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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 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 Line Item Veto Act, adopting "enhanced rescission," authorizes the President to "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. The cancellation 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

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violates Article I, §7, cl. 2 (the "Presentment Clause") of the Constitution. The Act does not permit the President to revise or repeal any laws. Instead, 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 -- that is, did Congress appropriate funds that <u>must</u> be spent or <u>may</u> be spent -- is one of legislative intent and statutory construction. <u>E.g.</u>, <u>Train</u> v. <u>City of New York</u>, 420 U.S. 35, 41 (1975); <u>Decatur</u> v. <u>Paulding</u>, 39 U.S. (12 Pet.) 497, 516 (1840); <u>State Highway Comm'n of Missouri</u> v. <u>Volpe</u>, 479 F.2d 1099, 1109 (8th Cir. 1973); <u>Nat'l Council of Comm. Mental Health Centers, Inc</u>. v. <u>Weinberger</u>, 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.

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 2-3; 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 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 established the Bureau of the Budget (now the Office of Management and Budget), and required 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 appropriations. 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 provide the President limited statutory 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

[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.

1182

rescission" of any reserves "not * * * required to carry out the 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 statutory impoundment authority. 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 statutory construction and examined the language of the

[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).

1182

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 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

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[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 that is mandated by law. 2 U.S.C. 687.

special message has been transmitted, Congress passes a bill rescinding all or part of the amount proposed. 2 U.S.C. 683(b).[5]

1182

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

[5] Congressional efforts to reform the budget process continued after passage of the ICA. In 1985, Congress enacted the Balanced Budget and Emergency Deficit Control Act, Pub. L. No. 99-177, 99 Stat. 1038, which required automatic reductions in certain expenditures if the federal deficit exceeded statutory maximum deficit amounts, and required the President to issue a sequestration order mandating the reductions. In Bowsher v. Synar, 478 U.S. 714 (1986), the Supreme Court held unconstitutional the provisions of that Act which vested certain executive responsibilities for the sequestration process i the Comptroller General, a legislative officer. Subsequently, Congress amended the Act to assign most of those responsibilities to the Office of Management and Budget. Balanced Budget and Emergency Deficit Control Reaffirmation Act, Pub. L. No. 100-119, 101 Stat. 1330-1345. In the Budget Enforcement Act, title Xiii of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-1573, Congress replaced the system of maximum deficit amounts with caps on discretionary spending and a pay-as-you-go requirement for direct spending and revenue provisions.

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). 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 A VIOLATION OF THE PRESENTMENT CLAUSE -- FUTURE SPENDING AND TAX BILLS WILL BE PRESENTED TO AND APPROVED OR VETOED BY THE PRESIDENT IN ACCORDANCE WITH THE CLAUSE

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 permissive, and not mandatory, 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. The Act does this by conferring discretion upon the President not to spend appropriations or to grant limited tax benefits. 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.[6] This determination must be made within five days after enactment of those laws, utilizing

[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.

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.[7]

Accordingly, the 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 an erroneous premise. The Act does not allow the President to "approve parts of a bill and reject others" or to "repeal" any laws.[8] Instead, it confers discretion upon the President in

[7] 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.

This contention is incorrect. Congress has, in the past, delegated discretionary authority to the Secretary of the Treasury to extend tax beneficial treatment not explicitly granted by statute to classes of taxpayers. See, e.g., 26 U.S.C. 41(d)(4)(E); 172(f)(3); 461(e); 4401(b). There is no reason Congress could not, conversely, confer discretionary authority on the Secretary to withdraw such beneficial treatment. That is the authority Congress has conferred on the President under the Line Item Veto Act with respect to limited tax benefits. By exercising that authority, the President is executing that law consistent with congressional instructions, not "changing" it.

[8] Contrary to plaintiffs' suggestions (Pl. Memo, pp. 26, 34), the appearance of the word "veto" in the Act's title has no (continued...)

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.[9]

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 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

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[8](...continued) 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.

[9] Even 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.

restriction, limitation or condition on the expenditure of budget authority, or any other requirement of the law." Id.[10]

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 an omnibus bill appropriating $10 billion for 100 defense projects, subject to a proviso that the President could cancel one or more of those projects over the life of the appropriations if the President determined it would reduce the federal budget deficit. Or both Houses could pass a bill appropriating $100 million for two defense projects, subject to a proviso that the President could cancel either or both of those expenditures within five days of enactment of the bill if the President determined it would reduce the federal budget deficit. If those bills were presented to and signed by the President, they would become law even though the expenditures were made permissive and not mandatory. If the President then determined that cancelling these expenditures would reduce the federal budget deficit, and the President cancelled them, the President would not be revising or repealing the law. The President merely would be exercising discretion and executing the law consistent

[10] 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).

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 instead to enact 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.[11]

[11] Plaintiffs also contend that, by defining the term "dollar amount of discretionary budget authority" 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" (2 U.S.C. 691e(7)(ii), the Act impermissibly gives these tables, charts, and texts "the force of law." Pl. Memo, pp. 38-39 n. 23. That is not so. As the House conference report on the Act makes (continued...)

II. THE LINE ITEM VETO ACT DOES NOT UNCONSTITUTIONALLY DELEGATE LEGISLATIVE POWER TO THE PRESIDENT

A. 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 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.

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[11](...continued)
clear, this definition "is not intended to give increased legal weight or authority to documents that accompany the law that it enacted. Rather, as an exercise of its authority to specify the terms of the delegation to the President, Congress is choosing to use those documents as a means of allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." H. Conf. Rep. No. 104-491, at 32 (1996). Thus, the tables, charts, and explanatory texts are merely points of reference, reflecting "an agreed upon set of dollar amounts that the President may rescind in their entirety." Id. Congress just as easily could have incorporated by reference tables, charts, or explanatory texts appearing in newspaper articles or other publications without giving them the force of law.

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.

A good example of this is the series of enactments which, in conferring broad authority on the Secretary of Defense to close military bases, did not specify 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).

Beginning in 1977, Congress enacted 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.

The Line Item Veto Act confers similar delegated authority. The Act delegates to the President the authority to decide, subject to legislative disapproval, whether to spend funds or grant limited tax benefits which are permitted, but not required, to be spent or granted. 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. 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.

B. The Linve 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 a review of the Act makes clear that it does.

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

That is not so. The legislative guidelines in the Line Item Veto Act meaningfully constrain the President's discretion, 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. 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),[12] 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.[13]

Finally, because the Line Item Veto Act provides that 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'

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[12] 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."

[13] 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.

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 the Act's delegation of authority to the President.

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. Placed in the historical context of the evolving relationship between the Legislative and Executive Branches on budgetary matters, 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 <u>partial</u> agency in, or no <u>controul</u> over the acts of each other," but rather "that where the <u>whole</u> power of one department is exercised by the same hands which possess the <u>whole</u> 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.'" <u>Mistretta</u> v. <u>United States</u>, <u>supra</u>, 488 U.S. at 380 (quoting <u>Buckley</u> v. <u>Valeo</u>, 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. 3-11) 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 and new direct spending make 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 a substantial delegation to the President.

Nonetheless, as we have shown in the second section of this Argument, the Act meets the delegation test articulated by the Supreme Court. And, as we have shown in this third 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).

1182

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. draft	Robert Byrd et al . v. Franklin Raines et al. 97-0001. Reply to Plantiffs' Opposition to Defendants' Motion to Dismiss. (15 pages)	02/25/1997	P5 1183
002. draft	Robert Byrd et al . v. Franklin Raines et al. 97-0001. Reply to Plantiffs' Opposition to Defendants' Motion to Dismiss. (15 pages)	02/25/1997	P5 1184

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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]
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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]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

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)

REPLY TO PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In our opening brief, we demonstrated that plaintiffs ~~lack~~ do not have Article III standing to sue, because they ~~failed to allege that~~ ~~they~~ have not suffered concrete injury ~~inflicted by the defendants or any other federal official~~ under the Line Item Veto Act. We also showed that plaintiffs' constitutional challenge to the Line Item Veto Act is not ripe under Article III, because the Act merely authorizes the President to cancel dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits in future spending and tax laws. At the present time, the President has not exercised this authority, and no one knows whether or when he will. Even if the President exercises the cancellation authority conferred on him by the Act, that cancellation may be nullified by a disapproval bill enacted by Congress. In this speculative environment about the operation of the Line Item Veto Act, plaintiffs' lawsuit is really a request for an advisory opinion, which Article III forbids federal courts from rendering.

state

Plaintiffs, ~~in their opposition and supporting declarations,~~ ~~claim~~ that the Line Item Veto Act already "affects" the way they conduct themselves as legislators and the way they deal with the Executive Branch, and they argue that this gives them standing. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment ["Pl. Memo"], pp. 12-18. Similarly, and for reasons of "prudence," plaintiffs contend that the present impact of the Act on the formulation of appropriations legislation makes this case constitutionally ripe. Id., p. 23.

not suffered

~~But, as we shall show,~~ plaintiffs have ~~failed to demonstrate~~ a here-and-now concrete injury ~~inflicted by defendants or the President~~ under the Line Item Veto Act. ~~Plaintiffs' declarations that the Act "affects" them, and that it is an important factor they must "take * * * into account" in representing their constituents (Pl. Memo, p. 16), reflect no more than the reality of the life of a legislator, who must "take into account" a myriad of factors from a multitude of sources. The declarations do not establish cognizable injury under Article III.~~ As this Court observed in rejecting the claims of non-congressional plaintiffs to have standing to challenge the Line Item Veto Act in NTEU v. United States, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996), "standing requires that the plaintiff have suffered an injury, not merely that the plaintiff can identify some way in which the challenged action hypothetically affects them."

the ripeness doctrine requires that

Furthermore, ~~while plaintiffs may deem it prudent to resolve their constitutional challenge "in an orderly manner now, rather than scrambling to do so only after a cancellation is in effect and Congress has failed to disapprove it" (Pl. Memo, p. 23), the constitutional law of the land is precisely the opposite. The Supreme Court repeatedly has admonished that, under Article III,~~ federal courts should refrain from deciding constitutional questions ~~unless they cannot avoid doing so. In the absence of injury in fact to plaintiffs, and~~

in the absence of a concrete controversy

In this case,

until the President exercises the cancellation authority conferred on him by the Line Item Veto Act and a cancellation becomes effective, there is no ~~need for the Court to consider or resolve plaintiffs' challenge to the constitutionality of the President's exercise of that authority. Accordingly,~~

concrete controversy and

this case is not ripe.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

We demonstrated in our opening brief (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ["Def. Memo"], pp. 14-17) that plaintiffs failed to allege they have suffered, or certainly will suffer, concrete personal injury inflicted by the defendants or any other federal official. Although the Line Item Veto Act provides that a Member of Congress may bring an action in this Court seeking declaratory or injunctive relief on the ground that the Act is unconstitutional (2 U.S.C. 692(a)), we argued that ~~plaintiffs' failure to show~~

the absence of

concrete injury ~~defeats their~~

means that the plaintiffs do not have

standing to sue, because such a

an injury ~~showing~~ is, under Article III, an "'irreducible minimum'" requirement. United Food & Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996).

In response, plaintiffs ~~argue~~ in support of this position that "the existence" of the Line Item Veto Act "injures the plaintiffs (and the public interest) now, by invading Members' rights and powers in the currently ongoing process of formulating and passing legislation, regardless of when or why the President first actually vetoes an item." Pl. Memo, p. 12. Plaintiffs have submitted declarations ~~purporting to substantiate these alleged present injures~~.

However, plaintiffs' declarations do not demonstrate plaintiffs are suffering a here-and-now concrete injury under the Line Item Veto Act. ~~inflicted by defendants or the President.~~ Moreover, the precedents upon which plaintiffs rely do not support their argument that they have suffered or certainly will suffer cognizable injury under Article III.

A. The Line Item Veto Act Has No Present Effect on Plaintiffs' Votes for Appropriations Laws

Contrary to plaintiffs' contention, the Line Item Veto Act does not have a "concrete present effect" by "chang[ing] the legal effect of Members' votes on appropriation bills. Pl. Memo, p. 16. There have been no such "votes" alleged by plaintiffs, let alone action by the President to change their legal effect.

close quote?

~~None of the plaintiffs declares that he actually has been "force[d]" by the Act "to authorize the President to select from 'menus'" when passing an appropriation bill, as they argue in their opposition. Id.~~ At most, plaintiffs declare that the Act will affect <u>future</u> votes on appropriation bills. This is ~~clearly~~ not a here-and-now injury.

~~Thus, Senator Byrd declares~~ that the Act "will" alter the meaning of the votes that he and other Members of Congress "will" cast on "the final passage of appropriation bills." Declaration of Senator Robert C. Byrd, dated January 24, 1997 ["Byrd Decl."], ¶18. It is only when a bill subject to the Act "is presented for a vote on final passage in the Senate" that Senator Byrd and Senator Moynihan claim the Act changes the legal effect of their votes. Id., ¶19; Declaration of Senator Daniel Patrick Moynihan, dated January 24, 1997 ["Moynihan Decl."], ¶22.

