President cancelled it within five days of enactment of the law, the President would not be revising or repealing the law. The President merely would be exercising discretion and executing the law consistent with Congress' instructions. Therefore, the President's exercise of the cancellation authority in this example would not violate the Presentment Clause.

It makes no constitutional difference that Congress chose the less cumbersome route of enacting a single, free-standing Line Item Veto Act that will put an interpretive gloss on future spending and tax laws. The President's exercise of the discretionary cancellation authority conferred by the Act does not implicate or violate the Presentment Clause because it applies only to spending and tax laws that have been duly enacted in accordance with that Clause.

To be sure, Congress is precluded by the separation of powers principle of our tripartite system of government from delegating its legislative power to the Executive or Judicial Branches. Field v. Clark, 143 U.S. 649, 692 (1892). Therefore, the instructions Congress has given the President under the Line Item Veto Act for executing spending and tax laws may not be so unbounded as to delegate legislative power to the President. But that means that the constitutionality of the President's exercise of the cancellation authority conferred by the Line Item Veto Act

involves primarily a question of delegation doctrine, not the Presentment Clause, as plaintiffs contend.¹⁰



B. The Line Item Veto Act Does Not
Unconstitutionally Delegate
Legislative Power to the President

1. Congress has broad power to delegate. The Supreme Court has observed that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." Mistretta v. United States, 488 U.S. 361, 372 (1989). The test the Supreme Court has used to decide whether Congress has sought too much assistance from another branch is well-settled. "In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must

¹⁰ Plaintiffs also contend that, in its definition of "dollar amount of discretionary budget authority," the Act violates INS v. Chadha, *supra*, and American Fed. of Gov't Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982). Pl. Memo, pp. 38-39 n. 23. The Act, at 2 U.S.C. 691e(7)(ii), defines that phrase to include amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law." Plaintiffs contend that the Act thus impermissibly gives these tables, charts, and explanatory texts, which are the product of congressional committees, "the force of law."

However, nothing in the Line Item Veto Act gives any committee tables, charts, and explanatory texts "the force of law." The Act merely recognizes that in future spending laws Congress, expressly or by implication, may incorporate by reference and give "the force of law" to tables, charts, and explanatory texts which may contain dollar amounts subject to cancellation under the Act. If that happens, the Act authorizes the President to cancel those dollar amounts. Moreover, the authority granted the President to cancel amounts in charts, tables, and explanatory texts reinforces the fact that the President does not repeal any law when doing so, but rather exercises discretion delegated by Congress not to spend amounts that are permitted, but not required, to be spent.

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be fixed according to common sense and the inherent necessities of the government co-ordination. * * * So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation.' " Mistretta v. United States, *supra*, quoting from J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406, 409 (1928).

Applying this "common sense" test to the "inherent necessities" of government, the Supreme Court has not struck down a challenged statute on delegation grounds in over 60 years. Indeed, except for invalidating two statutes as excessive delegations in 1935, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the Supreme Court has not struck down a single challenged statute on delegation grounds.

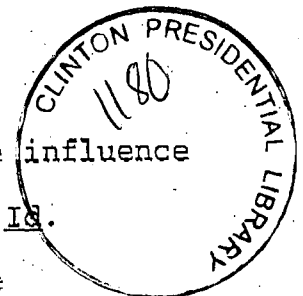
At the same time, the Supreme Court consistently has sustained Congress' delegation of sweeping discretionary powers to the Executive Branch, including powers that relate directly to the Nation's fisc. For example, the Supreme Court has held that Congress may authorize the President and other Executive Branch officials to raise or lower tariffs (J.W. Hampton, Jr. & Co. v. United States, *supra*), establish a minimum wage for industry (Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941)), determine just and reasonable power rates (FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)), fix fair and equitable commodities prices

(Yakus v. United States, 321 U.S. 414 (1944)), define and recover excessive wartime profits (Lichter v. United States, 334 U.S. 742 (1948)), raise license fees on imports (FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976)), and establish and collect pipeline safety user fees or taxes (Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989)).

These decisions have been "driven by a practical understanding that, in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives," Mistretta v. United States, *supra*, 488 U.S. at 372. Nevertheless, delegations of power by Congress to the Executive Branch also have been sustained where the reason for the delegation was not concern about Congress' ability to deal with complex and technical problems, but concern about its members' inclination to promote the narrow economic interests of their constituents over wider, national economic interests.

A good example of this is the series of enactments which conferred broad authority on the Secretary of Defense to close military bases without specifying which bases should be closed. Throughout the 1960s and 1970s, the President attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, at 1-1 (1991). But these efforts often were thwarted by members of Congress, who feared the economic impact

of the closures on their constituents and suspected the influence of political motivation in the President's decisions. Id.



