

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Proposals/S.4, S.14, S.137. (5 pages)	03/16/1995	P5 1062
002. memo	Duplicate of 001. (5 pages)	03/16/1995	P5 1063 - Dup 1062
003. memo	Duplicate of 001. (5 pages)	03/16/1995	P5 1064 - Dup 1062
004. memo	Duplicate of 001. (5 pages)	03/16/1995	P5 1065 - Dup 1062
005. email	To Robert Damus and Douglas Letter from Charles Konigsberg. Subject: Here is the Line Item Veto Compromise... (1 page)	03/24/1995	P5 1066
006. memo	For Abner Mikva from Walter Dellinger. Subject: Line Item Veto/S.14. (3 pages)	01/20/1995	P5 1067
007a. 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 1068
007b. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to H.R.2. (12 pages)	03/27/1995	P5 1069
008. draft	The Mechanism. 12pm. (5 pages)	03/27/1995	P5 1070
009. draft	Page 2 of 008. (1 page)	03/27/1995	P5 1071
010. draft	The Mechanism. 4:30pm. (1 page)	03/27/1995	P5 1072
011. draft	Duplicate of 010. (1 page)	03/27/1995	P5 1073 - Dup 1072

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

Line Item Veto [Folder 1] [1]

Van Zbinden
2007-0624-F
vz1202

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
012. draft	Duplicate of 009. (1 page)	03/27/1995	P5 1074 Dup 1071
013. draft	Duplicate of 010. (1 page)	03/27/1995	P5 1075 Dup 1072

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Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

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Van Zbinden
2007-0624-F
vz1202

RESTRICTION CODES

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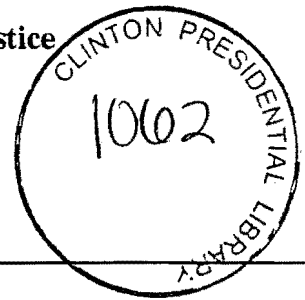
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U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D.C. 20530

March 16, 1995

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

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

From: Walter Dellinger 
Assistant Attorney General

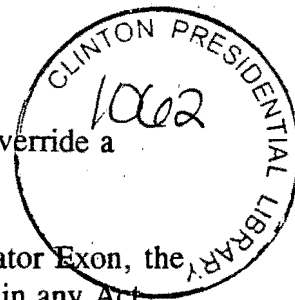
Re: Line Item Veto Proposals/S.4, S.14 and S.137

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

S.4 and S.14

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

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



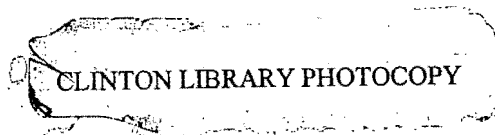
Under S.14, which has been introduced by Senator Domenici and Senator Exon, the President may propose to Congress the cancellation of budget items provided in any Act. Within prescribed time limits, the President may transmit a special message to Congress proposing such a cancellation and submitting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

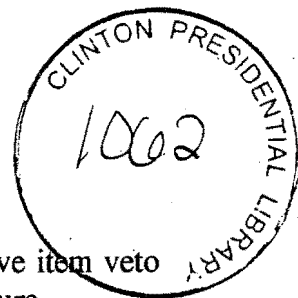
In actual practice, the chief difference between S.4 and S.14 is that under S.4, it would ordinarily require a two-thirds vote of each House of Congress to reinstate a spending item that the President has targeted for elimination, while under S.14, it would require only a majority vote of a single House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

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

Dellinger Statement at 9.

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





S.137

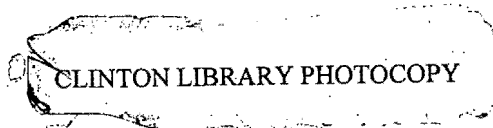
You have also asked for our views on S.137, a bill "[t]o create a legislative item veto by requiring separate enrollment of items in appropriations bills and tax expenditure provisions on revenue bills."

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

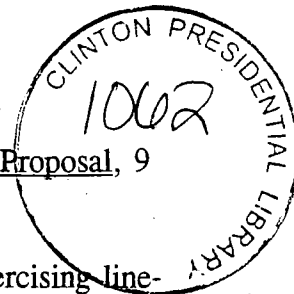
Clause 2 of article I, § 7 of the Constitution governs the procedure by which a bill or joint resolution becomes law. It declares in relevant part that:

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

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



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



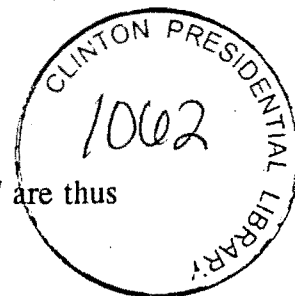
S.137 attempts to avoid this constitutional difficulty in the President's exercising line-item veto authority by requiring each individual item of appropriation or tax expenditure provision in a single bill passed by both Houses of Congress to be separately enrolled and separately presented to the President.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

We have not been convinced of the constitutionality of this approach in the past, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. at 30, and we continue to question its validity. On what seems to us to be the best reading of the Presentment Clause, what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

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

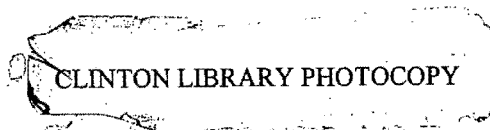
Furthermore, there appear to be ways to refine S.137 so as to avoid the objection that what must be presented to the President is the "bill" in exactly the form voted on by each House. So long as the Houses of Congress have treated each bill subsequently presented to the President as a bill at the time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

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



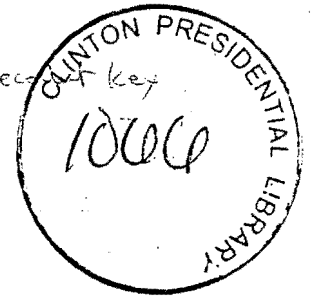
Chadha, 462 U.S. 919, 951 (1983). The chances of judicial invalidation of S.137 are thus substantially greater than they are in the case of the other two proposals.¹

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



add
HK 2 - "severability"
change veto to rescind
\$5 - each House gets to set its own rules

Packet Veto case
says tradition + precedents
Ev bloc voting



EXECUTIVE OFFICE OF THE PRESIDENT

24-Mar-1995 01:02pm

TO: Robert G. Damus
TO: Douglas N. Letter
FROM: Charles S. Konigsberg
Office of Mgmt and Budget
CC: Jacob J. Lew
SUBJECT: HERE IS THE ITEM VETO COMPROMISE WE DISCUSSED...

1. President may submit a package of proposed rescissions AT ANY TIME. (This flexibility on timing for presidential action is actually stronger than House- or Senate-passed and should appeal to those wanting a strong item veto).

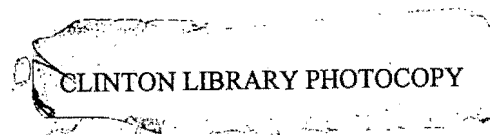
2. BA is withheld for 45 days (as under current law).

3. Congress required to vote on the proposed rescission package WITHOUT ANY SUBSTANTIVE CHANGE OR DELETION during the 45 day period under expedited procedures. (The ability of one House, by majority vote, to reinstate the money will appeal to Domenici and Byrd; the prohibition on deletions from the President's proposal is stronger than S. 14).

4. If Congress fails to vote within 45 days on the President's proposed rescissions, specifically as submitted by the President, the President is delegated the authority to rescind the affected accounts. More specifically, if both Houses fail to vote, the President may rescind; but if only one House votes and rejects the rescission, action by the other House becomes irrelevant and the President could not rescind. (This contingent delegation of rescission authority is insurance to guarantee that Congress will act on the President's proposal and should appeal to those wanting a strong item veto while still preserving Congress' right to act on the rescissions. Moreover, by formulating this as a delegation, rather than an action triggered by one House, this would seem to avoid any Chadha problem).

5:00 today
call Delahunt - OLC any issues with what was finally passed?

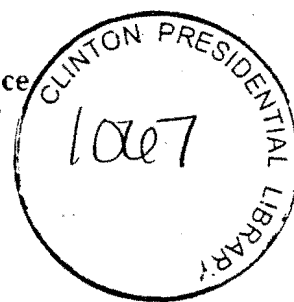
Ogden
Turetsky
Flynn





U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D. C. 20530

January 20, 1995

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

From: Walter Dellinger *W.D.*
Assistant Attorney General

Re: Line Item Veto/S.14

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

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

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

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

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

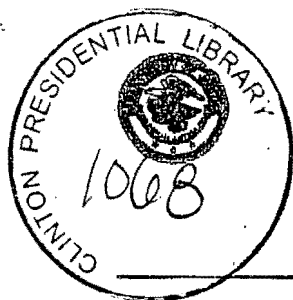
Even assuming the validity of this characterization of Congress' powers under S.14, we would point out that the courts have upheld the Comptroller General's power to stay procurements, over the Executive's protest. See Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), modified on other grounds,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

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

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

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

cc: Bob Damus



U. S. Department of Justice

Office of Legal Counsel

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

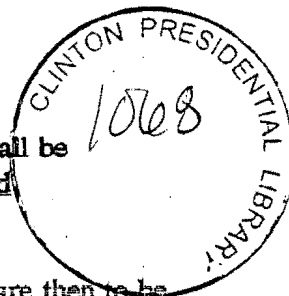
Re: Senate-Passed Separate Enrollment Line Item Veto/S.4

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

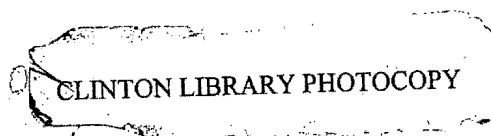
[o]n what seems to us to be the best reading of the Presentment Clause, what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has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

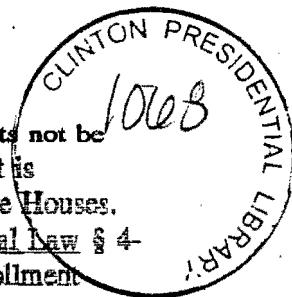
March 16 OLC Memo at 4. In finding such separate enrollment procedures to be constitutionally dubious, we reached the same conclusion that our Office had expressed ten years earlier, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28, 30 (1985).