Similarly, Senator Levin declares that his vote on appropriation bills will be affected by the Act "in a circumstance in which I vote for a bill on final passage that is subject to the Line Item Veto Act and that contains one or more provisions which I support and which have been the result of various negotiations." Declaration of Senator Carl Levin, dated January 24, 1977 ["Levin Decl."], ¶6.B.a. Senator Levin does not declare that this "circumstance" has occurred. Instead, he avers that, "[w]hen that bill is presented to the President, the President will have the power to approve it while cancelling the provision or provisions which I concluded had warranted my affirmative vote for the entire bill." Levin Decl., ¶6.B.a. "If the President cancels one or more of those provisions, that ~~cancellation would change the effect of my vote under the~~

~~Constitution." Id. Thus, like Senator Byrd, Senator Levin does not identify a here-and-now injury inflicted by the President.~~

1183

Article III requires that plaintiffs allege a present or certainly impending action of defendants under the Line Item Veto Act to change the legal effect of their votes on appropriation bills. They have not done so.

B. The Fact That Plaintiffs Must Take the Line Item Veto Act "Into Account" Does Not Constitute Cognizable Injury

~~We do not dispute plaintiffs' contention that~~ the Line Item ~~Veto Act "affects" plaintiffs and other Members of Congress (emphasis added).~~ See Pl. Memo, pp. 16-17. ~~This~~ it may very well be true, as plaintiffs argue, that the Act, "merely by being in force, affects Members' powers in the formulation of legislation, because they must take the item-veto power into account at that time, regardless of when or how it is later used." ~~Id.~~ ~~See Byrd Decl., ¶21; Declaration of Mark O. Hatfield, dated January 22, 1997, ¶4; Levin Decl., ¶¶4, 6; Moynihan Decl., ¶18; Declaration of David Skaggs, dated January 25, 1997, ¶¶4, 6; Declaration of Henry A. Waxman, dated January 23, 1997, ¶4.~~

But the fact that plaintiffs must take the Line Item Veto Act "into account" is not cognizable injury under Article III. ~~Plaintiffs and other~~ Members of Congress must take into account a variety of pressures and influences that affect them as

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~~[1] None of the other declarations deal with the alleged impact of the Line Item Veto Act on the legal effect of plaintiffs' votes on appropriation bills.~~

legislators -- from the Executive Branch, from colleagues in Congress, from constituents, and from public opinion. Many laws that are passed, and actions taken by the Executive Branch to execute those laws, may "affect" the power relationship between the political branches and the formulation of legislative strategy by individual Members of Congress. In Harrington v. Bush, 553 F.2d 190, 210-214 (D.C. Cir. 1977), the District of Columbia Circuit expressly held that a claim of injury based on the bare impact of a federal law on the legislative process is precisely the sort of abstract, generalized grievance about constitutional governance and the overall effectiveness of a legislator that does not establish standing under Article III. See Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217, 220 (1974).

None of the District of Columbia Circuit cases plaintiffs cite (Pl. Memo, pp. 13-15) supports the proposition that the mere existence of a challenged law which "affects" a Member of Congress is cognizable injury under Article III. In Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), aff'd, 14 F.3d 623 (D.C. Cir. 1994), members of the House of Representatives sued the Clerk of the House, who is responsible for tallying and reporting the votes of the House Committee on the Whole, and the five Delegates to the House (817 F. Supp. at 130 n. 5), challenging the votes the Delegates were casting in the Committee on the Whole under a rule adopted by the House. Plaintiffs alleged that, under the challenged House rule, they were being denied a vote carrying weight proportional to their states' population. 817 F. Supp. at 137.

This Court held that plaintiffs had alleged cognizable injury under Article III, because the challenged rule already had been implemented through defendants' conduct and plaintiffs' concrete loss of a proportional vote had occurred. 817 F. Supp. at 137.[2] Neither the named defendants nor the President have taken action under the Line Item Veto Act to inflict comparable injury on plaintiffs.

In Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985), members of the House of Representatives sued the House, the United States Senate, the Speaker of the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate, alleging that defendants injured them by allowing the Tax Equity and Fiscal Responsibility Act of 1982 to originate in the Senate, in violation of the Origination Clause of the Constitution. One of the plaintiffs had submitted a resolution in the House, which was not adopted, to return to the Senate without further action the bill which became the Act, because the bill had started out in the House as a tax reduction measure but had been amended in the Senate to become a tax revenue measure. 733 F.2d at 949-949.

The District of Columbia Circuit held that, because defendants refused to adopt the resolution returning the House

[2] On appeal, plaintiffs' standing was not challenged. 14 F.3d at 625.

bill to the Senate without further action, and the bill became law, plaintiffs actually had been deprived of the concrete opportunity to vote on a tax revenue measure in the manner prescribed by the Constitution, which was cognizable injury. 733 F.2d at 951, 954. In this case, No similar injury has been inflicted ~~by the named defendants or the President~~ on plaintiffs under the Line Item Veto Act.

In Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983), members of the House of Representatives sued the Speaker of the House, the Majority Leader, the Chairman of the Democratic Caucus, the Democratic Steering and Policy Committee, and the Democratic Caucus (699 F.2d at 1167 n. 1), alleging that defendants systematically discriminated against them by providing them with fewer seats on House committees and subcommittees than they were proportionately owed. 699 F.2d at 1167. The District of Columbia Circuit held that defendants' action in adopting a House resolution allotting committee and subcommittee seats already had caused concrete dilution of plaintiffs' voting power and was cognizable injury. Id., at 1169. There has been no comparable action taken by defendants or the President ~~against plaintiffs~~ under the Line Item Veto Act.

In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), 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

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Finally, in Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986), which plaintiffs say is "indistinguishable on the standing issue from the present case" (Pl. Memo, p. 15), members of Congress and the National Treasury Employees Union separately sued the government to challenge the constitutionality of the Gramm-Rudman-Hollings Act. In accordance with the Act, all spending increases provided by earlier legislation, including cost-of-living adjustments for federal retirees, were temporarily suspended, the Comptroller General issued a report specifying budget reductions that would have to be made during the balance of the fiscal year, and the President issued a "sequestration" order permanently suspending spending increases and sequestering new budget authority that would cause the federal budget to exceed specified levels.

This Court held that these concrete actions by the government -- and not the mere existence of the Gramm-Rudman-Hollings Act -- effectively "nullif[ied] plaintiffs' votes on th[e] earlier legislation" and gave the congressional plaintiffs standing. 626 F. Supp. at 1382.[3] Again, no such actions have been taken against plaintiffs by the named defendants or the President under the Line Item Veto Act.

These cases demonstrate that some palpable event~~, and not merely a legislator's subjective fear about, or "taking into account" the consequences of, a particular law,~~ is necessary to constitute cognizable injury under Article III. As the District of Columbia Circuit explained in Harrington v. Bush, supra, 553 F.2d at 213, a "'specific'" and "'objective'" test for congressional standing is the minimum necessary to protect the courts from becoming embroiled in ~~the~~ political disputes. ~~morass that is always hovering about when Members of Congress sue the Executive Branch~~. If a claim of injury does not meet such a quantifiable test, the courts will find themselves speculating about the interrelationships of the political branches in what is essentially a factual vacuum.

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Therefore, plaintiffs ~~cannot claim~~ standing based merely on the unexercised authority conferred by that Act. As this Court observed in rejecting the claims of plaintiffs to have standing to challenge the Line Item Veto Act in NTEU v. United States, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996), "standing requires that the plaintiff have suffered an injury, not merely that the plaintiff can identify some way in which the challenged action hypothetically affects them."

C. The President Has Not Nullified Plaintiffs' Votes

Finally, plaintiffs' third claim of injury -- that "when the President does cancel an item, he is both nullifying Members' votes for that item and repealing a duly enacted law" (Pl. Memo, p. 18) -- ~~plainly~~ is not based on any actions the President has taken, is taking, or imminently will take against plaintiffs under the Line Item Veto Act. It is not a claim of present injury. Instead, it is a supposition based on future action. As we have established, such suppositions do not satisfy Article

1183

III's requirement of present or certainly impending concrete injury to support standing to sue.[4]

II. THE ISSUES PRESENTED BY PLAINTIFFS ARE NOT RIPE FOR ADJUDICATION UNDER ARTICLE III

We showed in our opening brief that plaintiffs' constitutional challenge to the Line Item Veto Act is not ripe for adjudication under Article III, because the President has not exercised the cancellation authority conferred on him by the Act, and no one knows whether or when he will. Def. Memo, pp. 26-29. Therefore, there is no present "case" or "controversy" pending before the Court.

Plaintiffs respond that "the proper time to resolve" their constitutional challenge "is now." Pl. Memo, p. 20. They ~~claim~~ state that they "are suffering present injury," the "issues are purely legal and will not be clarified by further factual development," and "failure to resolve the constitutional issue before the President vetoes an item will leave that item -- and other parts of any

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[4] Plaintiffs ~~argue~~ state that the doctrine of equitable discretion does not apply in this case because it is a prudential rather than a constitutional doctrine. Pl. Memo, p. 24. But, as this Court has recognized, the doctrine is founded upon constitutional separation of powers concerns: "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." Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C.), appeal docketed, No. 95-5323 (D.C. Cir. Sept. 25, 1995). The separation of powers concerns informing the doctrine of equitable discretion are a matter of such concern that the doctrine prevents judicial intervention "even when 'such a disposition would render a constitutional question unreviewable.'" Id., at 2. Thus, regardless whether Congress authorized Members of Congress to bring an action, Congress cannot require the Court to exercise its equitable powers when the Court is concerned about its proper role vis-a-vis the legislative branch.

Rather, the ripeness doctrine requires that constitutional issues be presented in a concrete factual context so that questions may be resolved in a meaningful manner.

appropriation or other bill to which it was attached -- under the regime created by the Act." Id.

But, as we showed in part I of this reply, plaintiffs are not "suffering present injury." And it is a matter of speculation whether or when they will suffer injury in the future. First, Congress may exempt future laws from the operation of the Line Item Veto Act. Second, even if the President were to exercise the cancellation authority conferred on him by the Act, any cancellation is subject to override by the enactment of a disapproval bill. "Ripeness * * * shares the constitutional requirement of standing that an injury in fact be certainly impending," NTEU v. United States, supra, 101 F.3d at 1427, and the absence of a present or certainly impending injury in this case proves it is not ripe.

In this case,

Moreover, simply because the issues plaintiffs seek to raise are purely legal does not mean they are ripe. ~~On the contrary, it is the long-standing policy of the federal courts not to reach and decide novel and complex constitutional questions, such as those raised by plaintiffs, unless it is absolutely necessary to do so. United States v. NTEU, 115 S. Ct. 1003, 1019 (1995); Ashwander v. TVA, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). It is not absolutely necessary to reach and decide plaintiffs' constitutional claims. That is particularly true where, as here,~~ there is simply no factual context within which to decide those claims. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 139-140 (1974).

~~Finally, the "cloud" plaintiffs say they see hanging over future spending and tax laws is not "created by the Act" (Pl. Memo, p. 20). It has been created by plaintiffs. If and when the authority conferred by the Act is exercised by the President and becomes effective with respect to dollar amounts, items, or benefits in future spending and tax laws, this Court will be available to decide any constitutional issues presented.~~

CONCLUSION

For these reasons, and the reasons defendants gave in our opening brief, 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

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)

Standing
Ripeness

REPLY TO PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

In our opening brief, we demonstrated that plaintiffs lack Article III standing to sue, because they failed to allege that they have suffered concrete injury inflicted by the defendants or any other federal official. We also showed that plaintiffs' constitutional challenge to the Line Item Veto Act is not ripe under Article III, because the Act merely authorizes the President to cancel dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits in future spending and tax laws. At the present time, the President has not exercised this authority, and no one knows whether or when he will. Even if the President exercises the cancellation authority conferred on him by the Act, that cancellation may be nullified by a disapproval bill enacted by Congress. In this speculative environment about the operation of the Line Item Veto Act, plaintiffs' lawsuit is really a request for an advisory opinion, which Article III forbids federal courts from rendering.

1184

Plaintiffs, in their opposition and supporting declarations, claim that the Line Item Veto Act already "affects" the way they conduct themselves as legislators and the way they deal with the Executive Branch, and they argue that this gives them standing. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment ["Pl. Memo"], pp. 12-18. Similarly, and for reasons of "prudence," plaintiffs contend that the present impact of the Act on the formulation of appropriations legislation makes this case constitutionally ripe. Id., p. 23.

~~But, as we shall shew~~, Plaintiffs have failed to demonstrate a here-and-now concrete injury inflicted by defendants or the President under the Line Item Veto Act. Plaintiffs' declarations that the Act "affects" them, and that it is an important factor they must "take * * * into account" in representing their constituents (Pl. Memo, p. 16), reflect no more than the reality of the life of a legislator, who must "take into account" a myriad of factors from a multitude of sources. The declarations do not establish cognizable injury under Article III. As this Court observed in rejecting the claims of non-congressional plaintiffs to have standing to challenge the Line Item Veto Act in NTEU v. United States, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996), "standing requires that the plaintiff have suffered an injury, not merely that the plaintiff can identify some way in which the challenged action hypothetically affects them."