Beginning in 1977, Congress tried to deal with the parochial tactics of its own members by enacting legislation which conferred authority on the Secretary of Defense unilaterally to close military bases, subject to override by Act of Congress. Under the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623, enacted in 1988, Congress created an independent commission and authorized it to recommend bases for closure or realignment. The commission presented its recommendation to the Secretary of Defense, who had the power to approve or disapprove the entire group of recommendations. If the Secretary of Defense approved, Congress had 45 days to override the approval.

This legislation was challenged in National Fed. of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990), on the ground, among others, that it amounted to "an excessive delegation of legislative discretion in violation of the constitutionally based non-delegation doctrine." 905 F.2d at 404. The District of Columbia Circuit rejected this challenge. It noted that the test applied by the Supreme Court in delegation cases "has not been a tough one." Id. It then concluded that the 1988 act incorporated an intelligible standard to constrain administrative discretion, and that it was "well within the bounds of lawful delegation." Id.

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This decision is instructive for the present case, because the motivation for the delegation of power to the Executive Branch under the 1988 base closure legislation is remarkably similar to the motivation for the delegation of power to the President under the Line Item Veto Act. As the Senate Committee on Governmental Affairs reported, the purpose of the Line Item Veto Act was "to confront the serious problem of pork-barrel spending." S. Rep. No. 104-13, at 2 (1995).

Each year wasteful and parochial projects -- unlikely to pass on their own merits -- are tacked into omnibus bills. Often these projects are not germane to the bill. They may be nothing more than extraneous and indefensible riders that hope to make it to safety in the company of a larger bill. They are added routinely as part of the price for getting a bill out of committee or passing it on the floor.

Id.

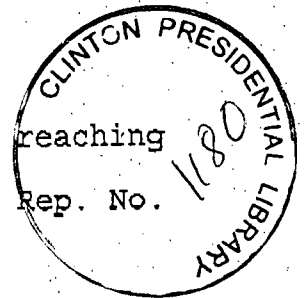
By delegating to the President the authority to decide whether to spend funds or grant limited tax benefits which are permitted but not required to be spent or granted, subject to legislative disapproval, Congress is enabling itself to address, as an institution, the specific merits of "pork-barrel" and other projects which may impede a reduction in the federal budget deficit. Whether appropriations are permissive or mandatory is a matter of statutory interpretation. E.g., Train v. City of New York, supra; Decatur v. Paulding, supra; State Highway Comm'n of Missouri v. Volpe, supra; Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, supra. But no court has ever suggested that Congress may not leave it to the President's

discretion, with whatever guidelines are necessary, to decide whether to spend appropriated funds or grant limited tax benefits. The discretion conferred by the Line Item Veto Act on the President, like the discretion conferred on the Executive Branch by the base closing legislation, is well within the bounds of lawful delegation.

2. The Line Item Veto Act has more than ample standards to be a valid delegation. As the Supreme Court reiterated in Mistretta v. United States, supra, 488 U.S. at 372, congressional delegations of power to the Executive Branch will be upheld if Congress lays down an "intelligible principle" to which the person or body authorized to exercise that power must conform. Congress was satisfied that the Line Item Veto Act included ample intelligible principles, and there is no basis for plaintiffs' contention that the Court should second-guess that judgment.

First, the President may exercise the cancellation authority conferred by the Act only if the President determines that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest," and only if the President notifies Congress of the cancellation by transmitting a special message within five days after enactment of a the law containing the dollar amounts, items, or benefits to be cancelled. 2 U.S.C. 691(a). The cancellation authority "is not separable from the President's duties to comply with these restrictions," so that, if the President "reaches beyond these limits to expand the

application of this new authority, the President will be reaching beyond the delegation of these authorities." H.R. Conf. Rep. No. 104-491, at 19 (1996).

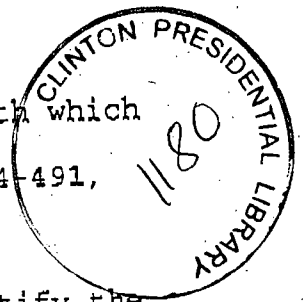


The President's authority to cancel limited tax benefits is particularly constrained. Under the Act, the President must comply with the separate sections, if any, of bills and joint resolutions prohibiting the application of the Line Item Veto Act to any provisions but those specifically enumerated and identified by the Joint Committee on Taxation as limited tax benefits. 2 U.S.C. 691f.