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).



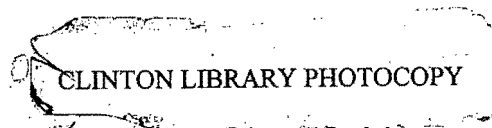


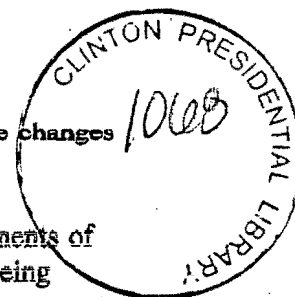
by statute, that each House follow certain procedural rules (e.g., that amendments not be permitted when the disaggregated bills are being voted on en bloc). However, it is questionable whether an Act of Congress could impose internal procedures on the Houses. See March 16 OLC Memo at 5, n.1; Laurence 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.



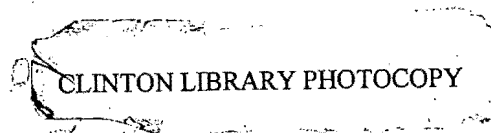


To cure this and other flaws, we attach proposed mark-ups of H.R. 2 that reflect the changes we would recommend in that bill.³

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)

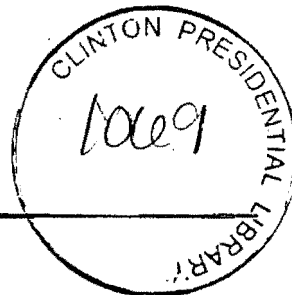
³ The mark-ups also include several other suggestions for improving H.R. 2: first, a subsection reserving to each House the right to alter the procedural rules adopted in the bill; second, language slightly modifying the elements of what must be set forth in the Presidential Special Message reporting 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 
Assistant Attorney General

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

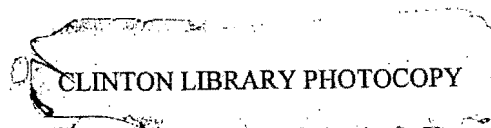
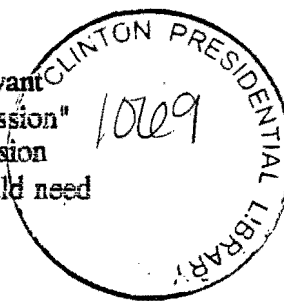
I am attaching two proposed mark-ups of H.R. 2 that reflect our suggested changes to the bill. Most significantly, in an effort to cure potential constitutional problems with the targeted tax benefit provisions of the existing bill, both proposals would eliminate the words "veto" and "repeal" from those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

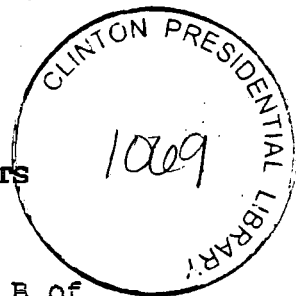
The proposed mark-ups are identical except in one critical respect. The first proposal would give the President the power to "rescind" targeted tax benefits, the effect of which would be to "cancel" such benefits. The terms "rescind" and "cancelled" are used in the bill to describe the President's power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

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

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

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





PROPOSAL # 1: "RESCISSION" OF TARGETED TAX BENEFITS

Sec. 2 LINE ITEM VETO AUTHORITY

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

(1) determines that --

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

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

Sec. 3 LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED

(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 [vetos] 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

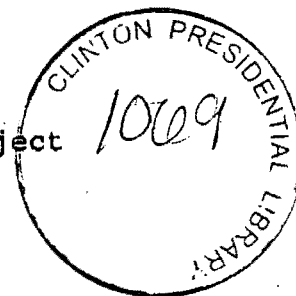
(C) the title of which is as follows: "A bill disapproving the recommendation submitted by the President on __," the blank space being filled in with the date of submission of the relevant special message and the public law to which the message relates.

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;

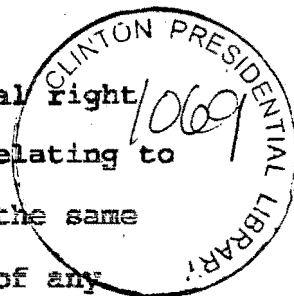
(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the rescission [or veto]; and

(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

Section 2

LINE ITEM VETO AUTHORITY

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

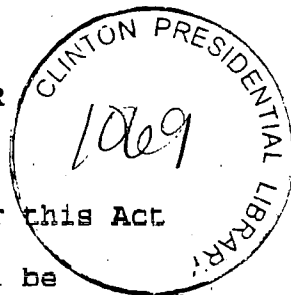
(1) determines that --

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

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

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

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



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

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

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

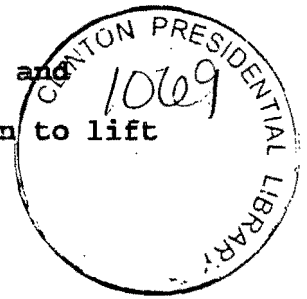
(2) the suspension is lifted by the President, provided that the President

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

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

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

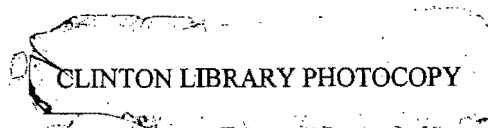
- (2) the estimated fiscal, economic, and budgetary effect of the determination to lift the suspension; and
- (3) all actions, circumstances, and considerations relating to or bearing upon the determination to lift the suspension.



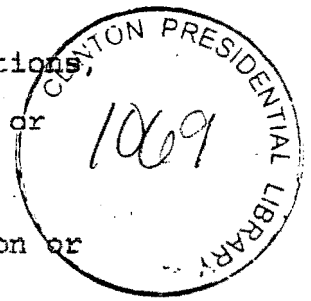
SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

- (1) the amount of budget authority rescinded or the targeted tax benefit [provision] suspended [vetoes];
- (2) any account, department, or establishment of the Government to which such budget authority is available for obligation, and the specific project or governmental functions involved;
- (3) the reasons and justifications for the determination to rescind budget authority or suspend [veto] any targeted tax benefit [provision] pursuant to this Act;
- (4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the rescission or suspension [veto]; and



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



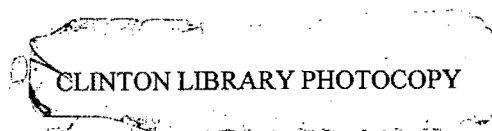
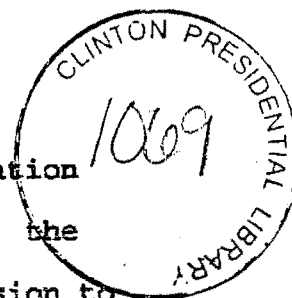
(g) This section is enacted by the Congress--

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

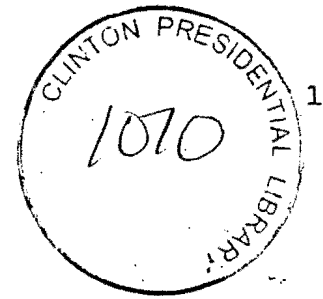
(2) with full recognition of the constitutional right of either House to change the rules (so far relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.

SEC. 8 SEVERABILITY

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



3/27/95, 12pm



I. THE MECHANISM.

House-passed (enhanced rescission): would permit the President -- within 10 days following enactment of a spending or tax bill -- to rescind appropriations (or certain tax benefits) UNLESS Congress disapproves by a 2/3 override vote (i.e. President vetoes congressional disapproval and Congress overrides). With respect to appropriations, the President could rescind all or part of an appropriations item.

PROBLEM--Senate will not accept enhanced rescission.

Senate-passed (separate enrollment): would require the committees of Congress -- when reporting spending and tax legislation -- to draft each budget item as separate items. Upon final passage of such legislation, congressional clerks would be required to "enroll" each spending and tax item as separate bills, whereupon they would be voted on en bloc and presented to the President. The President would then have authority to sign or veto each of the separate bills, subject only to congressional override by a 2/3 vote.

However, unlike HR 2, the President would not be able to rescind part of an appropriation; he would have to accept or reject the entire budget item.

PROBLEMS--This approach gives the President only a take-it-or-leave-it choice on each item. There are significant practical problems associated with drafting and enrolling each "item" separately.



I. THE MECHANISM (continued).

Possible compromise:

1. President may submit a package of proposed rescissions AT ANY TIME.

This flexibility on timing for presidential action is actually stronger than House- or Senate-passed and should appeal to those wanting a strong item veto. In addition, it would permit rescissions to be used as offsets for mid-year supplemental requests.

2. BA is withheld for 45 days (as under current law).

3. Congress required to vote, during the 45 days, on the proposed rescission package WITHOUT ANY SUBSTANTIVE CHANGE OR DELETION.

The ability of one House, by majority vote, to reinstate the money will appeal to Domenici and Byrd; the prohibition on deletions from the President's proposal is stronger than S. 14.