Furthermore, while plaintiffs may ~~deem it prudent~~ desire to resolve their constitutional challenge "~~in an orderly manner~~ now," rather than scrambling to do so only after a cancellation is in effect and Congress has failed to disapprove it" (Pl. Memo, p. 23), the constitutional law of the land is precisely the opposite. ~~The Supreme Court repeatedly has admonished that, under Article III,~~ federal courts should refrain from deciding constitutional questions ~~unless they cannot avoid doing so.~~ in the absence of a concrete controversy. ~~In the absence of injury in fact to plaintiffs, and~~ until the President exercises the cancellation authority conferred on him by the Line Item Veto Act and a cancellation becomes effective, ~~there is no need for the Court to consider or resolve plaintiffs' challenge to the constitutionality of the President's exercise of that authority.~~ ~~Accordingly,~~ this case is not ripe.

This desire standing alone, does not meet Art III standing requirements. The ripeness doctrine req's that,

in this case,

There is no concrete controversy & the case is not ripe.

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

We demonstrated in our opening brief (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ["Def. Memo"], pp. 14-17) that plaintiffs failed to allege they have suffered, or certainly will suffer, concrete personal injury inflicted by the defendants or any other federal official. Although the Line Item Veto Act provides that a Member of Congress may bring an action in this Court seeking declaratory or injunctive relief on the ground that the Act is unconstitutional (2 U.S.C. 692(a)), we argued that plaintiffs' failure to show concrete injury defeats their standing to sue, because such a showing is, under Article III, an "'irreducible minimum'" requirement. United Food & Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996).

In response, plaintiffs argue that "the existence" of the Line Item Veto Act "injures the plaintiffs (and the public interest) now, by invading Members' rights and powers in the currently ongoing process of formulating and passing legislation, regardless of when or why the President first actually vetoes an item." Pl. Memo, p. 12. Plaintiffs have submitted declarations purporting to substantiate these alleged present injures.

However, plaintiffs' declarations do not demonstrate plaintiffs are suffering a here-and-now concrete injury inflicted by defendants or the President. Moreover, the precedents upon which plaintiffs rely do not support their argument that they have suffered or certainly will suffer cognizable injury under Article III.

A. The Line Item Veto Act Has No Present Effect on Plaintiffs' Votes for Appropriations Laws

Contrary to plaintiffs' contention, the Line Item Veto Act does not have a "concrete present effect" by "chang[ing] the legal effect of Members' votes on appropriation bills. Pl. Memo, p. 16. There have been no such "votes" alleged by plaintiffs, let alone action by the President to change their legal effect. None of the plaintiffs declares that he actually has been "force[d]" by the Act "to authorize the President to select from 'menus'" when passing an appropriation bill, as they argue in their opposition. Id. At most, plaintiffs declare that the Act will affect future votes on appropriation bills. This is clearly not a here-and-now injury.

Thus, Senator Byrd declares that the Act "will" alter the meaning of the votes that he and other Members of Congress "will" cast on "the final passage of appropriation bills." Declaration of Senator Robert C. Byrd, dated January 24, 1997 ["Byrd Decl."], ¶18. It is only when a bill subject to the Act "is presented for a vote on final passage in the Senate" that Senator Byrd and Senator Moynihan claim the Act changes the legal effect of their votes. Id., ¶19; Declaration of Senator Daniel Patrick Moynihan, dated January 24, 1997 ["Moynihan Decl."], ¶22.

Similarly, Senator Levin declares that his vote on appropriation bills will be affected by the Act "in a circumstance in which I vote for a bill on final passage that is subject to the Line Item Veto Act and that contains one or more provisions which I support and which have been the result of various negotiations." Declaration of Senator Carl Levin, dated January 24, 1977 ["Levin Decl."], ¶6.B.a. Senator Levin does not declare that this "circumstance" has occurred. Instead, he avers that, "[w]hen that bill is presented to the President, the President will have the power to approve it while cancelling the provision or provisions which I concluded had warranted my affirmative vote for the entire bill." Levin Decl., ¶6.B.a. "If the President cancels one or more of those provisions, that cancellation would change the effect of my vote under the

Constitution." Id. Thus, like Senator Byrd, Senator Levin does not identify a here-and-now injury inflicted by the President.[1]

Article III requires that plaintiffs allege a present or certainly impending action of defendants under the Line Item Veto Act to change the legal effect of their votes on appropriation bills. They have not done so.

B. The Fact That Plaintiffs Must Take the Line Item Veto Act "Into Account" Does Not Constitute Cognizable Injury

~~We do not dispute plaintiffs' contention that the Line Item Veto Act "affects" plaintiffs and other Members of Congress (emphasis added). See Pl. Memo, pp. 16-17. Thus,~~ It may very well be true, as plaintiffs argue, that the Act, "merely by being in force, affects Members' powers in the formulation of legislation, because they must take the item-veto power into account at that time, regardless of when or how it is later used." Id. See Byrd Decl., ¶21; Declaration of Mark O. Hatfield, dated January 22, 1997, ¶4; Levin Decl., ¶¶4, 6; Moynihan Decl., ¶18; Declaration of David Skaggs, dated January 25, 1997, ¶¶4, 6; Declaration of Henry A. Waxman, dated January 23, 1997, ¶4. okay to keep in

But the fact that plaintiffs must take the Line Item Veto Act "into account" is not cognizable injury under Article III. Plaintiffs and other Members of Congress must take into account a variety of pressures and influences that affect them as

[1] None of the other declarations deal with the alleged impact of the Line Item Veto Act on the legal effect of plaintiffs' votes on appropriation bills.

legislators -- from the Executive Branch, from colleagues in Congress, from constituents, and from public opinion. Many laws that are passed, and actions taken by the Executive Branch to execute those laws, may "affect" the power relationship between the political branches and the formulation of legislative strategy by individual Members of Congress. In Harrington v. Bush, 553 F.2d 190, 210-214 (D.C. Cir. 1977), the District of Columbia Circuit expressly held that a claim of injury based on the bare impact of a federal law on the legislative process is precisely the sort of abstract, generalized grievance about constitutional governance and the overall effectiveness of a legislator that does not establish standing under Article III. See Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217, 220 (1974).

None of the District of Columbia Circuit cases plaintiffs cite (Pl. Memo, pp. 13-15) supports the proposition that the mere existence of a challenged law which "affects" a Member of Congress is cognizable injury under Article III. In Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), aff'd, 14 F.3d 623 (D.C. Cir. 1994), members of the House of Representatives sued the Clerk of the House, who is responsible for tallying and reporting the votes of the House Committee on the Whole, and the five Delegates to the House (817 F. Supp. at 130 n. 5), challenging the votes the Delegates were casting in the Committee on the Whole under a rule adopted by the House. Plaintiffs alleged that, under the challenged House rule, they were being denied a vote carrying weight proportional to their states' population. 817 F. Supp. at 137.

This Court held that plaintiffs had alleged cognizable injury under Article III, because the challenged rule already had been implemented through defendants' conduct and plaintiffs' concrete loss of a proportional vote had occurred. 817 F. Supp. at 137.[2] Neither the named defendants nor the President have taken action under the Line Item Veto Act to inflict comparable injury on plaintiffs.

In Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985), members of the House of Representatives sued the House, the United States Senate, the Speaker of the House, the President of the Senate, the Clerk of the House, and the Secretary of the Senate, alleging that defendants injured them by allowing the Tax Equity and Fiscal Responsibility Act of 1982 to originate in the Senate, in violation of the Origination Clause of the Constitution. One of the plaintiffs had submitted a resolution in the House, which was not adopted, to return to the Senate without further action the bill which became the Act, because the bill had started out in the House as a tax reduction measure but had been amended in the Senate to become a tax revenue measure. 733 F.2d at 949-949.

The District of Columbia Circuit held that, because defendants refused to adopt the resolution returning the House

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[2] On appeal, plaintiffs' standing was not challenged. 14 F.3d at 625.

bill to the Senate without further action, and the bill became law, plaintiffs actually had been deprived of the concrete opportunity to vote on a tax revenue measure in the manner prescribed by the Constitution, which was cognizable injury. 7?3 F.2d at 951, 954. No similar injury has been inflicted by the named defendants or the President on plaintiffs.

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Therefore, plaintiffs cannot claim standing based merely on the unexercised authority conferred by that Act. As this Court observed in rejecting the claims of plaintiffs to have standing to challenge the Line Item Veto Act in NTEU v. United States, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996), "standing requires that the plaintiff have suffered an injury, not merely that the plaintiff can identify some way in which the challenged action hypothetically affects them."

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Finally, plaintiffs' third claim of injury -- that "when the President does cancel an item, he is both nullifying Members' votes for that item and repealing a duly enacted law" (Pl. Memo, p. 18) -- plainly is not based on any actions the President has taken, is taking, or imminently will take against plaintiffs under the Line Item Veto Act. It is not a claim of present injury. Instead, it is a supposition based on future action. As we have established, such suppositions do not satisfy Article

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CONCLUSION

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Trey Schroeder's handwritten notes. (1 page)	n.d.	P5 1185
002a. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Senate-Passed Separate Enrollment Line Item Veto/S.4. (4 pages)	03/27/1995	P5 1186
002b. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to H.R.2. (~~11~~ 12 pages)	03/27/1995	P5 1187
002c. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Legislation/H.R.2. (4 pages)	06/13/1995	P5 1188
003. memo	For Jack Quinn from Walter Dellinger. Subject: Signing Statement for Line Item Veto Legislation. (1 page)	03/28/1996	P5 1189

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Clinton Presidential Records
Counsel's Office
Trey Schroeder
OA/Box Number: 11601

FOLDER TITLE:

Line Item Veto Legislative Materials [1]

Van Zbinden
2007-0624-F
vz1237

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]

Who shd argue ??

- only when there's been a veto
That's not been overridden may an
injured party have standing

Alan Kreczko 69111
Chuck Easley 56206
Judy Fletcher
NSS

Human Radiation

Limited expansion of the P's power on direct spending and taxes.

Merits: want to view as evolutionary rather than revolutionary. Inherent powers of impoundment originally suggested in early 70s; Congress responded w/ procedural rules; This act is an expression of Congressional intent; each appropriation is attached to an expression that says we've allocated this $ but you can spend less or not spend it at all - same old business but just in a refined way.

Merits: will need to downplay the line item veto as a tool → really a misnomer → in our legal interest to construe it v. narrowly

we move up in a ... of evolutionary order

... still have ...ission power; ...endment control still in force.

... of statement ??

BD: we won't want to unnecessarily downplay the significance

motion to dismiss due wk from Thursday
- const'lly there's no standing until the P acts
- case isn't ripe

Recusal? prob. not a serious issue plus Jackson's as good as we'll get

2/26 merits brief due

... al challenge can be made where executive ... it the act
→ we const'l.

- BD → will wk w/ DOJ to provide examples of how the act wks - P can't reorder priorities; C defines what an item is

→ limits P's power → lockbox mechanism also keeps a lot of definitional power away from the P

Dellinger
Johnsen
Roseborough
Shiffrin
Delahunty
Small
Murphy
Reading File
Files

U. S. Department of Justice

Office of Legal Counsel

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Office of the Assistant Attorney General

Washington, D.C. 20530

March 27, 1995

MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger
Assistant Attorney General

Re: Senate-Passed Separate Enrollment Line Item Veto/S.4

This is to provide you with our views on S.4, "The Separate Enrollment and Line Item Veto Act of 1995," as passed by the Senate, see 141 Cong. Rec. S4484-85 (daily ed. Mar. 23, 1995). We have commented on prior versions of this legislation, and more generally on the constitutionality of "separate enrollment" provisions in line item veto proposals. See Memorandum for Abner J. Mikva, Counsel to the President, and Alice M. Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, re: Line Item Veto Proposals/S.4, S.14 and S.137 (Mar. 16, 1995) (the March 16 OLC Memo). As passed by the Senate, S.4 incorporates an amendment, introduced by Senator Spencer Abraham, that addresses one of the constitutional concerns we identified in that memorandum. Although the bill, as so amended, is distinctly improved from a constitutional standpoint, we continue to believe that it may fail to survive judicial review. Accordingly, in the interest of ensuring that Congress passes a line item veto measure that has the greatest chance of being sustained, we recommend that the House-Senate Conference report out a measure that does not include a separate enrollment provision.

In prior versions, S.4 provided only that, after a covered bill had been passed in the same form by both Houses, the enrolling clerk of the House in which the measure originated was to disaggregate the various items in the measure for presentment, as separate "bills," to the President. Under Senator Abraham's amendment to S.4, after the clerk has disaggregated the bill into items that are to be considered separate bills,

> [t]he new bills resulting from the disaggregation . . . shall be immediately placed on the appropriate calendar in the House of origination, and upon

passage, placed on the appropriate calendar in the other House. They shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment.

Sec. 4(b) (emphasis added). If passed by both Houses in this manner, the bills are then to be presented to the President.

In the March 16 OLC Memo, we advised you that the separate enrollment procedure envisaged in earlier bills -- which did not contemplate another vote by both Houses after the enrolling clerk had disaggregated the bill -- would "raise[] very difficult questions" under the Presentment Clause, U.S. Const. art. I, § 7, cl. 2, and might well not be sustained. March 16 OLC Memo at 4. Specifically, we stated that

> [o]n what seems to us to be the best reading of the Presentment Clause, what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

March 16 OLC Memo at 4. In finding such separate enrollment procedures to be constitutionally dubious, we reached the same conclusion that our Office had expressed ten years earlier, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 30 (1985).