Second, in identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President must "(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits; (2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and (3) use the definitions contained in [the Act] in applying this part to the specific provisions of such law." 2 U.S.C. 691(b). The President's special message to Congress must include relevant supporting material about each cancellation, including the reasons for the cancellation and, to the maximum extent practicable, its estimated fiscal, economic, and budgetary impact. 2 U.S.C. 691a(b). This helps to cabin the delegation to the President, because it requires an explanation of the President's action. It also serves "to ensure that the

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Congress and the public receive sufficient information with which to judge the President's action." H.R. Conf. Rep. No. 104-491, at 21 (1996).



Where applicable, the special message must also identify the states and congressional districts affected by the cancellation, and the total number of cancellations imposed during the current session of Congress on those states and districts. 2 U.S.C. 691a(b)(2)(B-C). This is "to ensure that the Congress has information to determine if there is a disproportionate impact on a particular state or congressional district." H.R. Conf. Rep. No. 104-491, at 21 (1996).

Third, the Act incorporates a "lockbox" provision, requiring the Office of Management and Budget to take prescribed accounting steps to guarantee that any credit for money not spent or tax benefits not granted is dedicated to deficit reduction. 2 U.S.C. 691c(a-b). "This ensures that the President does not simply cancel a particular dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit in order to increase spending in other areas." H.R. Conf. Rep. No. 104-491, at 20-21 (1996).

Plaintiffs characterize these intelligible principles, to which the President must conform in exercising the cancellation authority conferred by the Line Item Veto Act, as "an illusion." Pl. Memo, p. 40. They claim that the determinations the President is required to make "tell the President only that he

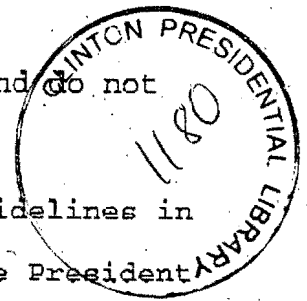
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should exercise the same judgment a lawmaker would, and do not constrain his authority at all." Id., pp. 40-41.

That is demonstrably not so. The legislative guidelines in the Line Item Veto Act, especially those requiring the President to exercise the cancellation authority within five days after enactment of the relevant spending or tax laws, to transmit a special message demonstrating compliance with Congress' instructions, and to comply with the "lockbox" requirement, meaningfully constrain the President's discretion. Those provisions deny the President a roving charter to cancel, at any time as the President sees fit, a particular spending or tax relief measure simply because the President disagrees with its purposes. These guidelines are no more illusory than the guidelines in those laws delegating power to the Executive Branch to decide whether to increase or decrease tariffs (see J.W. Hampton, Jr. & Co. v. United States, supra),¹¹ to fix fair and equitable commodities prices (see Yakus v. United States, supra), to define and recover excessive wartime profits (see Lichter v. United States, supra), and to close military bases (see National Fed. of Federal Employees v. United States, supra), all of which were upheld against a delegation challenge.¹²

¹¹ This delegation is remarkably similar to the delegation to the President under the Line Item Veto Act of the authority to cancel "limited tax benefits."

¹² In Skinner v. Mid-America Pipeline Co., supra, the Supreme Court held that Congress' delegation of discretionary authority under the taxing power "is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." 490 U.S. at 223. Therefore, the cited cases upholding delegation guidelines plainly apply to the delegation of spending and taxing authority under the Line Item Veto Act.

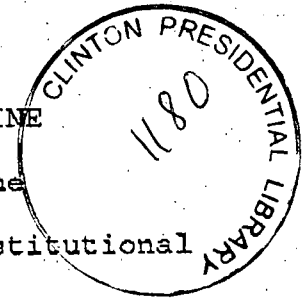


Finally, because the Line Item Veto Act provides that, by a simple majority of both Houses, Congress may pass disapproval legislation that overturns a presidential cancellation, 2 U.S.C. 691d, Congress has retained a sufficient degree of its legislative prerogative. Congress' reservation of the power to examine and override the exercise of delegated power is frequently employed "to make sure that the action under the delegation squares with the Congressional purpose." Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941).

Plaintiffs presume that all disapproval bills would require a two-thirds vote of each House of Congress to secure passage, because, they imply, the President would not sign a disapproval bill containing provisions he had cancelled. Pl. Memo, p. 11. However, the President may decide to sign a disapproval bill when a specific item has garnered the support of a majority of Congress on its own merits, rather than made a "rider" to a larger appropriations measure. See Nat'l Treasury Employees Union v. United States, 929 F. Supp. 484, 489 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996).

Congress' reservation of the power to disapprove a presidential cancellation under the Line Item Veto Act is an additional safeguard against the exercise of cancellation authority in a manner that would preclude Congress from "accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). This provides further support for Act's delegation of authority.