4. If Congress fails to vote within 45 days on the President's proposed rescissions, specifically as submitted by the President, the President is delegated the authority to rescind the affected accounts.

More specifically, if both Houses fail to vote, the President may rescind; but if only one House votes and rejects the rescission, action by the other House becomes irrelevant and the President could not rescind.

This contingent delegation of rescission authority is insurance to guarantee that Congress will act on the President's proposal and should appeal to those wanting a strong item veto while still preserving Congress' right to act on the rescissions. Moreover, by formulating this as a delegation, rather than an action triggered by one House, this would seem to avoid any Chadha problem.



II. APPLICATION TO DIRECT SPENDING.

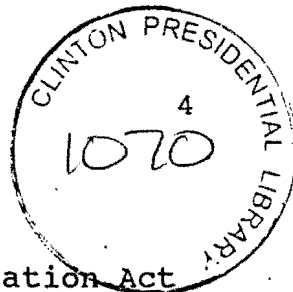
House-passed: explicitly applies to "discretionary budget authority"

Senate-passed: "The term item means...with respect to an authorization measure (i) any numbered section, or (ii) unnumbered paragraph, that contains new direct spending...and identified in conformance with section 2(b)."

Section 2(b) provides that committees "shall not report an authorization measure that contains new direct spending...unless such measure presents each new direct spending...as a separate item and the accompanying committee report for that measure shall contain such level of detail as is necessary to clearly identify the allocation of new direct spending...."

Problem--Senate version calls for items of direct spending to be separately identified and enrolled, but is very unclear about what constitutes an "item of direct spending". Is it the clause creating the government's obligation to pay? the conditions upon which payments will be made? the allocation formulas?

Proposed position: new entitlements should be covered, but we need to work out a definition of what constitutes an "item of direct spending" which would be subject to "rescission" or "veto".



III. APPLICATION TO TARGETED TAX BENEFITS.

House-passed: "Any provision of a revenue or reconciliation Act determined by the President to provide a Federal tax deduction, credit, exclusion, preference, or other concession to 100 or fewer beneficiaries. Any partnership, limited partnership, trust, or S corporation, and any subsidiary or affiliate of the same parent corporation, shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."

Senate-passed: "Any provision:

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

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

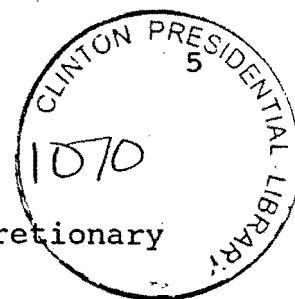
(2) the period of 5 fiscal years covered by the most recently adopted concurrent resolution on the budget; or

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

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

Comment: Senate version appears to be broader, however, Dole and Domenici have said that it does not include cap gains or any other "structural" change to the tax code.

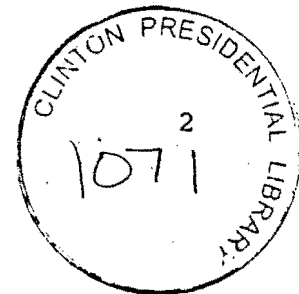
IV. VETOED AMOUNTS APPLIED TO DEFICIT?



House-passed: President can propose reduction in discretionary caps.

Senate-passed: President shall reduce the caps and adjust the PAYGO scorecard to reflect vetoed items.

Problem: automatic reductions in caps are problematic given the common practice of using rescissions to pay for supps.



I. THE MECHANISM (continued).

Possible compromise:

1. President may submit a package of proposed rescissions AT ANY TIME.

This flexibility on timing for presidential action is actually stronger than House- or Senate-passed and should appeal to those wanting a strong item veto. In addition, it would permit rescissions to be used as offsets for mid-year supplemental requests.

2. BA is withheld for 45 days (as under current law).

3. Congress required to vote, during the 45 days, on the proposed rescission package WITHOUT ANY SUBSTANTIVE CHANGE OR DELETION.

The ability of one House, by majority vote, to reinstate the money will appeal to Domenici and Byrd; the prohibition on deletions from the President's proposal is stronger than S. 14.

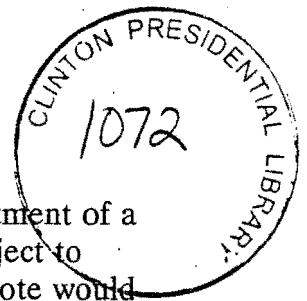
4. If Congress fails to vote within 45 days on the President's proposed rescissions, specifically as submitted by the President, the President is delegated the authority to rescind the affected accounts.

More specifically, if both Houses fail to vote, the President may rescind; but if only one House votes and rejects the rescission, action by the other House becomes irrelevant and the President could not rescind.

This contingent delegation of rescission authority is insurance to guarantee that Congress will act on the President's proposal and should appeal to those wanting a strong item veto while still preserving Congress' right to act on the rescissions. Moreover, by formulating this as a delegation, rather than an action triggered by one House, this would seem to avoid any Chadha problem.

3/27/95, 4:30pm

ITEM VETO ISSUES



I. THE MECHANISM

- House-passed would permit the President -- within 10 days following enactment of a spending or tax bill -- to rescind appropriations (or certain tax benefits) subject to congressional disapproval. Since President would veto disapprovals, a 2/3 vote would effectively be required to overturn rescissions.

- Senate-passed would require the committees of Congress -- when reporting spending and tax legislation -- to draft each budget item separately. Upon final passage of such legislation, congressional clerks would be required to "enroll" each spending and tax item as separate bills, whereupon the separated bills would be voted en bloc and presented to the President. The President would then have authority to sign or veto each of the separate bills. A 2/3 vote would therefore be required to restore a vetoed item.

However, unlike HR 2, the President would not be able to rescind part of an appropriation; he would have to accept or reject the entire budget item -- no matter how that item might be configured or bundled by the appropriators.

II. TARGETED TAX BENEFITS

House-passed: President could veto any tax benefit, determined by the President to provide a benefit to 100 or fewer beneficiaries.

Senate-passed: Separately enroll provisions estimated by JCT as losing revenue 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."

[Dole/Domenici/Packwood letter says this doesn't apply to "changes in the basic structure of the tax code....an across-the-board tax cut on capital gains of all individuals would not be a targeted tax benefit."]

III. DEFICIT LOCK-BOX

In the House bill, President can propose reduction in discretionary caps. However, in the Senate bill, the President must reduce the caps (and adjust PAYGO). Problem--if caps must be reduced, how can rescissions be used to pay for supplementals?

IV. APPLICATION TO DIRECT SPENDING (ENTITLEMENTS)

House bill does not cover direct spending. The Senate bill explicitly covers NEW direct spending, but is very unclear about what constitutes an "item of direct spending."

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. 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 1076
001b. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Proposed Changes to H.R.2. (12 pages)	03/27/1995	P5 1077
002. email	To Douglas Letter and Paul Weinstein, Jr. from Charles Konigsberg. Subject: Revised Item Veto Analysis--Any Comments? (13 pages)	05/02/1995	P5 1078
003. memo	Incomplete. E. Constitutionality. (2 pages)	05/03/1995	P5 1079
004. memo	Line Item Veto-Technical Analysis. (16 pages)	05/25/1995	P5 1080
005. email	To Douglas Letter from Charles Konigsberg. Subject: Item Veto Analysis. (16 pages)	05/25/1995	P5 1081

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

Line Item Veto [Folder 1] [2]

Van Zbinden
2007-0624-F
vz1203

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

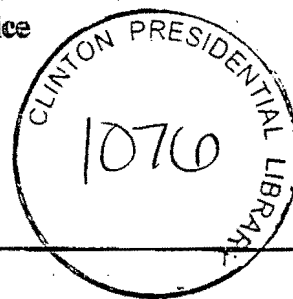
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or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

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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 
Assistant Attorney General

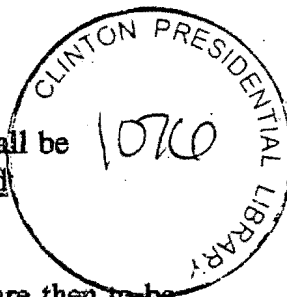
Re: Senate-Passed Separate Enrollment Line Item Veto/S.4

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

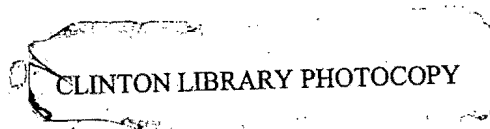
[o]n what seems to us to be the best reading of the Presentment Clause, what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has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

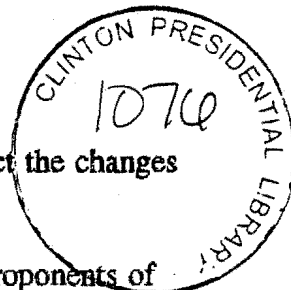


by statute, that each House follow certain procedural rules (e.g., that amendments not be permitted when the disaggregated bills are being voted on en bloc). However, it is questionable whether an Act of Congress could impose internal procedures on the Houses. See March 16 OLC Memo at 5, n.1; Laurence 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.