The Abraham amendment attempts to address this difficulty by requiring that, after the enrolling clerk of the originating House has disaggregated a covered bill, both Houses vote on the disaggregated bills en bloc. The evident purpose of the amendment is to ensure that both Houses have voted on the bills that are presented to the President in exactly the same form as they are presented to him. As we pointed out in our earlier memorandum, the amendment improves the chances that S.4 will be sustained. See March 16 OLC Memo at 4.

Nevertheless, we continue to believe that there is a serious litigation risk that a separate enrollment procedure, even as found in amended S.4, would be held to be unconstitutional. If nothing else, the procedure of passing a large number of "bills" in a single, en bloc vote represents a significant departure from what has been the ordinary congressional practice under the Presentment Clause for over two hundred years. In this area, the courts have given considerable weight to past practice in deciding what the Constitution permits or requires. See, e.g., The Pocket Veto Case, 279 U.S. 655, 689-90 (1929).[1] Second, the scope of Congress' authority -- if any -- to determine what shall constitute a "bill" for purposes of the Presentment Clause appears to be wholly untested. Third, the language of the Abraham amendment could be construed as attempting to require

[1] We are aware that Congress' practice has not been absolutely unvarying, and that in particular circumstances a single vote may be deemed to apply to two distinct bills. See 141 Cong. Rec. S4084 (daily ed. Mar. 16, 1995) (remarks of Sen. Coats) (citing Rule XLIX of the Rules of the House of Representatives).

by statute, that each House follow certain procedural rules (e.g., that amendments not be permitted when the disaggregated bills are being voted on en bloc). However, it is questionable whether an Act of Congress could impose internal procedures on the Houses. See March 16 OLC Memo at 5, n.1; Laurence H. Tribe, American Constitutional Law § 4-13 at 267 (2d ed. 1988).[2] Finally, as a practical matter, under any separate enrollment procedure, the President could not be expected physically to sign each and every one of the numerous separate "bills" that were presented to him. While we believe that the President can comply with the "signing" requirement of article I, § 7 even if he does not affix his signature at the end of every single, disaggregated bill, cf. Hill v. United States, 288 F. 192, 193 (7th Cir. 1923); Signature of Secretary of the Treasury, 1 Op. Att'y Gen. 670 (1824), the practical necessity of en bloc Presidential signing -- as well as en bloc congressional voting -- would raise another constitutional issue for the courts.

Accordingly, we believe that if Congress enacted a "separate enrollment" form of the line item veto -- such as the Senate-passed S.4 -- there would be a serious risk that the measure would not survive judicial review. By contrast, line item veto measures -- such as the House-passed bill, H.R. 2 -- that delegate to the President the authority to withhold the expenditure of appropriated funds in certain circumstances are, in our judgment, very likely to be upheld. To the extent that such measures pose constitutional questions, they do so in two main areas -- the delegation of congressional power to the President, and separation of powers doctrine. These are areas, however, in which the Court has a well-settled jurisprudence. We have carefully reviewed such proposals in light of the Court's decisions, and have concluded that they would very likely survive judicial review. See Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Before the Subcomm. on the Constitution, Federalism, and Property Rights, Senate Judiciary Comm., Line Item Veto Hearing (Jan. 24, 1995) (the January 24 Statement).

We note, however, that H.R. 2 itself poses a constitutional problem that can, and should, be cured. As explained in the January 24 Statement, the language of the targeted tax provisions of that bill is objectionable as drafted. The use of the terms "veto" and "repeal" in those provisions raises constitutional concerns that are not posed by the budget authority provisions of the bill. Article I, § 7, cl. 2 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. But H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law. As for the use of the word "repeal," it suggests that the President is being given the unilateral power to change existing law. A court might well conclude that this would amount to an unconstitutional delegation of authority to the President, and a violation of the plain textual provisions of article I, § 7, cl. 2 governing the manner in which laws are to be changed (specifically, through passage of amending legislation by both Houses of Congress and presentment to the President for his approval).

[2] If, contrary to our advice, the House-Senate Conference adopts a separate enrollment procedure, we would recommend that it add a provision clarifying that each House reserves the right to alter the procedure that it is to follow.

To cure this and other flaws, we attach proposed mark-ups of H.R. 2 that reflect the changes we would recommend in that bill.[3]

It is clearly in the interests of the Administration and of congressional proponents of the line item veto alike to enact legislation that has the greatest possible chance of being sustained in the courts. We recommend, therefore, that the House-Senate Conference report out a line item veto bill that does not include a separate enrollment procedure.

(Attachments)

[3] The mark-ups also include several other suggestions for improving H.R. 2: first, a subsection reserving to each House the right to alter the procedural rules adopted in the bill; second, language slightly modifying the elements of what must be set forth in the Presidential Special Message reporting the rescission of a budget authority or targeted tax benefit; and, third, a severability clause.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 27, 1995

MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger WED
Assistant Attorney General

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

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

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

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

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

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

PROPOSAL # 1: "RESCISSION" OF TARGETED TAX BENEFITS

Sec. 2 LINE ITEM VETO AUTHORITY

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

(1) determines that --

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

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

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

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

Sec. 3 LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED

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

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

SEC. 4 DEFINITIONS

As used in this Act:

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

(A) which does not have a preamble;

(B)(i) **in the case of a special message regarding rescissions of discretionary budget authority**, the matter after the enacting clause of which is as follows: "That Congress disapproves each rescission of discretionary budget authority of the President as submitted by the President in a special message on __," the blank space being filled in with the appropriate date and the public law to which the message relates; and

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

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

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

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

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

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

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

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

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

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

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

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

SEC. 8 SEVERABILITY

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

PROPOSAL # 2: "SUSPENSION" OF TARGETED TAX BENEFITS

1187

Section 2 LINE ITEM VETO AUTHORITY

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

(1) determines that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

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

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

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

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

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

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

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

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

SEC. 8 SEVERABILITY

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

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

June 13, 1995

MEMORANDUM FOR

ABNER J. MIKVA
COUNSEL TO THE 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 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.

1188

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 disaggreagated from one another, enrolled as separate bills, and then voted on en bloc by both Houses. Thereafter, each separately enrolled bill would be presented to the President, who could then veto any of the separate bills. In our view, the separate enrollment procedure of the Senate legislation raises complex questions under the Presentment Clause of the Constitution (Article I, section 7 clause 2) that simply are not posed by the delegation of power to the President in H.R. 2 to rescind discretionary budget authority.

B. Targeted Tax Benefits

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

1. Replacing the Word "Veto"

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

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

2. Replacing the Word "Repealed"

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

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

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

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

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

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

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 28, 1996

MEMORANDUM FOR JACK M. QUINN
COUNSEL TO THE PRESIDENT

From: Walter Dellinger WED
Assistant Attorney General

Re: Signing Statement for Line Item Veto Legislation

I am suggesting the following language to OMB for consideration for inclusion in the President's statement on signing the Line Item Veto Act:

> The carefully defined cancellation authority granted by the bill is a practical and principled means of serving the constitutional balance of powers. The modern congressional practice of presenting the President with omnibus legislation substantially reduces the President's ability to play the role in the enactment of laws that the Constitution intended. This legislation is a useful corrective that returns us closer to the Founders' view of a responsible Executive check on legislative excesses.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. note	To Jack Quinn and Kathy Wallman from Elena Kagan. Subject: "guidelines" for line item veto. (1 page)	12/1996	P5 1190
001b. email	To M.G. Green from Paul Weinstein. Subject: Line-Item Veto. (2 pages)	12/10/1996	P5 1191
002. email	Duplicate of 001b. (2 pages)	12/10/1996	P5 1192 - Dup 1191
003. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [with Jack Quinn note] (2 pages)	03/18/1996	P5 1193
004. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [less Jack Quinn note] (2 pages)	03/18/1996	P5 1194

COLLECTION:
Clinton Presidential Records
Counsel's Office
Trey Schroeder
OA/Box Number: 11601

FOLDER TITLE:
Line Item Veto Legislative Materials [2]

Van Zbinden
2007-0624-F
vz1238

RESTRICTION CODES

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

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

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

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

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

THE WHITE HOUSE
WASHINGTON

Jack + Kathy -

Please look at the attached memo on issuing "guidelines" on the line-item veto. All I've heard is that 1) Gene is seriously considering this proposal and that 2) the OMB Counsel's Office is strongly opposed.

For what it's worth, I think issuing guidelines of this kind would be a terrible idea, for the first reason listed in the "con" section of the memo. We should try to maintain maximum flexibility to use the line-item veto when and where we want. Any guidelines we try to write now — when we are ignorant of specific issues and circumstances we will face in the future — stand a good chance of limiting our ability to use this new weapon.

Elena

WEINSTEIN_P @ A1
12/10/96 07:24:00 PM

Record Type: Record

To: GREEN_MG @ A1@CD@LNGTWY

cc: See the distribution list at the bottom of this message
Subject: Line-Item Veto

Gene: Per your request, the following give the pro and cons for having the President direct OMB to issue guidelines on the scope and authority of the Line-Item Veto:

Pro:

1. Preempts Republican attempts to limit the scope and authority of the Line-Item Veto.

2. Underscores President's commitment to balancing the budget.

3. Consistent with the President's efforts to take unilateral/Executive action on issues important to the American people.

4. Sends message to Congress that the Administration is serious about using the Line-Item Veto and underscores its significance as a negotiating tool in the upcoming budget process.

5. Clears up misunderstandings about the scope and authority of the Line-Item Veto and clarify for the Administration what budget and targeted tax items can be subject to the Line-Item Veto.

Con:

1. Issuing specific guidelines about the scope and authority of the Line-Item Veto now may limit our flexibility in using the Line-Item Veto later in the budget cycle.

2. Issuing guideliines may scare Members of Congress and Republican leadership and provoke them into passing legislation that would curtail the Line-Item Veto.

3. Issuing guidelines may underscore a message that the Line-Item Veto will allow the President to dramatically reduce the budget deficit, when in fact the new authority is very limited.

ps. Melissa, when will the meeting be rescheduled?

Message Copied To:

Rahm Emanuel
Charles E. Kieffer
Charles Konigsberg
Barbara Chow
Elena Kagan
Robert G. Damus
Jacob J. Lew
REED_B @ A1@CD@LNGTWY
FOLEY_M @ A1@CD@LNGTWY
MAZUR_M @ A1@CD@LNGTWY
GREEN_MG @ A1@CD@LNGTWY

Elena —
Please talk to Chuck Konigsberg of OMB. Alice said he's thinking [illegible] Kathy need to help on this. Perhaps you already are in touch. Thanks JQ

1193

THE WHITE HOUSE

WASHINGTON

March 18, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.

is R's deal-breaker issue?

- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.

- The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this definition. In the new draft, Congress gave the Pres. very limited power to identify tax benefits.

- The President will have up to five calendar days to submit cancellations. We had asked for 20 days, but we probably should count ourselves lucky with five: House conferees had wanted a provision requiring the President to submit cancellations on the date of enactment.

- The effective date of the statute is still open, but the likelihood is that the President will not immediately gain veto authority. Some reports say the effective date will be 1997. Other reports say the effective date will be the earlier of 1997 or enactment of a balanced budget. ← Congress picked this

No — though it's going to prevent [illegible] from making much use of the thing

- DOJ has a newfound constitutional concern about the statute's definition of "cancellation." The latest language talks about cancellation as preventing a provision "from taking legal force or effect." DOJ would prefer the phrase "from having legal force or effect." DOJ thinks that its phrasing suggests a suspension, rather than a straight veto, and thus will aid the argument for constitutionality. We have passed on this concern to Republican staff members; we do not know yet if they will change the language.

Note that the non-severability provision to which we previously objected has been dropped.

How serious is this? Will DOJ rec. a veto on it?

No problem — it was fixed. DOJ and I have also made some suggested changes in the Conference Report to bolster the argument that the bill meets constitutional standards.

THE WHITE HOUSE

WASHINGTON

March 18, 1996

EK 1194

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

To: Jack + Kathy (again)

SUBJECT: LINE ITEM VETO

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

Is this a deal-breaker for us?

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.

- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.

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- The effective date of the statute is still open, but the likelihood is that the President will not immediately gain veto authority. Some reports say the effective date will be 1997. Other reports say the effective date will be the earlier of 1997 or enactment of a balanced budget. ← Congress picked this.

No - though it's going to prevent us from making much use of the thing.

COPY

1194

- DOJ has a newfound constitutional concern about the statute's definition of "cancellation." The latest language talks about cancellation as preventing a provision "from taking legal force or effect." DOJ would prefer the phrase "from having legal force or effect." DOJ thinks that its phrasing suggests a suspension, rather than a straight veto and thus will aid the argument for constitutionality. We have passed on this concern to Republican staff members; we do not know yet if they will change the language.

Note that the non-severability provision to which we previously objected has been dropped.

How serious is this? Will any rec. a veto on it?