III. THE LINE ITEM VETO ACT DOES NOT
VIOLATE THE SEPARATION OF POWERS DOCTRINE

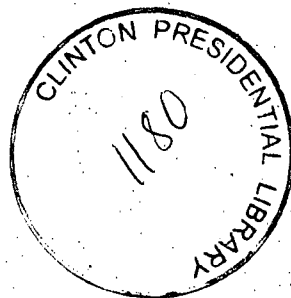


Plaintiffs also argue that the role assigned to the President under the Line Item Veto Act exceeds the constitutional limit of Executive Branch power and encroaches upon the Legislative Branch, in violation of the separation of powers doctrine. Pl. Memo, pp. 31-32, 39-40, 42-43. However, plaintiffs appear to misapprehend the separation of powers doctrine and ignore the history of evolving interdependence and cooperation between the Legislative and Executive Branches on budgetary matters. Placed in this historical context, the Line Item Veto Act does not violate the separation of powers doctrine.

In the words of James Madison, separation of powers "d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other," but rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, at 325-326 (James Madison) (Cooke ed. 1961). Accordingly, "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" Mistretta v. United States, supra, 488 U.S. at 380 (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)). As Justice Jackson wrote:

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The 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. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.



Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)

(Jackson, J., concurring).

Although the Constitution, in Article I, §9, entrusts the "power of the purse" to Congress ("no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), the expenditure of funds pursuant to congressional authorization is an executive function, consistent with the President's obligation under Article II, §3 to "take Care that the Laws be faithfully executed." We showed earlier (supra, pp. 3 12) that the Line Item Veto Act is the latest step in a nearly 200 year cooperative effort by the two political branches to control federal spending. In particular, the Act is a logical outgrowth and refinement of the Impoundment Control Act ["ICA"].

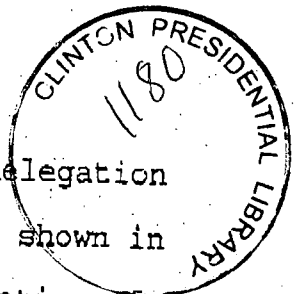
The various committees of Congress that reviewed the ICA found that it was "overly restrictive." S. Rep. No. 104-13, at 1 (1995). See H.R. Conf. Rep. No. 104-491, at 15-16 (1996); S. Rep. No. 104-9, at 1 (1995). In particular, Congress found that the "[t]he statutory procedures for rescission are too stringent to achieve significant savings." S. Rep. No. 104-13, at 2

(1995). From 1974 and forward, Presidents (both Democrats and Republicans) had recommended \$72.8 billion in rescissions, but Congress passed legislation rescinding only \$22.9 billion. *Id.*; H.R. Conf. Rep. No. 104-491, at 16 (1996); S. Rep. No. 104-9, at 5 (1995). Congress decided it should "reverse the burden by adopting a procedure called 'enhanced rescission.'" S. Rep. No. 104-13, at 2 (1995). Under "enhanced rescission," as authorized in the Line Item Veto Act, budget savings will be achieved "by placing the onus on Congress to overturn the President's cancellation of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996).

It is clear from the legislative history that the Line Item Veto Act is an evolutionary, rather than a revolutionary, step in the on-going and interdependent effort by the Legislative and Executive Branches to manage the federal budget and federal spending. The President has been involved for many years in controlling federal spending. This "precedent and practice" is powerful evidence that there is "no separation-of-powers impediment" to the role assigned to the President under the Act. See Mistretta v. United States, *supra*, 488 U.S. at 390.

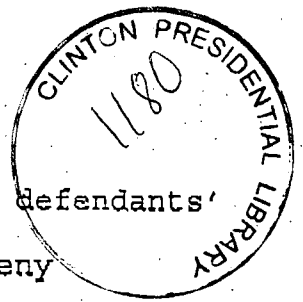
Undoubtedly, the cancellation authority conferred on the President by the Line Item Veto Act is quite broad. Discretionary budget authority makes up a significant portion of the total federal budget. Given both the dollar amounts involved and the functions and programs at issue, the Act is an expansive delegation to the President. Nonetheless, as we have shown in

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the first section of this Argument, the Act meets the delegation test articulated by the Supreme Court. And, as we have shown in this second section, the Act does not violate the separation of powers doctrine. Instead, it fulfills Justice Jackson's expectation that "practice will integrate the dispersed powers into a workable government" consistent with the dictates of the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

As the Supreme Court has observed, "[w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons." Mistretta v. United States, supra, 488 U.S. at 384). The Line Item Veto Act has been carefully considered by both Houses of Congress and the President, and it is designed to confront the serious national problem of the federal budget deficit. The Act passes constitutional muster and should be sustained.



CONCLUSION

For the foregoing reasons the Court should grant defendants' motion to dismiss. Alternatively, the Court should deny plaintiffs' motion for summary judgment and grant defendants' motion for summary judgment.

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