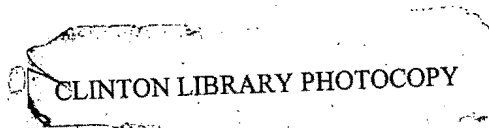


To cure this and other flaws, we attach proposed mark-ups of H.R. 2 that reflect the changes we would recommend in that bill.³

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)

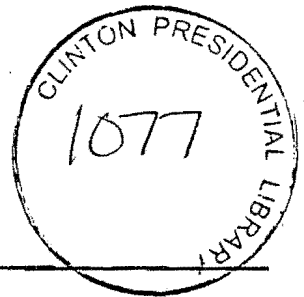
³ The mark-ups also include several other suggestions for improving H.R. 2: first, a subsection reserving to each House the right to alter the procedural rules adopted in the bill; second, language slightly modifying the elements of what must be set forth in the Presidential Special Message reporting 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 PRESIDENTALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGETFrom: Walter Dellinger 
Assistant Attorney General

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

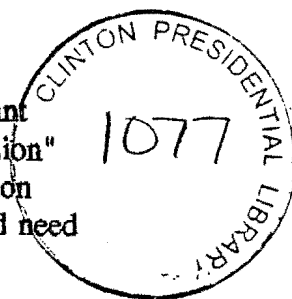
I am attaching two proposed mark-ups of H.R. 2 that reflect our suggested changes to the bill. Most significantly, in an effort to cure potential constitutional problems with the targeted tax benefit provisions of the existing bill, both proposals would eliminate the words "veto" and "repeal" from those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

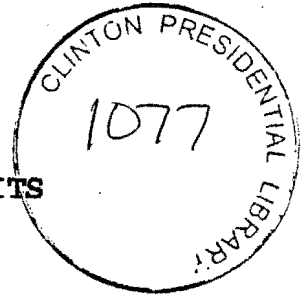
The proposed mark-ups are identical except in one critical respect. The first proposal would give the President the power to "rescind" targeted tax benefits, the effect of which would be to "cancel" such benefits. The terms "rescind" and "cancelled" are used in the bill to describe the President's power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

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

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

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



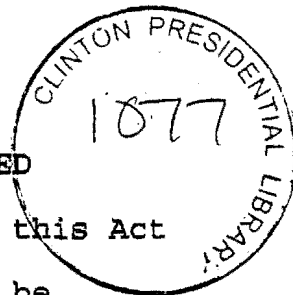
**PROPOSAL # 1: "RESCISSION" OF TARGETED TAX BENEFITS****Sec. 2 LINE ITEM VETO AUTHORITY**

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

(1) determines that --

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

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



Sec. 3 LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED

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

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

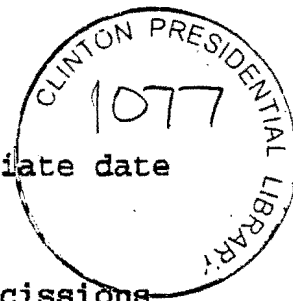
SEC. 4 DEFINITIONS

As used in this Act:

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

(A) which does not have a preamble;

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



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

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

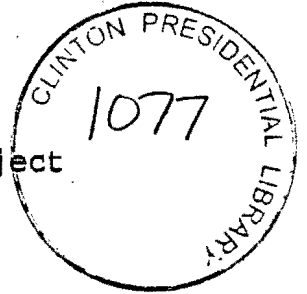
(C) the title of which is as follows: "A bill disapproving the recommendation submitted by the President on __," the blank space being filled in with the date of submission of the relevant special message and the public law to which the message relates.

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

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

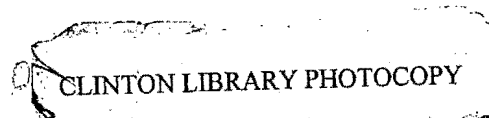
(3) the reasons and justifications for the determination to rescind budget authority or [veto] any targeted tax benefit [provision] pursuant to this Act;

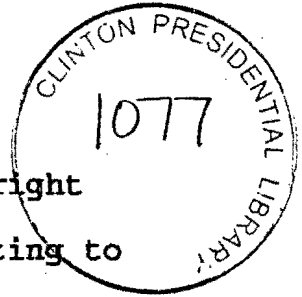
(4) to the maximum extent practicable, the estimated fiscal, economic, and budgetary effect of the rescission [or veto]; and

(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

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 --

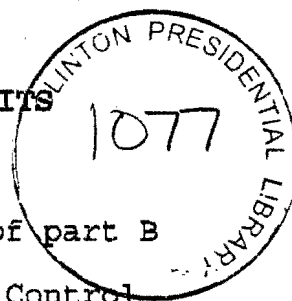
(A) such rescission or suspension [veto] would help reduce the Federal budget deficit;

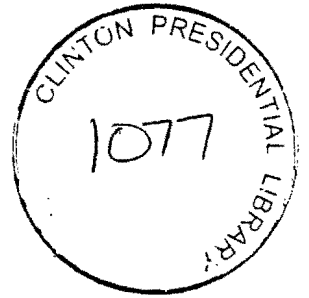
(B) such rescission or suspension [veto] will not impair any essential Government functions; and

(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

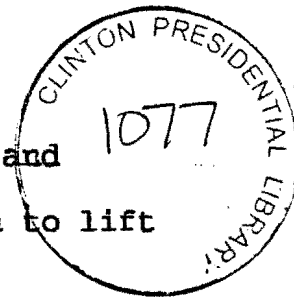
(1) during the period described in subsection (c) [(b)] of this section, a rescission/receipts disapproval bill restoring that benefit [provision] is enacted into law; or

(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;

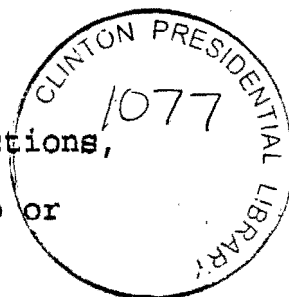


- (2) the estimated fiscal, economic, and budgetary effect of the determination to lift the suspension; and
- (3) all actions, circumstances, and considerations relating to or bearing upon the determination to lift the suspension.

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

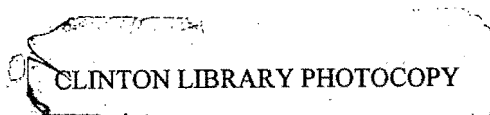


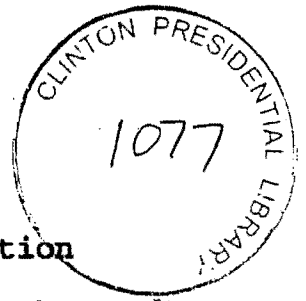
(5) to the maximum extent practicable, all actions, circumstances, and considerations relating to or bearing upon the rescission or suspension [veto] and the decision to effect the rescission or suspension [veto], and to the maximum extent practicable, the estimated effect of the rescission upon the 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

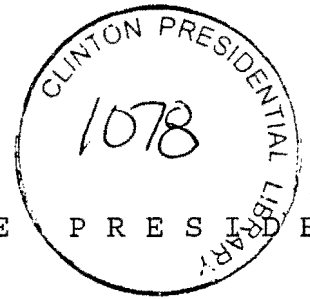
(2) with full recognition of the constitutional right of either House to change the rules (so far relating to the procedure of that House) at any time, in the same manner and to the same extent as in the case of any other rule of that House.



**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.

THE WHITE HOUSE
WASHINGTON



EXECUTIVE OFFICE OF THE PRESIDENT

02-May-1995 10:02am

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

FROM: Charles S. Konigsberg
Office of Mgmt and Budget

SUBJECT: Revised item veto analysis--any comments?

ITEM VETO ISSUES

I. THE MECHANISM

A. House-passed bill (HR 2)

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

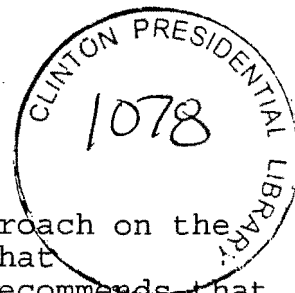
Comment--This time constraint would unnecessarily constrain the Administration's ability to carefully review each appropriation and tax item. Appropriations bills are normally enacted within a short period of time at the end of a fiscal year. Ten calendar days would be an unnecessarily short period of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

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

DOJ Comment--Taken literally, this provision could be understood to obligate the President to say more than was reasonably appropriate and necessary to explain a

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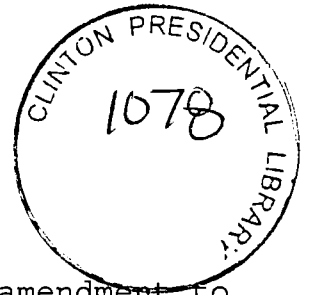
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rescission/veto decision. If so, it could encroach on the President's deliberative process. To dispel that implication, the Department of Justice (DOJ) recommends that the section be amended to require the President to provide the information only "to the maximum extent practicable."

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B. Senate-passed bill (S. 4)

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

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

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

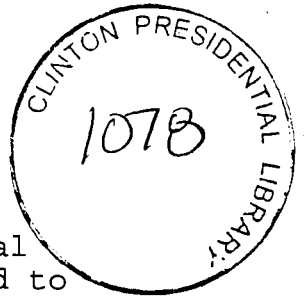
Nevertheless, DOJ believes that there still is a risk that a separate enrollment procedure, even as amended in the current version of S. 4, would be held unconstitutional.
[DOJ will supplement]

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

Appropriations Legislation--[OMB to bill in comment]

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

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

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

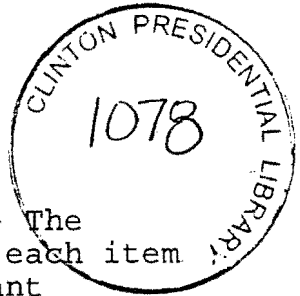
The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram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

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

[Damus to fill in]

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

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

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

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

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II. TARGETED TAX BENEFITS

A. House-passed bill (HR 2)

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

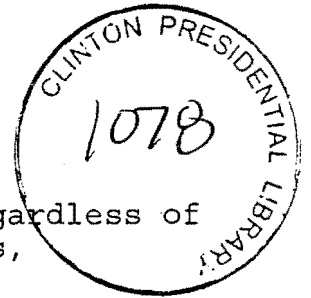
DOJ Comment--DOJ firmly believes that the use of the terms "veto" and "repeal" raises serious constitutional concerns that are not posed by the budget authority provisions of the House bill. In particular, U.S. Const. art. I, § 7, cl. 2 provides that the President can exercise his "veto" power only before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

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

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

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shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."