No problem — it was fixed. DOJ and I have also made some suggested changes in the Conference Report to bolster the argument that the bill meets constitutional standards.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. (2 pages)	03/18/1996	P5 1195
002. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. (2 pages)	03/12/1996	P5 1196

COLLECTION:

Clinton Presidential Records
Counsel's Office
Trey Schroeder
OA/Box Number: 11601

FOLDER TITLE:

Line Item Veto Legislative Materials [3]

Van Zbinden
2007-0624-F
vz1239

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

THE WHITE HOUSE

WASHINGTON

March 18, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.

- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.

- The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this definition.

- The President will have up to five calendar days to submit cancellations. We had asked for 20 days, but we probably should count ourselves lucky with five: House conferees had wanted a provision requiring the President to submit cancellations on the date of enactment.

- The effective date of the statute is still open, but the likelihood is that the President will not immediately gain veto authority. Some reports say the effective date will be 1997. Other reports say the effective date will be the earlier of 1997 or enactment of a balanced budget.

- DOJ has a newfound constitutional concern about the statute's definition of "cancellation." The latest language talks about cancellation as preventing a provision "from taking legal force or effect." DOJ would prefer the phrase "from having legal force or effect." DOJ thinks that its phrasing suggests a suspension, rather than a straight veto, and thus will aid the argument for constitutionality. We have passed on this concern to Republican staff members; we do not know yet if they will change the language.

Note that the non-severability provision to which we previously objected has been dropped.

THE WHITE HOUSE

WASHINGTON

March 12, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO UPDATE

The House made an offer to the Senate last week on line item veto language. We have heard that Republican staff are trying to conclude an agreement ASAP.

We submitted comments on the House offer to the Republican Senate staffers with whom we have been dealing. The most important comments are as follows:

1. We once again objected to so-called "lockbox" language, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. We have said that this provision would make it difficult to enact supplemental appropriations later in the year. We have proposed, as an alternative, the creation of an "emergency reserve fund." When the President strikes a spending item, the amount would be credited to these accounts; Congress could tap the accounts to pay for emergency supplementals and other emergency legislation. So far, Senate staff have rejected this suggestion; they probably will decide to maintain the lockbox mechanism.

2. We objected to a provision making the Act effective only upon enactment of a seven-year balanced budget and sunsetting the Act in 2002. We urged Congress to grant immediate and permanent authority to eliminate wasteful spending.

3. We objected to a provision requiring the President to cancel a spending item on the very day Congress enacts the legislation. Earlier versions of the bill gave the President 10 days to identify items for cancellation; the Administration had recommended 20 days as a more realistic time frame. The time frame provided is especially unworkable given the detailed findings that must accompany cancellations. We urged that if less than 20 days is provided, Congress either pare down the bill's current reporting requirements or permit the President to issue and transmit the required findings at a later date.

4. We objected to the way the House offer defines and identifies targeted tax benefits, which are subject to the President's rescission authority. The House offer defines such a benefit as "any revenue-losing provision which provides a federal income tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries." The offer further provides that nothing

will count as a targeted tax benefit unless it is specifically identified as such in the relevant bill, based on findings made by the Joint Committee on Taxation (JCT). We urged that the definition is impracticable because in most cases, no one can accurately determine the number of persons affected by a tax provision. We also proposed that Congress delegate authority to the President to identify targeted tax benefits on his own.

5. We objected to a nonseverability provision, which will invalidate the entire bill if any part is held unconstitutional.

The House offer cures two constitutional problems we previously had raised. First, this version uses the word "cancel" instead of "veto," as OLC had requested. (We do, however, think that the definition of "cancel" is too vague.) Second, this version provides that the JCT's identification of targeted tax benefits be written into law, thus removing our complaint that Congress cannot delegate power to one of its committees.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	To Charles Konigsberg, Robert Damus, Charles Kieffer, et al. from Charles Konigsberg. Subject: Summary of Comments on House Item Veto Draft. (7 pages)	03/06/1996	P5 1197
002. memo	To Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. (2 pages)	12/05/1995	P5 1198

COLLECTION:

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Counsel's Office
Trey Schroeder
OA/Box Number: 11601

FOLDER TITLE:

Line Item Veto Legislative Materials [4]

Van Zbinden
2007-0624-F
vz1240

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]
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P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

b(1) National security classified information [(b)(1) of the FOIA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

1197

EXECUTIVE OFFICE OF THE PRESIDE

06-Mar-1996 09:19pm

TO: (See Below)

FROM: Charles S. Konigsberg
Office of Mgmt and Budget, LA

SUBJECT: ITEM VETO

FOLLOWING IS A REVISED ANALYSIS OF THE LATEST ITEM VETO DRAFT; I HAVE INCORPORATED COMMENTS RECEIVED ON WEDNESDAY; LET ME KNOW ASAP IF YOU HAVE ANY ADDITIONAL COMMENTS. THANKS.

Summary of comments on House Item Veto Draft
(dated March 4, 1996 -- 1:18pm)

The following provisions could render the item veto ineffective:

1. The lockbox language -- requiring automatic reductions in spending caps -- would impair the ability of the President and Congress to pay for supplemental appropriations; the automatic cap reductions would not permit the President and the Congress to eliminate wasteful spending early in the year and use the savings to pay for necessary additional spending later in the year.

2. Requiring the President to transmit cancellations of wasteful spending on the same day as enactment of spending bills is unrealistic -- especially given the extensive findings and determinations which are required to accompany all cancellations. A period of time -- 10 to 20 days -- following enactment is necessary for the authority to be exercised effectively.

3. The definition of targeted tax benefit is too narrow to be truly effective in eliminating special interest tax provisions; it also fails to delegate any authority to the President to identify special interest provisions.

4. The "nonseverability" provision needlessly makes the authority to cancel discretionary spending dependent on the constitutionality of authority to cancel direct spending and tax provisions.

5. Making the Act effective only upon enactment of a balanced budget agreement, needlessly postpones the availability of

authority which is needed to eliminate wasteful spending. The authority should be made available now and should be applied to unobligated balances from already enacted FY96 bills.

DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--
Preliminary comments on House Item Veto Draft
(dated March 4, 1996 -- 1:18pm):

PROVISIONS WHICH COULD RENDER ITEM VETO INEFFECTIVE:

1. Lockbox: The lockbox language, set forth in [brackets] as new section 1024, would require the President to: reduce the statutory discretionary spending caps to reflect rescissions of discretionary budget authority; and to eliminate from the PAYGO scorecard any positive balance that would otherwise have accrued from applying the item veto to new direct spending or tax benefits.

This is problematic, especially on the discretionary side, because the automatic lowering of spending caps, would make it difficult for the Congress to pay for necessary supplementals later in the year (or to pay for emergency supps which, although not required to be offset, has been the recent pattern).

Suggested improvement in the lockbox mechanism: Provide that the rescinded or canceled amounts be placed in an "emergency reserve" to be available to offset emergency supplementals and other emergency legislation. Although such "emergency legislation" does not legally require offsets, the availability of these emergency reserves might facilitate supplementals and other emergency legislation when needed.

2. Time for transmittal of cancellation message: Earlier versions of item veto had given the President 10 days following enactment of spending/revenue bills to identify items for cancellation; the Administration had recommended 20 days as a more realistic time period. This offer, however, requires that special messages be transmitted "on the same calendar day as enactment of the law to which the cancellation applies."

Especially in the case of discretionary appropriations, this is unrealistic and unworkable. Appropriations legislation often has to be signed immediately upon presentment to the President in order to continue vital government functions; this would leave no time at all to identify wasteful spending in legislative and report language, and to prepare the very detailed findings required for cancellation messages. For discretionary appropriations, the language should provide 20 days following enactment of a bill to prepare cancellation messages (however, it might be workable to transmit cancellation messages on targeted tax benefits, on or near the date of enactment, since they would already be clearly identified in the law).

If less than 20 days is provided, consideration should be given to: (1) paring down the extensive findings required to accompany cancellation messages; and/or (2) permitting most of the findings to be transmitted at a later time than the actual cancellations. If only a few days are provided to review bills, the qualifier "to the maximum extent practicable" should precede the list of required determinations and findings.

5. Definition of Targeted Tax Benefit: The draft language would define targeted tax benefit as "any revenue-losing provision which provides a federal income tax deduction, credit, exclusion or preference to 100 or fewer beneficiaries" with several exceptions; the definition also includes transition rules that provide special treatment to 10 or fewer taxpayers, with exceptions. Congress would identify in the statutory language, provisions falling within this definition -- based upon determinations made by the JCT.

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

The provisions also fails to delegate any authority to the President to identify special interest provisions.

A definition of targeted tax benefit closer to the original Senate definition is preferable -- i.e., causing a revenue loss and "having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

4. Nonseverability: The draft contains in [brackets] a nonseverability provision which would invalidate the entire item veto mechanism if any part of the mechanism -- cancellation of targeted tax benefits, for example -- were to be found unconstitutional. The statute should be severable, so that -- for example -- cancellation of discretionary budget authority could continue, even if cancellation of direct spending or tax benefits is successfully challenged.

3. Effective Dates and Sunset: This Act would become effective upon enactment of a balanced budget (by 2002), and would sunset in FY 2002. Authority to eliminate wasteful spending and special interest tax provisions should be provided immediately -- without delay -- and should be permanent. In addition, in order to be most effective, the cancellation authority should be made applicable to unobligated balances from already enacted FY 1996 appropriations.

ADDITIONAL ISSUES:

o Disapproval bill: is defined as a bill which disapproves every cancellation associated with a particular spending or revenue bill. Is the intention that disapproval bills must reject every cancellation?

o Identifying congressional districts: The draft would require that each cancellation message identify "the specific State and congressional district, if any, affected by the cancellation; and the total number and dollar value of all cancellations imposed during the current session of Congress on the State and congressional district...." This requirement is unduly burdensome and unnecessary: unduly burdensome for OMB which will already face the difficult task of carefully vetting each provision of spending and revenue bills immediately upon presentment; and unnecessary because the objective of the cancellation authority is to eliminate wasteful spending wherever it may occur, without regard to geographic distribution.

o Definition of "item of new direct spending": The phrase "relative to the most recent levels calculated pursuant to section 251 of the Balanced Budget and Emergency Deficit Control act of 1985" incorrectly references section 251; should be 257. Also, the reference to increasing any "Federal financial obligation" has no definitive budget meaning.

o Definition of "cancel": This draft is preferable to earlier drafts because the term "cancel" is substituted for the constitutionally problematic term "veto." However, the definition of "cancel" -- particularly with respect to new direct spending and targeted tax benefits -- is too vague. We recommend the following:

> The term "cancel" means--
> (A) with respect to "new direct spending," withholding the authority to obligate the United States pertaining thereto, and suspension of legal entitlement to claim any benefits or payments deriving therefrom; and
> (B) with respect to "targeted tax benefits," the suspension of legal entitlement to claim any Federal tax deduction, credit, exclusion, preference or other tax benefit deriving therefrom.

o Disapproval bills: are required to be titled "A bill disapproval the recommendations submitted by the President on ________ ....." Use of the term "recommendations" is inaccurate; the special messages are more than mere recommendations. The term "cancellations" would be more appropriate.

DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT

Previous Administration comments which have been incorporated:

(for EOP use only)

note this

o Uses the word "cancel" with respect to direct spending and targeted tax benefits, instead of "veto" which we objected to on constitutional grounds.

o Inserts "new" before "direct spending" in order to clarify.

note this

o JCT's determination of what is a targeted tax benefit would be written into law, thereby apparently solving the potential Chadha problem (earlier version had limited the President's authority based solely on determinations made by the JCT).

clearing (or memo?)

o Latest draft has dropped the Senate provision prohibiting the inclusion of non-emergency items in an emergency bill.

o Deletes the 3-judge court judicial review mechanism but retains the requirement for expedited consideration.

DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--

Time-line under latest House item veto language:

(for EOP use only)

(Session Days)

DAY 1: Date of enactment of spending or revenue bill; President to transmit special messages on the same calendar day (single special message for each Act); cancellation is effective unless disapproved, as outlined below

DAY 5: Disapproval bills, if any must be introduced in House and Senate

7 days following introduction: (day 12) Committees must report disapproval bills

DAY 30: Congressional consideration of the disapproval bill and any conference report thereon must be completed (conferences may be required because it's in order in the House and Senate to strike specific disapprovals, and it's in order in the Senate to add additional disapprovals).

Track 1:

Spending/revenue provisions are cancelled unless, w/in 10 calendar days (excluding Sundays) after the expiration of the congressional review period (above), a disapproval bill is enacted into law bill

Track 2:

In the case of a veto, 5 session days are provided for consideration of the veto message; the spending/revenue provisions are cancelled unless within 10 calendar days the disapproval has become law (due to an override)

DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--DRAFT--

Information which must accompany cancellations:

(for EOP use only)

Message shall specify:

1. Dollar amount of BA, or identify the direct spending or tax benefit.

2. Determination whether the cancellation will reduce the budget deficit.

3. Determination that the cancellation will not impair essential Government functions.

4. Determination that the cancellation will not harm the national interest.

5. Reasons for the cancellation.

6. To the maximum extent practicable, the estimated fiscal, economic, and budgetary effect.

7. All facts circumstances and considerations relating to or bearing upon the cancellation.

8. To the maximum extent practicable, the estimated effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided.

9. The adjustments that will be made to the discretionary spending caps or the PAYGO scorecard and an evaluation of the effects on sequestration.