[Comment--to be filled in by Minarik and Treasury]

B. Senate-passed bill (S 4)

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

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

- (1) the first fiscal year covered by the most recently adopted concurrent resolution on the budget; or
- (2) the period of 5 fiscal years covered by the most recently adopted concurrent resolution on the budget; or
- (3) the period of 5 fiscal years following the

first 5 years covered by the most recently adopted concurrent resolution on the budget; and

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

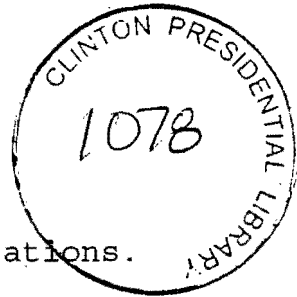
Comment (from Treasury)--[Treasury to expand their analysis]

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

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

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similar services to that performed by for-profit organizations.

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

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

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

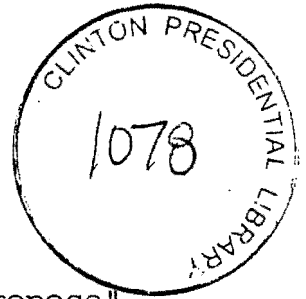
Comment (from Treasury): This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section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

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

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

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III. DEFICIT LOCK-BOX; SUPPLEMENTALS

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

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

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

IV. APPLICATION TO DIRECT SPENDING (ENTITLEMENTS)

A. House-passed bill (HR 2)

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

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

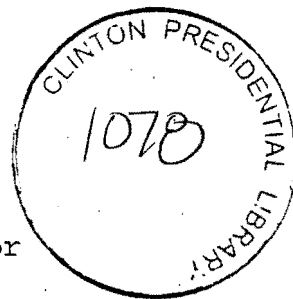
B. Senate-passed bill (S. 4)

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

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

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

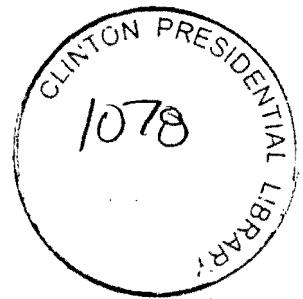
2. Annually appropriated entitlements.--The Senate bill would apparently require that each item of appropriation --including appropriations which fund underlying entitlement obligations -- be separately enrolled.

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

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

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V. JUDICIAL REVIEW

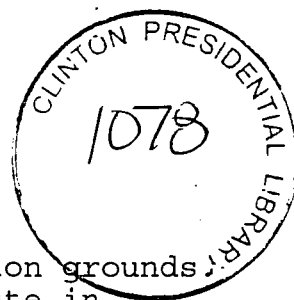
A. Expedited Review -- Both House- and Senate-passed bills provide that "[a]ny Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that a provision of this Act violates the Constitution."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

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

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

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

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

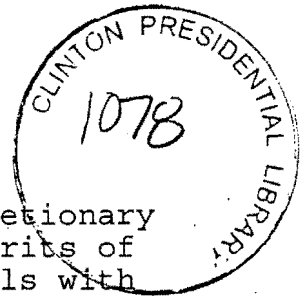
B. Severability.--The Senate-passed bill, see S. 4, ¶6(d), includes a "severability" provision. The House-passed bill does not.

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

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

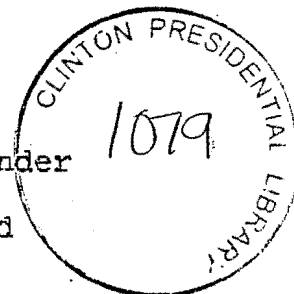
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The provision would apply to bills with emergency designations that also have any nonemergency discretionary or direct spending proposals, regardless of the merits of the proposals. For example, it would apply to bills with emergency designations that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

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

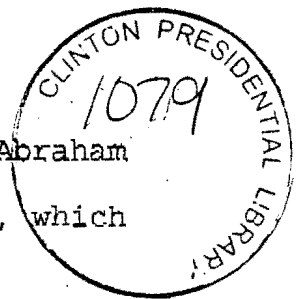


E. Constitutionality -- separate enrollment. -- Under Senator Abraham's amendment to S. 4, after the clerk has disaggregated a bill into items that are to be considered separate bills, "[t]he new bills resulting from the disaggregation . . . shall be immediately placed on the appropriate calendar in the House of origination, and upon passage, placed on the appropriate calendar in the other House. They shall be the next order of business in each House and they shall be considered and voted on en bloc and shall not be subject to amendment." If passed by both Houses in this manner, the bills are then to be presented to the President.

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

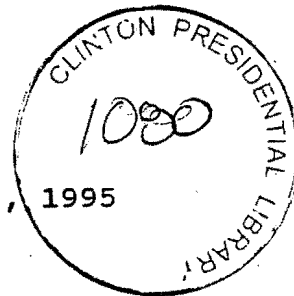
Senator Abraham's amendment attempts to address this difficulty by requiring that, after the enrolling clerk of the originating House has disaggregated a covered bill, both Houses vote on the disaggregated bills en bloc. The evident purpose of the amendment is to ensure that both Houses have voted on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

Nevertheless, DOJ believes that it remains uncertain whether a separate enrollment procedure, even as amended in the current version of S. 4, would be upheld. As DOJ understands it, the en bloc mechanism contemplated by Senator Abraham's amendment is a significant departure from traditional en bloc voting procedures -- a critical factor in the analysis, given that courts tend to ascribe considerable weight to past practice when deciding what the Constitution permits or mandates. See, e.g., The Pocket Veto Case, 279 U.S. 655, 688-90 (1929). Under traditional en bloc voting procedures, unanimous consent is required (i.e., a member of Congress can request individualized consideration of a bill(s) slated for en bloc voting); the matters voted on in that manner tend to be noncontroversial (e.g., uncontested presidential nominations); and there is a



single vote on a package of bills. By contrast, the Abraham amendment contemplates two votes on what are often contentious matters -- one vote before disaggregation, which is the only point at which debate is permitted, and a second, en bloc vote after disaggregation, in which individualized consideration of the bills is not permitted. Thus, under Senator Abraham's amendment, the President is given authority to veto measures on which members of Congress could not effectively exercise a vote as to an individual provision when the provisions were disaggregated at the en bloc stage. In DOJ's view, a court might well seize on this point and conclude that the Abraham amendment violates the Presentment Clause, because the disaggregated bills that are presented to the President will never have been voted on by Congress as individual measures.

May 25, 1995



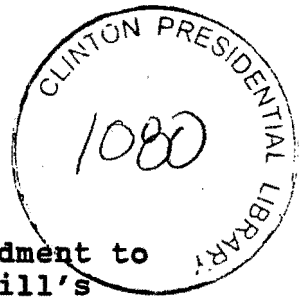
ITEM VETO ISSUES

I. THE MECHANISM

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

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



I. THE MECHANISM (continued)

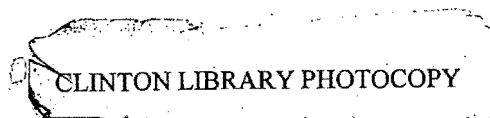
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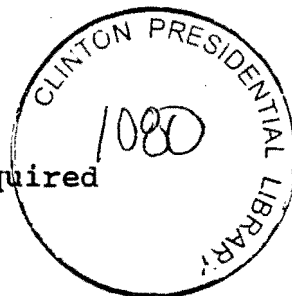
1. Constitutionality.--Under Senator Abraham's amendment to the Senate version, after the clerk has disaggregated a bill's items into separate bills, "[t]he new bills resulting from the disaggregation...shall be immediately placed on the appropriate calendar in the House of origination, and upon passage,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

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

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

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





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

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

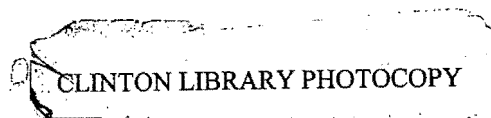
2. Effect of Senate version on coherence of legislation.--
The Senate version calls for the separate enrollment of each item with respect to appropriations measures, which raises serious concerns about the coherence of legislation.

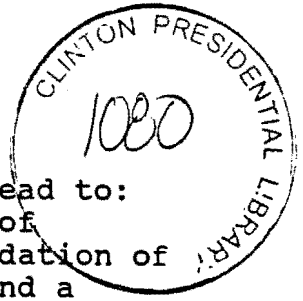
OMB Comment--The Senate bill defines "item of appropriation" as "any numbered section" or "unnumbered paragraph," or "allocation or suballocation of an appropriation." This would result in thousands of appropriations bills which -- of necessity -- would have to reference many other related bills in order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

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

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

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





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

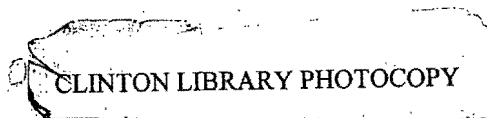
The Department would attempt to compensate for these limitations through the use of expanded transfer authority, but the approval process for numerous minor budget adjustments could quickly overload the capability of the congressional committees to provide a timely response. Each time DOD needed to reprogram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

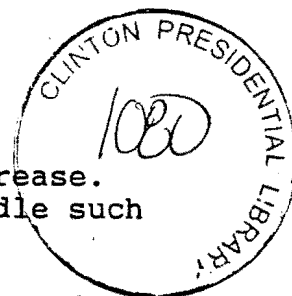
4. Separate enrollment under the Senate version of items which are classified or incorporated by reference.

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

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

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



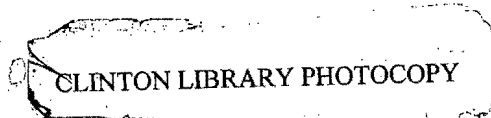


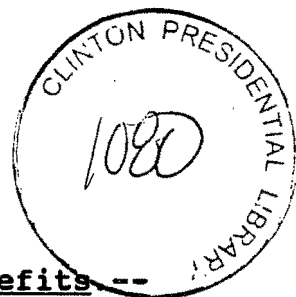
memoranda and veto messages) would significantly increase. Present equipment and staffing are inadequate to handle such volume.

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

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

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





II. TARGETED TAX BENEFITS

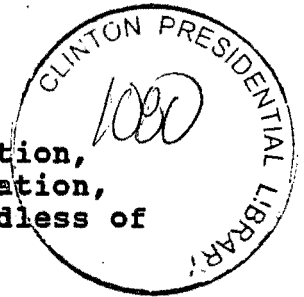
A. House-passed bill (HR 2)

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

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

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

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

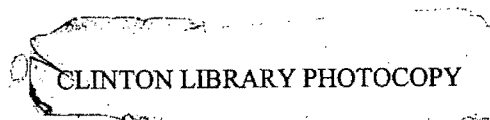


Any partnership, limited partnership, trust, or S corporation, and any subsidiary or affiliate of the same parent corporation, shall be deemed and counted as a single beneficiary regardless of the number of partners, limited partners, beneficiaries, shareholders, or affiliated corporate entities."

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

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

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





II. TARGETED TAX BENEFITS (continued)

B. Senate-passed bill (S 4)

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

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

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

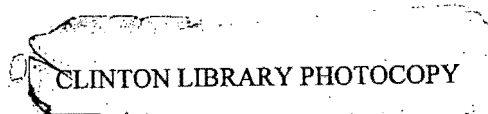
(3) the period of the 5 fiscal years following the first 5 years covered by the most recently adopted concurrent resolution on the budget; and

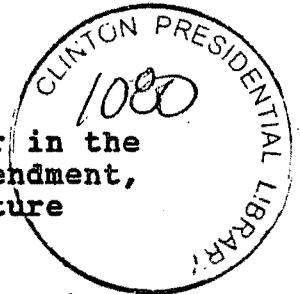
(B) having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

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

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

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





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

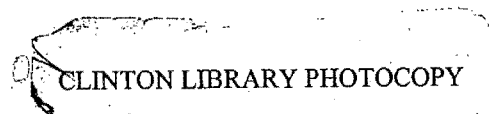
OMB Comment--It should be noted that requirements that the President submit legislation have generally been viewed as precatory.

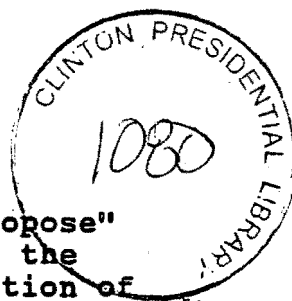
Treasury Comment: This section potentially affects most provisions of the Code including provisions governing employee benefits (including pension plans), charitable organizations, individual and corporate deductions, and credits. In effect, virtually every provision of the Code outside of section 61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

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

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

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



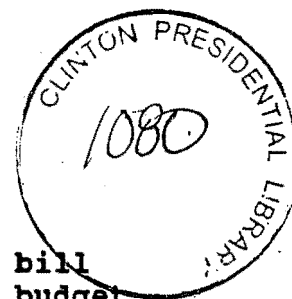


III. DEFICIT LOCK-BOX; SUPPLEMENTALS

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

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

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



IV. APPLICATION TO DIRECT SPENDING

A. House-passed bill (HR 2)

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

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

IV. APPLICATION TO DIRECT SPENDING (continued)

B. Senate-passed bill (S. 4)

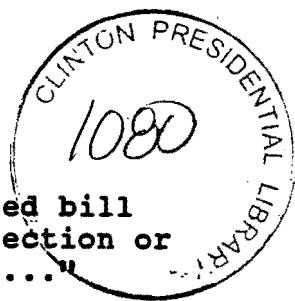
1. Definition of direct spending.--The Senate-passed bill would require the separate enrollment of "any numbered section or unnumbered paragraph, that contains new direct spending...."

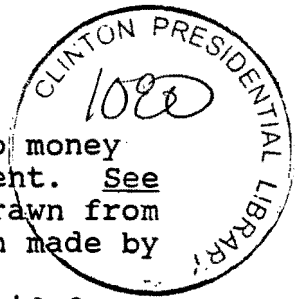
OMB Comment--The Senate-passed definition of "items of direct spending" is very unclear. Is a paragraph creating the government's obligation to pay an "item?" Are paragraphs setting forth beneficiaries, or conditions of payment, separate items? Is legislation changing an existing entitlement program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

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

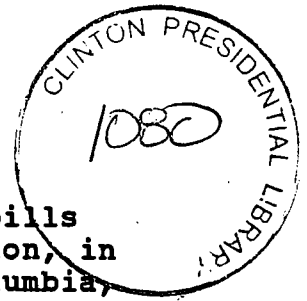
DOJ Comment--Section 5(1) of the Senate bill defines the term "appropriation measure" to mean "any general or special appropriation bill or any bill or joint resolution making supplemental, deficiency, or continuing appropriations." See also Bengzon v. Secretary of Justice, 299 U.S. 410, 413 (1937) "[a]n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

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





However, in the absence of an appropriation, no money may be withdrawn from the Treasury to make the payment. See U.S. Const. Art. I, §9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of an Appropriation made by Law."); OPM v. Richmond, 496, U.S. 414, 424 (1990) (Appropriations Clause requires that money may be paid from Treasury only pursuant to duly enacted appropriations measures). In resolving this conflict, a court would have to determine whether, given the underlying entitlement statute, payment is owed. This would be a matter of statutory interpretation.

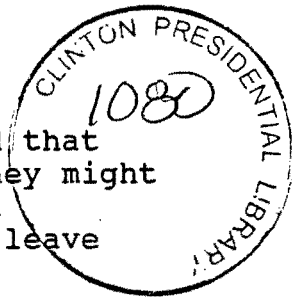


V. JUDICIAL REVIEW

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

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

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



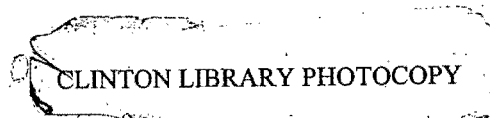
line item veto would be upheld. (It should be noted that even if the courts upheld the standing provision, they might still decline to reach the merits, e.g. on political question grounds. Such a non-merits decision would leave the statute in effect.)

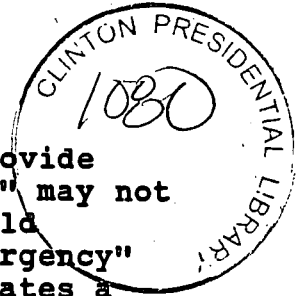
DOJ does not believe, however, that Congress can authorize actions by its members to challenge the line item statute before the President has actually exercised his veto authority under it. Any such suit would be, in effect, a request for a merely advisory opinion. Cf. Goldwater v. Carter, 444 U.S. 996,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

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

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

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

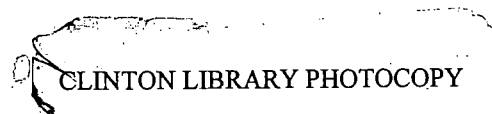




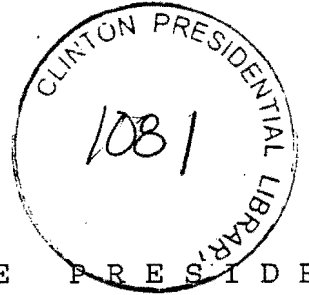
VI. EMERGENCY SPENDING.--The Senate-passed bill would provide that any *appropriations* statute designated as "emergency" may not contain any non-emergency provisions; similarly, it would provide that any *direct spending* statute designated "emergency" may not contain any non-emergency provisions; and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

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

The Senate item veto bill would therefore eliminate regular and supplemental appropriations bills as vehicles for enacting emergency funding. Regular appropriations bills have included necessary emergency appropriations in the past, such as \$50 million for Rwanda in the FY 1995 Foreign Operations bill. Rescission bills, such as the FY 95 rescission bill, have likewise included emergency funding (FEMA funding in the case of the '95 rescission bill).