10. The specific project or governmental function cancelled.

11. The specific State and congressional district affected and the total impact of cancellations during the current session on the State and congressional district.

Distribution:

TO: Charles S. Konigsberg
TO: Robert G. Damus
TO: Charles E. Kieffer
TO: Lisa Kountoupes
TO: Joseph Minarik
TO: Barry B. Anderson
TO: James J. Jukes
TO: Jacob J. Lew
TO: James C. Murr
TO: Harry E. Moran
TO: Betty I. Bradshaw
TO: Elena Kagan
TO: Paul J. Weinstein, Jr

THE WHITE HOUSE

WASHINGTON

December 5, 1995

MEMORANDUM FOR JACK QUINN
KATHY WHALEN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

OMB's statement on the latest House offer regarding the line item veto is generally on target. OLC has reviewed and approved the OMB statement. In this memo, I describe the most important of OMB's proposed changes to the House offer, all of which seem sensible, and suggest two further minor revisions.

It should be noted first that the House's version of the line item veto (the "enhanced rescissions" model), which is retained in the House offer, is much superior to the Senate's version(the "separate enrollment" mechanism). The House version essentially allows the President to rescind or suspend part of a bill he has just signed into law; the Senate version splits up a bill into many different bills and then provides for the President to sign or veto each of them. OLC has opined that the House version raises fewer constitutional difficulties and creates less of an administrative burden.

The most significant concerns, raised by OMB, relating to the House offer are as follows:

1. Lockbox language. The House offer incorporates a Senate provision that would require the President to reduce statutory discretionary spending caps to reflect presidential rescissions (the so-called lockbox provision). OMB points out that this provision would make supplemental appropriations very difficult. It prefers a provision (included in the original House bill) that would authorize the President to propose reductions in the discretionary caps. This seems a sensible proposal.

2. JCT determination of targeted tax benefits. The House offer provides that the Joint Committee of Taxation (JCT) will determine whether a tax provision is a "targeted tax benefit," such that the President can suspend it. OMB's statement notes that this provision is unconstitutional because Congress cannot delegate power to one of its own committees. (Congress could cure this defect by the relatively easy means of incorporating the JCT's determination in the revenue bill at issue.) OMB suggests leaving this determination to the President. This solution is obviously preferable on policy, as well as constitutional, bases.

3. Use of term "veto." The House offer provides that the

President may "veto" spending items or tax benefits. OMB suggests changing this term to "suspend." The reasoning here is that use of the term "veto" will raise red flags as to the bill's constitutionality. This is probably right and should be easy to remedy.

4. Emergency spending point of order. The House offer accepts a Senate provision that prohibits the inclusion of non-emergency items in an emergency bill (except for rescissions and reductions to pay for the emergency provisions) and provides a point of order against legislation that includes such items. OMB suggests removing this provision on the ground that it would impair an Administration's ability to develop appropriations packages that include both supplemental and emergency spending. Of course, such a provision also would prevent Congress from inserting non-emergency items that the President does not want into emergency legislation. But presumably, the President could use his new rescissions power to remove these items anyway. The OMB proposal thus seems a good one.

Two further minor changes that should be considered are as follows:

1. Remove Section 7(c). This change relates to the change #2 noted above. For some reason, OMB has left in (though amended slightly) a provision referring to the JCT's views on whether legislation contains a targeted tax benefit. This provision should be taken out. We should not want a mechanism by which the JCT issues views contrary to the President's.

2. Presidential messages. OLC recommends adding the phrase "to the maximum extent practicable" to the provision that requires the President, in a message to Congress, to list "facts, circumstances, and considerations" relating to a rescission. OLC says that this amendment prevents the provision from constituting an "encroachment on executive authority." OLC itself admits that this is only a minor matter. If there is no harm in suggesting the change, we should do so; if there is any harm, we should not.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	To Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto Memo. (1 page)	12/05/1995	P5 1199
002a. email	To Charles Konigsberg, Charles Kieffer, Lisa Koutoupes, et al. from Charles Konigsberg. Subject: Follow-up on Item Veto. (3 pages)	01/29/1996	P5 1200
002b. draft	Line Item Veto language. (6 pages)	01/29/1996	P5 1201

COLLECTION:

Clinton Presidential Records
Counsel's Office
Trey Schroeder
OA/Box Number: 11601

FOLDER TITLE:

Line Item Veto Legislative Materials [5]

Van Zbinden
2007-0624-F
vz1241

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]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

December 5, 1995

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: LINE ITEM VETO MEMO

Another issue has reared its head relating to OMB's statement on the latest line item veto proposal. In a memo to OMB dated yesterday, OLC urged OMB to propose that new language be inserted authorizing the President to lift suspensions of direct spending and targeted tax benefits. I am attaching this memo; see pp. 2-4. In brief, OLC is concerned that the suspension power could be held unconstitutional on the ground that it is tantamount to a power to repeal laws unilaterally; and for some reason (which does not strike me as intuitively obvious), OLC believes that a further power to lift suspensions would mitigate the possible constitutional problem. OLC saw a very recent ~~statement~~ of the OMB statement that addressed this issue to OLC's satisfaction; the language doing so must have been very recently deleted. (I have a call in to Chuck Konigsberg to find out why OMB made this deletion.) OLC now wants the language reinserted.

version

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

29-Jan-1996 03:56pm

TO: (See Below)

FROM: Charles S. Konigsberg
Office of Mgmt and Budget, LA

SUBJECT: Follow-up on item veto

\d

SENSITIVE - NOT FOR DISTRIBUTION

TO: Rivlin, Lew, Kieffer, Kountoupes, Damus, Minarik, Anderson, Jukes, Blickstein, Murr, Kagan (WH Counsel), Griffin, Chow, Weinstein (DPC), Angell, Foley, PADs, Potter (Treasury), Small/Johnsen (Justice), Moran, Bradshaw, Tyson

FROM: Chuck Konigsberg
OMB/LA, 395-5069

RE: ITEM VETO - ADMINISTRATION LANGUAGE

FYI -- Attached is our line-item veto language, which I've given to Bob Damus for inclusion in the budget enforcement title of the January 18 bill. (We haven't discussed whether to include this in the budget enforcement title, or as a separate title -- but it probably makes sense to include this as a "budget enforcement" item since this will arguably assist future Administrations in living within the discretionary caps).

The attached revised draft reflects comments I received earlier today. Note that the section setting forth congressional procedures for consideration of disapproval bills has been omitted, on the grounds that we should not be proposing to the Congress how to structure its own internal procedures. Also, the sections pertaining to an advisory report by the JCT on targeted tax benefits, and an annual GAO report, have been deleted, on the same grounds.

Finally -- with respect to direct spending and targeted tax benefits -- DOJ has appealed the use of the term "cancel"; they continue to prefer "suspension," on the grounds that suspension might be construed as less similar to "repeal," and therefore less constitutionally suspect. However, this draft uses the term "cancel," as defined in section 4 of the bill, because it is our understanding that the Senate has settled on this term, and it is in our interest to provide input into defining "cancel" -- rather than continuing to insist on "suspend."

WORD PERFECT FILE FOLLOWS.

Distribution:

TO: Charles S. Konigsberg
TO: Charles E. Kieffer
TO: Lisa Kountoupes
TO: Robert G. Damus
TO: Joseph Minarik
TO: Barry B. Anderson
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DRAFT -- NOT FOR DISTRIBUTION

Subtitle ___ - Line-item Veto Authority

SECTION 1. SHORT TITLE.

This subtitle may be cited as the "Line Item Veto Act of 1996".

SEC. 2. LINE ITEM VETO AUTHORITY.

(a) IN GENERAL.--Notwithstanding the provisions of part B of title X of The Congressional Budget and Impoundment Control Act of 1974, and subject to the provisions of this section, the President may rescind in whole or in part any discretionary budget authority provided in an appropriation act, cancel any new direct spending, or cancel any targeted tax benefit which is subject to the terms of this Act if the President--

(1) determines that--

(A) such rescission or cancellation would help reduce the Federal budget deficit;

(B) such rescission or cancellation will not impair any essential Government functions; and

(C) such rescission or cancellation will not harm the national interest; and

(2) notifies the Congress of such rescission or cancellation by a special message not later than twenty calendar days (not including Sundays) after the date of enactment of an appropriation or authorization Act providing such budget authority or a revenue or other Act containing a targeted tax benefit or new direct spending.

(b) DEFICIT REDUCTION.--In each special message, the President may also propose to reduce the appropriate discretionary spending limit set forth in section 601(a)(2) of the Congressional Budget Act of 1974 by an amount that does not exceed the total amount of discretionary budget authority rescinded by that message.

(c) SEPARATE MESSAGES.--(1) The President shall submit a separate special message for each appropriation Act, for each authorization Act, and for each revenue or other Act under this section.

(2) In the case of any such special message that message shall specify--

(A) the amount of budget authority which he proposes to be rescinded, the direct spending to be cancelled, or the targeted tax benefit to be cancelled;

(B) any account, department, or establishment of the Government to which such budget authority is available for obligation, or which has jurisdiction over the direct spending or targeted tax benefit affected, and the specific project or governmental functions involved;

(C) the reasons why the budget authority should be rescinded, or the direct spending or targeted tax benefit should be cancelled;

(D) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the proposed rescission or cancellation; and

(E) to the maximum extent practicable, all facts, circumstances, and considerations relating to or bearing upon the proposed rescission or cancellation and the decision to effect the proposed rescission or cancellation, and the estimated effect of the proposed rescission or cancellation upon the objects, purposes, and programs for which the budget authority, direct spending, or tax benefit is provided.

(d) SPECIAL RULE FOR FISCAL YEAR 1996 APPROPRIATION MEASURES.--Notwithstanding subsection (a)(2), in the case of any unobligated discretionary budget authority provided by any appropriation Act for fiscal year 1996, the President may rescind all or part of that discretionary budget authority under the terms of this Act if the President notifies the Congress of such rescission by a special message not later than twenty calendar days (not including Sundays) after the date of enactment of this Act.

(e) Amendments to the Budget Enforcement Act.--

(1) Section 251(a)(7) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended by inserting in the second sentence, following "within 5 calendar days after the enactment of any discretionary appropriations," the following: "or following a special message rescinding any amount of discretionary spending pursuant to the Line Item Veto Act of 1996 or after a disapproval bill relating thereto is enacted,".

(2) Section 252(d) of the Balanced Budget and Emergency Deficit Control Act of 1985 is amended by inserting in the second sentence, following "within 5 calendar days after the enactment of any direct spending or receipts legislation enacted after the date of enactment of this section," the following: "or following a special message cancelling any new direct spending or targeted tax benefit pursuant to the Line Item Veto Act of 1996 or after a disapproval bill relating thereto is enacted,".

SEC. 3. LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED.

(a)(1) Discretionary Budget Authority.--Any amount of discretionary budget authority rescinded under this Act as set forth in a special message by the President shall not be made available unless, during the period described in subsection (b), a disapproval bill making available all or part of the amount rescinded is enacted into law.

(2) New Direct Spending and Targeted Tax Benefits.--

(A) Any provision of law which provides new direct spending or provides a targeted tax benefit which has been cancelled under this Act, as set forth in a special message by the President, shall take effect only if a disapproval bill restoring that provision is enacted into law during the period described in subsection (b).

(B) In the case of a cancellation of a targeted tax benefit, the

Internal Revenue Service is authorized and directed to take appropriate enforcement actions against individuals or entities seeking to use a targeted tax benefit that has been cancelled.

(b) The period referred to in subsection (a) is--

(1) a congressional review period of twenty calendar days of session, beginning on the first calendar day of session after the date of submission of the special message, during which Congress must complete action on the disapproval bill and present such bill to the President for approval or disapproval;

(2) after the period provided in paragraph (1), an additional ten days (not including Sundays) during which the President may exercise his authority to sign or veto the disapproval bill; and

(3) if the President vetoes the disapproval bill during the period provided in paragraph (2), an additional five calendar days of session after the date of the veto, provided for congressional review.

(c) If a special message is transmitted by the President under this Act and the last session of the Congress adjourns sine die before the expiration of the period described in subsection (b), the rescission or cancellation, as the case may be, shall not take effect. The message shall be deemed to have been retransmitted on the first calendar day of session in February of the succeeding Congress and the review period referred to in subsection (b) (with respect to such message) shall run beginning after such first day.

SEC. 4. DEFINITIONS.

As used in this Act:

(1) The term "direct spending" means--
(A) budget authority provided by law other than appropriation Acts;
(B) entitlement authority as defined in section 3(9) of the Congressional Budget and Impoundment Control Act of 1974; and
(C) the food stamp program.

(2)(A) Except as otherwise provided in this paragraph, the term "targeted tax benefit" means any revenue-losing tax provision which is identified by the President as--
(i) a provision which provides a Federal tax deduction, credit, exclusion, or preference to a particular taxpayer or limited group of taxpayers, or
(ii) a transitional rule or other provision which provides special treatment to a particular taxpayer or limited group of taxpayers, or any portion of a provision that has substantially the same effect.