THE WHITE HOUSE
WASHINGTON



EXECUTIVE OFFICE OF THE PRESIDENT

25-May-1995 12:13pm

TO: Douglas N. Letter

FROM: Charles S. Konigsberg
Office of Mgmt and Budget

SUBJECT: ITEM VETO ANALYSIS

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

ITEM VETO ISSUES

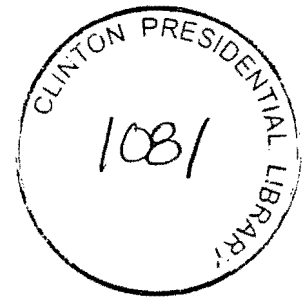
I. THE MECHANISM

A. House-passed bill (HR 2)

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

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

THE WHITE HOUSE
WASHINGTON



I. THE MECHANISM (continued)

B. Senate-passed bill (S. 4)

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

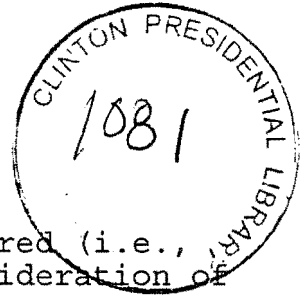
DOJ Comment--The enrollment procedure envisaged in an earlier version of S. 4 -- which did not contemplate another vote by both Houses after the enrolling clerk had disaggregated the bill -- would raise very serious questions under the Presentment Clause, U.S. Constitution Art. I, §7, cl. 2, and might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

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

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

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

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

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

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

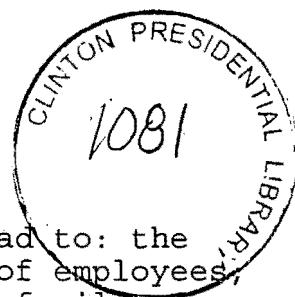
Treasury Comment--Separate enrollment would make it difficult to determine whether a particular provision in the tax code had been changed and would, in general, make the codification of tax laws less reliable. It would require multiple separate effective dates and transition rules --making the tax laws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

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

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

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

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

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

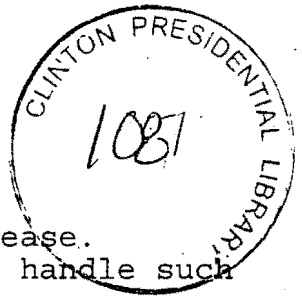
OMB Comment--It is unclear how or whether separate enrollment would apply to classified material. Where a classified report or annex is incorporated by reference or otherwise included in a bill as if it were law, the separate enrollment procedure may not apply or might not allow the President to separately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

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

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

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

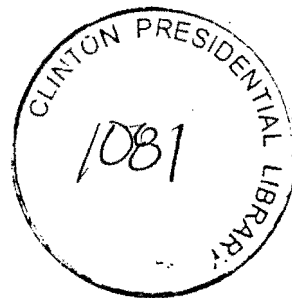
Similar procedural issues could arise in the case of large tax and reconciliation measures. In addition, to the extent that multiple direct spending and revenue provisions in a large bill interact with each other for purposes of the "pay-as-you-go" estimates that must be issued by OMB 5 days after enactment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

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

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

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II. TARGETED TAX BENEFITS

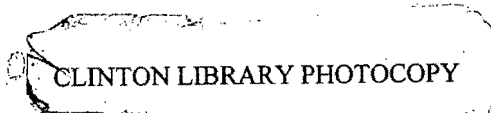
A. House-passed bill (HR 2)

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

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

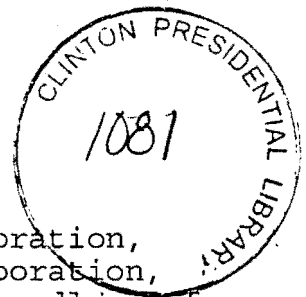
To avoid this significant constitutional problem, DOJ urges the following reformulation of the targeted tax benefit provisions of the House bill: (1) substitute "rescind" for "veto"; (2) substitute "indefinite suspension" for "repeal" (the Supreme Court long ago ruled that Congress may authorize the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

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



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

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

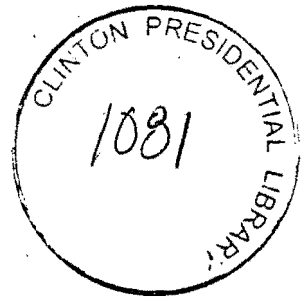
Treasury Comment--It would be difficult, if not impossible to determine the number of persons affected by any particular tax provision. The "100 or fewer beneficiaries" test requires too much precision and is too easy to avoid or manipulate in the drafting process. It creates an incentive for tax benefit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

The provision treating many persons as a single beneficiary is not properly drafted. For example, the language applying the rule to the subsidiaries of a corporation could treat each subsidiary as a separate beneficiary for purposes of the 100 or fewer test. It would be preferable to treat all "related persons" as a single beneficiary for purposes of the test and use a definition

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from the tax code, such as the one used in section 267(d), of related persons. This would prevent an individual from avoiding the 100 or fewer test by, for example, arranging for a business to be operated through 101 separate corporations.

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II. TARGETED TAX BENEFITS (continued)

B. Senate-passed bill (S 4)

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

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

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

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

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

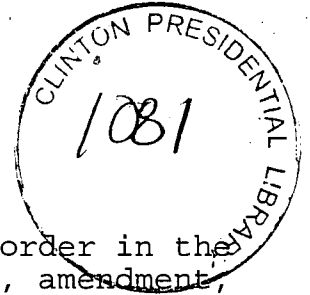
(B) having the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."

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

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

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

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Finally, section 9 would create a new point of order in the House and Senate against "any bill, joint resolution, amendment, motion, or conference report that contains a tax expenditure20HINVOKE
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unless the bill, joint resolution, amendment, motion, or conference report provides that the tax expenditure will terminate not later than 10 years after the date of enactment of the tax expenditure."

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

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

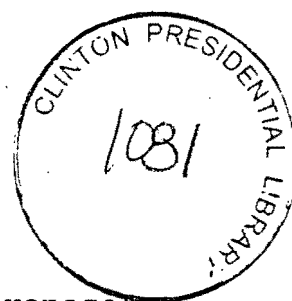
It is unclear from the bill who is responsible for establishing the performance goals, how detailed they are intended to be, and what criteria should be used in determining effectiveness.

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

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

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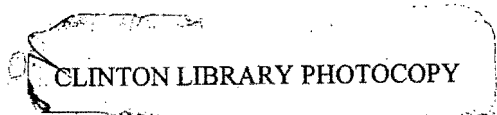


III. DEFICIT LOCK-BOX; SUPPLEMENTALS

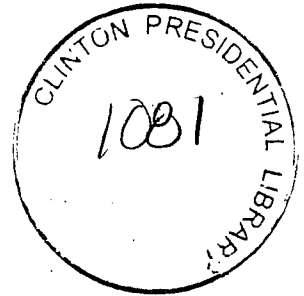
The House bill provides that the President may "propose" reduction in the discretionary caps up to the amount of the rescissions. The Senate-passed bill would require reduction of the caps or reduction of PAYGO balances by the amount of the vetoed items.

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

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



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IV. APPLICATION TO DIRECT SPENDING

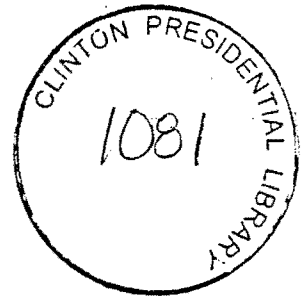
A. House-passed bill (HR 2)

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

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

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IV. APPLICATION TO DIRECT SPENDING (continued)

B. Senate-passed bill (S. 4)

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

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

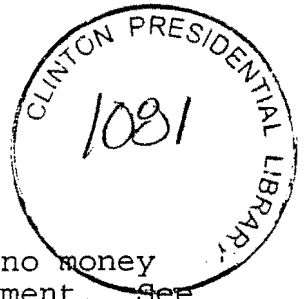
2. Annually appropriated entitlements.--The Senate bill would apparently require that each item of appropriation --including appropriations which fund underlying entitlement obligations -- be separately enrolled.

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

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

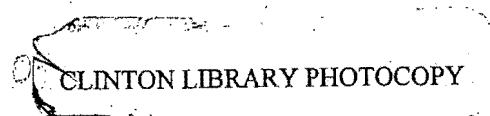
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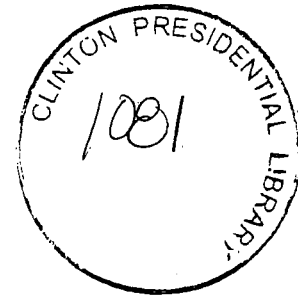
However, in the absence of an appropriation, no money may be withdrawn from the Treasury to make the payment. See U.S. Const. Art. I, ?9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of an Appropriation made by Law."); OPM v. Richmond, 496, U.S. 414, 424 (1990)

(Appropriations Clause requires that money may be paid from Treasury only pursuant to duly enacted appropriations measures). In resolving this conflict, a court would have to determine whether, given the underlying entitlement statute, payment is owed. This would be a matter of statutory interpretation.



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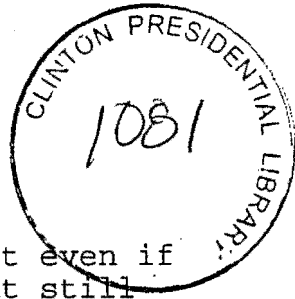


V. JUDICIAL REVIEW

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

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

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



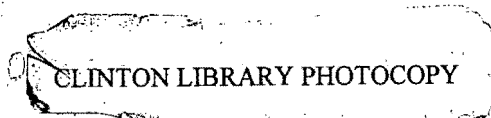
line item veto would be upheld. (It should be noted that even if the courts upheld the standing provision, they might still decline to reach the merits, e.g. on political question grounds. Such a non-merits decision would leave the statute in effect.)