(B) A provision shall be treated as not described in subparagraph (A)(i) if the President determines that--
(i) all persons engaged in the same type of activity receive the same treatment under the provision,
(ii) all persons owning the same type of property, or issuing the same type of investment, receive the same treatment under

1201

the provision, or

(iii) any difference in the treatment of persons is based solely on--

(I) in the case of entities, the size or type of the entities involved,

(II) in the case of individuals, their filing status,

(III) the amount involved, or

(IV) a generally-available election made by taxpayers.

(C) A provision shall be treated as not described in subparagraph (A)(ii) if the President determines that it provides for the retention of prior law with respect to all binding contracts in existence on the date of first public notice that a change in law is actively being considered by a committee of either House of Congress, either House of Congress, or a conference committee.

(D) For purposes of subparagraph (A), a provision is "revenue-losing" when the Secretary of the Treasury determines that the provision, when compared to the rest of the bill if the provision were not included, reduces governmental receipts for any one of the four following periods--

(1) the first fiscal year for which the most recent budget has been submitted by the President;

(2) the fiscal year immediately preceding the first fiscal year for which the most recent budget has been submitted by the President;

(3) the period comprised of the first fiscal year for which the most recent budget has been submitted by the President and the four immediately succeeding fiscal years; or

(4) the period comprised of the five fiscal years immediately succeeding the period described in paragraph (3).

(3) The term "disapproval bill" means a bill or joint resolution which only disapproves, in whole, a special message transmitted by the President under this Act, setting forth rescissions of discretionary budget authority or cancellations of new direct spending or targeted tax benefits, and--

(A) which does not have a preamble;

(B)(i) in the case of a special message regarding rescissions, the matter after the enacting clause of which is as follows: "That Congress disapproves each rescission of discretionary budget authority of the President as submitted by the President in a special message on ______", the blank space being filled in with the appropriate date and the public law number to which the message relates; and

(ii) in the case of a special message regarding cancellations of new direct spending (and/or targeted tax benefits), the matter after the enacting clause of which is as follows: "That Congress disapproves each cancellation of new direct spending (and/or targeted tax benefits) as submitted by the President in a special message on _______", the blank space being filled in with the appropriate date and the public law number to which the message relates; and

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

(4) The term "calendar days of session" shall mean only those days on which both Houses of Congress are in session.

(5) The term "appropriation Act" means any general or special appropriation Act, or any Act or joint resolution making supplemental, deficiency, or continuing appropriations.

(6) The term "cancel" means--

(A) with respect to "new direct spending," withholding the authority to obligate the United States pertaining thereto, and suspension of legal entitlement to claim any benefits or payments deriving therefrom; and

(B) with respect to "targeted tax benefits," the suspension of legal entitlement to claim any Federal tax deduction, credit, exclusion, preference or other tax benefit deriving therefrom.

SEC. 5. CONGRESSIONAL CONSIDERATION OF DISAPPROVAL BILLS.

[to be inserted by the Congress]

SEC. 6. REPORTS OF THE GENERAL ACCOUNTING OFFICE.

[to be inserted by the Congress]

SEC. 7. JUDICIAL REVIEW.

(a) EXPEDITED REVIEW.--

(1) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this Act violates the Constitution.

(2) A copy of any complaint in an action brought under paragraph (1) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.

Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under paragraph (1) without the necessity of adopting a resolution to authorize such intervention.

(b) APPEAL TO SUPREME COURT.--Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1) of subsection (a) shall be issued by a single Justice of the Supreme Court.

(c) EXPEDITED CONSIDERATION.--It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

(d) SEVERABILITY.--If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of this Act shall not be affected thereby.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Jack Quinn from Walter Dellinger. Subject: Signing Statement for Line Item Veto Legislation. (1 page)	03/28/1996	P5 1202
002. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [initial comment copy] (2 pages)	03/18/1996	P5 1203
003. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. (2 pages)	03/18/1996	P5 1204
004. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [Elena answer copy] (2 pages)	03/18/1996	P5 1205
005. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto Update. (2 pages)	03/12/1996	P5 1206
006a. memo	For Walter Dellinger from Kathleen Wallman. Subject: Lobbying Disclosure Act and 501(c)(3) Organizations. (1 page)	02/26/1996	P5 1207
006b. draft	Memo for Jack Quinn from Steve Neuwirth. Subject: Proposed DOJ Notice on the Lobbying Disclosure Act. (2 pages)	02/26/1996	P5 1208
007a. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject Line Item Veto Memo. (1 page)	12/05/1995	P5 1209
007b. memo	For Chuck Konigsberg from Richard Shiffrin. Subject: Line Item Veto Legislation/House Conference. (4 pages)	12/04/1995	P5 1210
008. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. (2 pages)	12/05/1995	P5 1211

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Counsel's Office
Kathleen Wallman
OA/Box Number: 7945

FOLDER TITLE:

Line Item Veto

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2007-0624-F
vz1242

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 28, 1996

MEMORANDUM FOR JACK M. QUINN
COUNSEL TO THE PRESIDENT

From: Walter Dellinger WED
Assistant Attorney General

Re: Signing Statement for Line Item Veto Legislation

I am suggesting the following language to OMB for consideration for inclusion in the President's statement on signing the Line Item Veto Act:

> The carefully defined cancellation authority granted by the bill is a practical and principled means of serving the constitutional balance of powers. The modern congressional practice of presenting the President with omnibus legislation substantially reduces the President's ability to play the role in the enactment of laws that the Constitution intended. This legislation is a useful corrective that returns us closer to the Founders' view of a responsible Executive check on legislative excesses.

THE WHITE HOUSE

WASHINGTON

March 18, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

is R's deal-breaker?

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.
- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.
- The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this definition.
- The President will have up to five calendar days to submit cancellations. We had asked for 20 days, but we probably should count ourselves lucky with five: House conferees had wanted a provision requiring the President to submit cancellations on the date of enactment.
- The effective date of the statute is still open, but the likelihood is that the President will not immediately gain veto authority. Some reports say the effective date will be 1997. Other reports say the effective date will be the earlier of 1997 or enactment of a balanced budget.

- DOJ has a newfound constitutional concern about the statute's definition of "cancellation." The latest language talks about cancellation as preventing a provision "from taking legal force or effect." DOJ would prefer the phrase "from having legal force or effect." DOJ thinks that its phrasing suggests a suspension, rather than a straight veto, and thus will aid the argument for constitutionality. We have passed on this concern to Republican staff members; we do not know yet if they will change the language.

Note that the non-severability provision to which we previously objected has been dropped.

How serious is this? Will dg rec. a veto on it?

THE WHITE HOUSE

WASHINGTON

March 18, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

fyi

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.

- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.

- The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this definition.

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Note that the non-severability provision to which we previously objected has been dropped.

THE WHITE HOUSE

WASHINGTON

March 18, 1996

EK/KW

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

To: Jack + Kathy (again)

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

Republican conferees on the line-item veto have arrived at an agreement on all but one or two subjects. The current Republican strategy is to add the line-item veto to the debt ceiling bill in the last week of March.

Problems we have with the agreement are as follows:

- The conferees decided to stick with the lockbox mechanism, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. This creates a significant disincentive for using the authority. Conferees are saying in defense of the lockbox mechanism that the purpose of the item veto is to save money -- not to permit a President to shift priorities.

is this a deal-breaker for us?

- The conferees decided to limit the President's authority to canceling provisions "in whole," rather than "in whole or in part." The agreement, however, is supposed to permit the authority to apply down to the level of any project specified in the joint statement of managers, committee report, or authorizing legislation. I haven't yet seen the language effecting this agreement.

- The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this definition. In the new draft, Congress gave the Pres. very limited power to identify tax benefits.

- The President will have up to five calendar days to submit cancellations. We had asked for 20 days, but we probably should count ourselves lucky with five: House conferees had wanted a provision requiring the President to submit cancellations on the date of enactment.

- The effective date of the statute is still open, but the likelihood is that the President will not immediately gain veto authority. Some reports say the effective date will be 1997. Other reports say the effective date will be the earlier of 1997 or enactment of a balanced budget. ← Congress picked this.

No - though it's going to prevent us from making much use of the thing

- DOJ has a newfound constitutional concern about the statute's definition of "cancellation." The latest language talks about cancellation as preventing a provision "from taking legal force or effect." DOJ would prefer the phrase "from having legal force or effect." DOJ thinks that its phrasing suggests a suspension, rather than a straight veto, and thus will aid the argument for constitutionality. We have passed on this concern to Republican staff members; we do not know yet if they will change the language.

Note that the non-severability provision to which we previously objected has been dropped.

How serious is
this? Will they
rec. a veto
on it?

No problem —
it was fixed.
DOJ and I have
also made some
suggested changes in
the Conference Report
to bolster the argument
that the bill meets
constitutional standards.

file: line item veto

THE WHITE HOUSE

WASHINGTON

March 12, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO UPDATE

The House made an offer to the Senate last week on line item veto language. We have heard that Republican staff are trying to conclude an agreement ASAP.

We submitted comments on the House offer to the Republican Senate staffers with whom we have been dealing. The most important comments are as follows:

1. We once again objected to so-called "lockbox" language, which requires a reduction in discretionary spending caps (or PAYGO balances) whenever the President strikes a spending item. We have said that this provision would make it difficult to enact supplemental appropriations later in the year. We have proposed, as an alternative, the creation of an "emergency reserve fund." When the President strikes a spending item, the amount would be credited to these accounts; Congress could tap the accounts to pay for emergency supplementals and other emergency legislation. So far, Senate staff have rejected this suggestion; they probably will decide to maintain the lockbox mechanism.

2. We objected to a provision making the Act effective only upon enactment of a seven-year balanced budget and sunsetting the Act in 2002. We urged Congress to grant immediate and permanent authority to eliminate wasteful spending.

3. We objected to a provision requiring the President to cancel a spending item on the very day Congress enacts the legislation. Earlier versions of the bill gave the President 10 days to identify items for cancellation; the Administration had recommended 20 days as a more realistic time frame. The time frame provided is especially unworkable given the detailed findings that must accompany cancellations. We urged that if less than 20 days is provided, Congress either pare down the bill's current reporting requirements or permit the President to issue and transmit the required findings at a later date.

4. We objected to the way the House offer defines and identifies targeted tax benefits, which are subject to the President's rescission authority. The House offer defines such a benefit as "any revenue-losing provision which provides a federal income tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries." The offer further provides that nothing

will count as a targeted tax benefit unless it is specifically identified as such in the relevant bill, based on findings made by the Joint Committee on Taxation (JCT). We urged that the definition is impracticable because in most cases, no one can accurately determine the number of persons affected by a tax provision. We also proposed that Congress delegate authority to the President to identify targeted tax benefits on his own.

5. We objected to a nonseverability provision, which will invalidate the entire bill if any part is held unconstitutional.

The House offer cures two constitutional problems we previously had raised. First, this version uses the word "cancel" instead of "veto," as OLC had requested. (We do, however, think that the definition of "cancel" is too vague.) Second, this version provides that the JCT's identification of targeted tax benefits be written into law, thus removing our complaint that Congress cannot delegate power to one of its committees.

MEMORANDUM FOR WALTER DELLINGER

FROM: KATHLEEN WALLMAN

SUBJECT: LOBBYING DISCLOSURE ACT AND 501(C)(3) ORGANIZATIONS

DATE: FEBRUARY 26, 1996

I called you earlier to tell you that I was sending over the attached memorandum. I thought it would make sense to ask you to read it and then come over to meet and talk with Jack, Steve Neuwirth and me about how to proceed. Are you amenable to this approach? You are welcome, of course, to invite others to join us.

Many thanks.

Kathy

cc: Jack Quinn, Steve Neuwirth

THE WHITE HOUSE

WASHINGTON

REVISED DRAFT

February 26, 1996

MEMORANDUM FOR JACK QUINN

FROM: STEVE NEUWIRTH

SUBJECT: Proposed DOJ Notice on the Lobbying Disclosure Act

In his memorandum to you of February 21, Walter Dellinger proposes that the Justice Department announce that it will interpret the new Lobbying Disclosure Act to exempt <u>all</u> 501(c)(3) organizations from the registration and disclosure requirements of the Act.

As you will recall, the Act as signed by the President only exempts religious organizations from the registration and disclosure requirements. The effect of DOJ's action will be to *broaden* substantially the category of organizations that will be exempt.

If DOJ takes this action, I believe Republicans in Congress could argue:

1) *The President is by executive fiat exempting a category of lobbyists -- 501(c)(3) organizations -- that the Congress purposely chose to include within the Act's coverage.* As you know, many House and Senate Republicans have expressed particular concern about lobbying by tax exempt organizations that receive federal funds. The Istook Amendment was just one manifestation of this concern. <u>Republicans could argue that they never would have supported a lobbying bill that exempts all 501(c)(3) organizations.</u>

2) *The President cannot be serious about lobbying reform if he is exempting only those groups -- 501(c)(3)'s -- that, in the view of Republicans, are most likely to support Democratic policy positions.* It does not necessarily follow that the only way to deal with DOJ's concerns is to exempt all 501(c)(3)'s. DOJ might have been able to exempt all organizations with assets below a certain dollar amount. Another option -- however unattractive -- would have been simply to declare the religious exemption invalid. Or DOJ might have announced that it will not defend the religious exemption if it is challenged in court.

3) *The President is less willing than Congressional Republicans to protect religious liberty.* Republicans may argue that there is no court precedent which compels the action DOJ is taking, and that the President simply does not believe religious organizations should be exempt. Republicans could argue that DOJ simply should have stated that it would not defend the religious exemption in court -- as DOJ stated with respect to a provision of the Defense Appropriations Bill.

I believe many lawyers would argue that Supreme Court jurisprudence does not compel the conclusion that the Lobbying Disclosure Act's exemption for religious organizations would be held unconstitutional. The principal precedent relied on by DOJ is Texas Monthly v. Bullock, a 1989 case in which the Supreme Court invalidated a Texas statute that exempted only religious periodicals -- and no other periodicals -- from sales and use taxes. Justices Brennan, Marshall, Stevens, Blackmun and O'Connor all concluded that the statute violated the Establishment Clause. In a concurring opinion joined by Justice O'Connor, Justice Blackmun wrote that "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."

It is not clear that the type of economic preference the Court found in Texas Monthly -- involving an exemption from sales and use taxes -- would be found by the Court in a case involving an exemption from lobbying registration requirements. Indeed, in Corporation of the Presiding Bishop v. Amos (1987), the Court upheld an exemption, solely for religious organizations, from Title VII's prohibition of religious discrimination in employment. In that case, the Court stated: "It cannot be seriously contended that the [exemption for only religious organizations] impermissibly entangles church and state; the state effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case."

In Walz v. Tax Commission (1970), the Court upheld a state tax exemption for religious institutions. While the tax exemption at issue applied to all non-profit corporations, Chief Justice Burger's majority opinion stated that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." Indeed, when Justice Scalia (joined by Rehnquist and Kennedy) dissented in the Texas Monthly case, Justice Scalia stated that Walz expressly rejected the notion that a religious exemption is appropriate only if part of a broader exemption that includes non-religious groups. Scalia wrote: "The Court's opinion in Walz, however, not only failed to conduct such an analysis, but . . . explicitly and categorically disavowed reliance upon it." Scalia added: "Walz is just one of a long line of cases in which we have recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." Scalia noted that in Sherbert v. Verner (1963), the Court held that the Free Exercise Clause "*required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws."

While DOJ's position appears to assume that the majority opinion in Texas Monthly controls here, there would seem to be enough distinctions and ambiguities in the law that one could make a legitimate argument that the Court would uphold the exemption for religious organizations in the Lobbying Disclosure Act.

file

THE WHITE HOUSE

WASHINGTON

December 5, 1995

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: LINE ITEM VETO MEMO

Another issue has reared its head relating to OMB's statement on the latest line item veto proposal. In a memo to OMB dated yesterday, OLC urged OMB to propose that new language be inserted authorizing the President to lift suspensions of direct spending and targeted tax benefits. I am attaching this memo; see pp. 2-4. In brief, OLC is concerned that the suspension power could be held unconstitutional on the ground that it is tantamount to a power to repeal laws unilaterally; and for some reason (which does not strike me as intuitively obvious), OLC believes that a further power to lift suspensions would mitigate the possible constitutional problem. OLC saw a very recent statement of the OMB statement that addressed this issue to OLC's satisfaction; the language doing so must have been very recently deleted. (I have a call in to Chuck Konigsberg to find out why OMB made this deletion.) OLC now wants the language reinserted.

Memorandum

Roseborough
Shiffrin
Schroeder
[redacted]
Murphy File
Reading file Ret.(Smallm)billcom/livconfl

Subject	Date
Line Item Veto Legislation/House Conference Offer	December 4, 1995

To	From
Chuck Konigsberg Legislative Affairs OMB	Richard Shiffrin RS Deputy Assistant Attorney General OLC

This memorandum sets forth our comments on (i) the offer that has been made by the House of Representatives in connection with the House-Senate conference on line item veto legislation, and (ii) the draft OMB letter responding to the House offer.

1. The House conference offer would use the general approach of the line item veto legislation that passed the House earlier this year. This approach would enable the President, within certain parameters, to "rescind" all or part of any dollar amount of any discretionary budget authority after the enactment of an appropriations measure containing that budget authority. As previously stated in our comments on the House legislation, we believe that granting such power to the President would constitute a permissible delegation of authority. It is well-established that the legislative branch may delegate broad powers to the executive branch, including powers that affect the nation's fisc.[1] In addition, the House conference offer, like the legislation passed by the House, comports with Supreme Court requirements governing delegations to the executive, because it sets forth "intelligible" standards that serve to guide the exercise of the delegated power.[2] Furthermore, the type of rescission authority that would be conferred on the President by the House conference offer is not entirely unprecedented, as prior statutes have given the President some modicum of control over the outlay of appropriated funds.

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[1] See Lichter v. United States, 334 U.S. 742 (1948); United States v. Rock Royal Co-operatives, Inc., 307 U.S. 533 (1939); J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

[2] See Mistretta v. United States, 488 U.S. 361, 372 (1989). Specifically, under the House conference offer, the President may rescind discretionary budget authority only when he makes specific determinations, and only during a limited time period after enactment of the appropriations measure containing the budget authority.

In short, the House conference offer 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 appropriations bill that has passed both Houses of Congress would be disaggreagated 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, this procedure 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 the House conference offer. Therefore, consistent with the views expressed in the draft OMB letter, we strongly recommend that conferees adopt the approach of the House conference offer, and not opt for the Senate's separate enrollment mechanism.

2. The House conference offer also would authorize the President to "veto" targeted tax benefits contained in a revenue (or other) act. The use of the term "veto" raises constitutional concerns. 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. However, as was the case with the legislation that passed the House, the House conference offer purports to authorize the President to veto targeted tax benefits after they have become law. Thus, as stated in our comments on the House legislation, we urge that the word "veto" not be used in the provision that describes the power that the President would exercise over targeted tax benefits.[3] The draft OMB letter suggests replacing "veto" with "suspend." We support that suggestion, and believe that it would be constitutional. The Supreme Court has long upheld the constitutionality of provisions that delegate to the President the power to suspend the operation of particular laws, see Field v. Clark, 143 U.S. 649 (1892), and there are many examples of such provisions in the U.S. Code today.

The House conference offer also would enable the President to "veto" any item of "direct spending" (which is distinct from spending contained in discretionary budget authority that the President could "rescind"). Here too, the word "suspend" should be used instead of "veto."

3. Assuming that the term "suspension" is used, one constitutional question remains: if a suspension is permanent, it could be attacked as tantamount to unilateral repeal of laws by the

[3] We do not believe that it is necessary to eliminate the word "veto" from the title of the legislation.

President -- the same constitutional flaw that we identified in the line item veto legislation that passed the House.[4] To avoid this potential shoal, we recommend that the OMB letter propose that the President be granted the authority to lift suspensions of targeted tax benefits and direct spending. We understand that such a proposal might prompt concerns that it would allow for the casual reinstatement of suspended targeted tax benefits or direct spending whenever the President sees fit. To address those concerns, the authority to lift suspensions could be restricted.

What about this?

1210

One possible restriction would be to require that any suspension remain in place for a particular period of time before it could be lifted (e.g., until the end of the current fiscal year, or the end of the next fiscal year). In addition, the President could be required to make findings that certain conditions have been met in order to lift a suspension.[5] Finally, procedures could

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4 A provision in the House legislation stated that any targeted tax benefit "vetoed" by the President would be deemed "repealed." In our comments on the legislation, we indicated that the use of the term "repealed" raised constitutional concerns, because it intimated that the President was being given the power to amend existing law on his own. The grant of such power would 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). This constitutional problem is eliminated by the House conference offer, which does not include a provision describing the effect of a presidential veto of targeted tax benefits.

5 For example, the President could be required to determine:

> (A) that such action would advance the national interest, and that the suspension is no longer necessary to help reduce the Federal budget deficit; and (B) notify Congress of the determination to lift the suspension by a special message specifying, to the maximum extent practicable, (1) the reasons and justifications for the determination to lift the suspension; (2) the estimated fiscal, economic, and budgetary effect of the determination to lift the suspension; and (3) all actions, circumstances, and considerations relating to or bearing upon the determination to lift the suspension.

Such a requirement would essentially track provisions in the House conference offer that cabin the President's discretion to "veto" targeted tax benefits or direct spending in the first place. In be established whereby the President's decision to lift a suspension could be reversed through the enactment of "disapproval" legislation (or, if the President vetoes such legislation, through an override by 2/3 of the members of both Houses). This would parallel the mechanism in the House conference offer by which Congress could disapprove (or override) the President's initial decision to "veto" a targeted tax benefit or direct spending.

4. Section 4 of the House conference offer defines targeted tax benefit as any "revenue-losing provision" in a tax (or other) bill, and that has certain specified characteristics. Under the House conference offer, the task of identifying such provisions would go to the congressional Joint Committee on Taxation (JCT). In turn, the JCT determinations would be made in committee reports accompanying bills.

Significantly, the House conference offer does not state that the JCT determinations would be incorporated into bills -- either directly or indirectly through reference to a committee report. As a result, the scope of the President's "veto" authority would be established by the JCT alone. In short, law would be made by a committee of Congress in a report, not by Congress as a whole in legislation. This violates the "[e]xplicit and unambiguous provisions" of the Constitution that prescribe "a single, finely wrought and exhaustively considered, procedure" by which laws are to be made: bicameral passage by both Houses of Congress followed by presentment to the President for his approval. INS v. Chadha, 462 U.S. 919, 945 (1983). See Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 275 (1991) ("Congress may not delegate the power to legislate to its own agents or to its own Members.").

The draft OMB letter proposes to charge the President, not the JCT, with the role of determining which provisions in a bill constitute targeted tax benefits. Like the House conference offer, the letter sets forth specific characteristics that a provision would have to meet in order to be considered a targeted tax benefit. These characteristics reflect the intelligible standards that are constitutionally required to guide the delegation of power to the President to determine what is a targeted tax benefit.

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any event, a requirement of this sort probably would be necessary in order to ensure that the delegation of authority to lift the suspension satisfies the constitutional rule that delegations contain intelligible principles that guide executive action.

file

THE WHITE HOUSE

WASHINGTON

December 5, 1995

MEMORANDUM FOR JACK QUINN
KATHY WHALEN

FROM: ELENA KAGAN EK

SUBJECT: LINE ITEM VETO

OMB's statement on the latest House offer regarding the line item veto is generally on target. OLC has reviewed and approved the OMB statement. In this memo, I describe the most important of OMB's proposed changes to the House offer, all of which seem sensible, and suggest two further minor revisions.

It should be noted first that the House's version of the line item veto (the "enhanced rescissions" model), which is retained in the House offer, is much superior to the Senate's version(the "separate enrollment" mechanism). The House version essentially allows the President to rescind or suspend part of a bill he has just signed into law; the Senate version splits up a bill into many different bills and then provides for the President to sign or veto each of them. OLC has opined that the House version raises fewer constitutional difficulties and creates less of an administrative burden.

The most significant concerns, raised by OMB, relating to the House offer are as follows:

1. <u>Lockbox language.</u> The House offer incorporates a Senate provision that would <u>require</u> the President to reduce statutory discretionary spending caps to reflect presidential rescissions (the so-called lockbox provision). OMB points out that this provision would make supplemental appropriations very difficult. It prefers a provision (included in the original House bill) that would authorize the President to propose reductions in the discretionary caps. This seems a sensible proposal.

2. <u>JCT determination of targeted tax benefits.</u> The House offer provides that the Joint Committee of Taxation (JCT) will determine whether a tax provision is a "targeted tax benefit," such that the President can suspend it. OMB's statement notes that this provision is unconstitutional because Congress cannot delegate power to one of its own committees. (Congress could cure this defect by the relatively easy means of incorporating the JCT's determination in the revenue bill at issue.) OMB suggests leaving this determination to the President. This solution is obviously preferable on policy, as well as constitutional, bases.

3. <u>Use of term "veto."</u> The House offer provides that the

President may "veto" spending items or tax benefits. OMB suggests changing this term to "suspend." The reasoning here is that use of the term "veto" will raise red flags as to the bill's constitutionality. This is probably right and should be easy to remedy.

4. Emergency spending point of order. The House offer accepts a Senate provision that prohibits the inclusion of non-emergency items in an emergency bill (except for rescissions and reductions to pay for the emergency provisions) and provides a point of order against legislation that includes such items. OMB suggests removing this provision on the ground that it would impair an Administration's ability to develop appropriations packages that include both supplemental and emergency spending. Of course, such a provision also would prevent Congress from inserting non-emergency items that the President does not want into emergency legislation. But presumably, the President could use his new rescissions power to remove these items anyway. The OMB proposal thus seems a good one.

Two further minor changes that should be considered are as follows:

1. Remove Section 7(c). This change relates to the change #2 noted above. For some reason, OMB has left in (though amended slightly) a provision referring to the JCT's views on whether legislation contains a targeted tax benefit. This provision should be taken out. We should not want a mechanism by which the JCT issues views contrary to the President's.

2. Presidential messages. OLC recommends adding the phrase "to the maximum extent practicable" to the provision that requires the President, in a message to Congress, to list "facts, circumstances, and considerations" relating to a rescission. OLC says that this amendment prevents the provision from constituting an "encroachment on executive authority." OLC itself admits that this is only a minor matter. If there is no harm in suggesting the change, we should do so; if there is any harm, we should not.