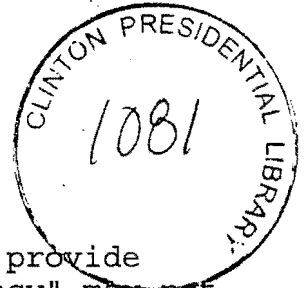
DOJ does not believe, however, that Congress can authorize actions by its members to challenge the line item statute before the President has actually exercised his veto authority under it. Any such suit would be, in effect, a request for a merely advisory opinion. Cf. Goldwater v. Carter, 444 U.S. 996,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

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

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

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

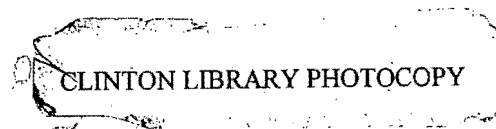




VI. EMERGENCY SPENDING.--The Senate-passed bill would provide that any appropriations statute designated as "emergency" may not contain any non-emergency provisions; similarly, it would provide that any direct spending statute designated "emergency" may not contain any non-emergency provisions; and it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

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

The Senate item veto bill would therefore eliminate regular and supplemental appropriations bills as vehicles for enacting emergency funding. Regular appropriations bills have included necessary emergency appropriations in the past, such as \$50 million for Rwanda in the FY 1995 Foreign Operations bill. Rescission bills, such as the FY 95 rescission bill, have likewise included emergency funding (FEMA funding in the case of the '95 rescission bill).



Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	For Abner Mikva and Pat Griffin from Jack Lew. Subject: Balanced Budget and Line Item Veto... (1 page)	01/26/1995	P5 1082
001b. memo	Technical Issues - S.J.Res. 1. (1 page)	01/25/1995	P5 1083
001c. memo	Line Item Veto Technical Issues. (1 page)	01/20/1995	P5 1084
001d. memo	For Robert Damus from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to S.4 and S.14. (3 pages)	01/20/1995	P5 1085
002. memo	Suggested Changes to H.R.2. (5 pages)	01/1995	P5 1086
003. note	OMB/LA 02/06/1995 -- Item Veto Meeting. (1 page)	02/06/1995	P5 1087

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Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

Line Item Veto [Folder 1]: Line Item Veto [1]

Van Zbinden
2007-0624-F
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RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

January 26, 1995

MEMORANDUM FOR ABNER MIKVA AND PAT GRIFFIN

SUBJECT: BALANCED BUDGET AND LINE ITEM VETO TECHNICAL ISSUES

FROM: JACK LEW

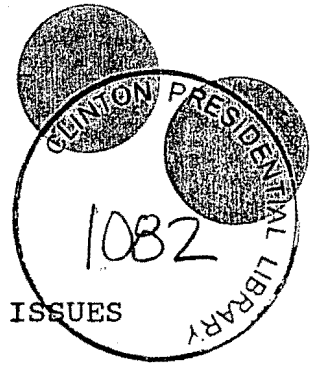
cc: Martha Foley, Chuck Konigsberg, Cliff Sloan, Bob Damus,
Barbara Chow

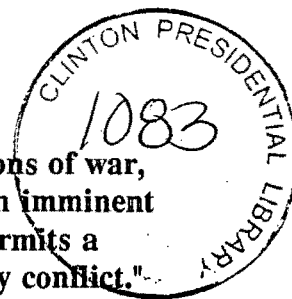
128 DEOB

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

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

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



Technical Issues - S.J.Res. 1

✓ 1. **Military Threat Provision.** S.J.Res. 1 limits military waivers to declarations of war, and where "the United States is engaged in military conflict which causes an imminent and serious military threat to national security". By contrast, H.J.Res. 1 permits a majority waiver where a threat exists, but without being "engaged in military conflict."

NOT
SD ✓ 2. **"Tax Revenue" vs. "Revenue".** S.J.Res. 1 calls for a vote of each House to increase "revenue." This budgetary term is broader than "tax revenue" which is used in H.J.Res. 1.

✓ 3. **Budget Process Flexibility.** House and Senate versions have different mechanisms--statement of receipts and outlays to be adopted by law (H.J.Res. 1) vs. a general balance requirement (S.J.Res. 1). The latter, S.J.Res. 1, leaves more budget process flexibility to implementing legislation.

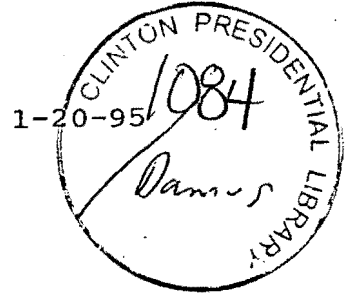
4. **Debt Limit.** H.J.Res. 1 requires a super-majority vote to increase debt held by the public "as of the date this Article takes effect." S.J.Res. 1 requires a super-majority vote to increase the "limit on debt held by the public" without specifying what the limit is. There is no such limit in current law.

5. **Effective Date.** H.J.Res. 1 is effective "for" FY 2002; S.J.Res. 1 is effective "beginning with" FY 2002. Is a budget resolution for FY 98, which includes FY 2002 as year-5, subject to the balanced budget requirement under the House version, but not the Senate version?

which
are ✓ 6. **U.S. Definition.** H.J.Res. 1 applies to total outlays/receipts of "the United States." S.J.Res. 1 applies to total outlays/receipts of the "United States Government." These two provisions might be interpreted differently with regard to how the amendment applies to off-budget or quasi-governmental entities.

ND ✓ 7. **Enforcement by the Courts and the President.** Neither version is clear regarding the enforcement powers and responsibilities of the judiciary or the President. Neither version is clear about whether enforcement is limited solely to implementing legislation.

✓ 8. **Balance Required in Every Year.** Both versions require balance in each "fiscal year." However, Congress is currently considering proposals for a biennial budget period. In order to preserve the flexibility of future Congress' to adjust the fiscal periods of the government, the language would have to be changed from "fiscal year" to "budget period."



Line Item Veto
Technical Issues

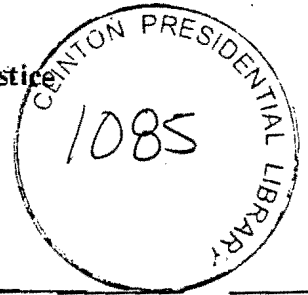
1. Direct Spending. S. 14 allows cancellation of "an amount of direct spending." Direct spending is provided in direct spending provisions, not accounts (e.g., a provision amends Medicaid to provide a new benefit). The direct spending provision is estimated to cost a certain amount. But it is the provision,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

01/20/85 16:00



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 20, 1995

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

From: Walter Dellinger *WD*
Assistant Attorney General

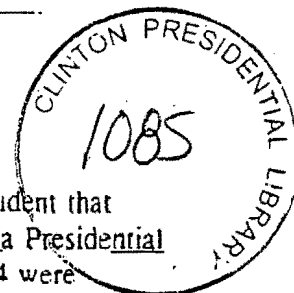
Re: Line Item Veto/Proposed Changes to S.4 and S.14

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

S.4

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

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



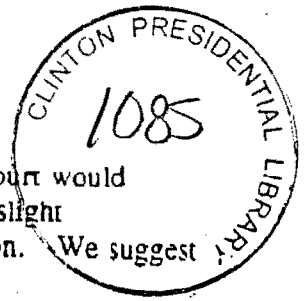
cannot be abridged by a statute passed by both houses and signed by the President that attempts to channel or regulate those powers." Paul R.Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 855 (1987). Accordingly, if S.4 were construed to put the procedures prescribed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

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

S.14

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

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



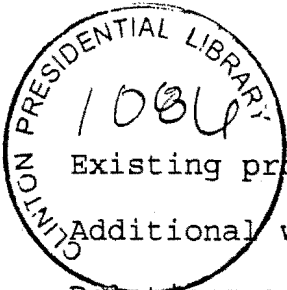
952 (1983). Although we believe that this argument is unsound, and that a court would likely conclude that S. 14 does not entail a one-House veto, we recommend a slight modification to Section 2(e) so that it avoids any reference to one-House action. We suggest that the provision be changed to read as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

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

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

cc: Abner J. Mikva

Line Item
Vets



SUGGESTED CHANGES TO H.R. 2

Existing provisions are noted in regular type-face

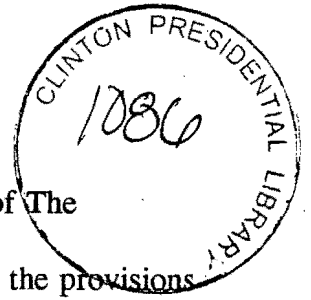
Additional words and provisions are noted in **bold**.

Deletions are [bracketed and underlined].

NOTE: THIS MARK-UP DOES NOT INCLUDE ALL SECTIONS, ONLY THE MOST RELEVANT SECTIONS

Section 2

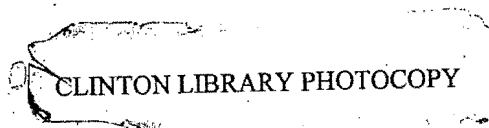
LINE ITEM VETO AUTHORITY

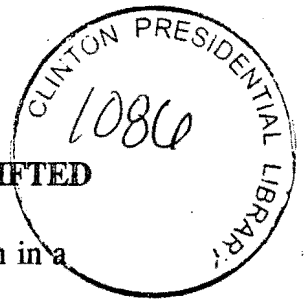


[(a)] IN GENERAL-- Notwithstanding the provisions of part B of title X of The Congressional Budget and Impoundment Control Act of 1974, and subject to the provisions of this section, the President may rescind all or part of any discretionary budget authority or **suspend [veto]** any targeted tax benefit, 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 message for each appropriation Act and for each revenue Act under this paragraph.



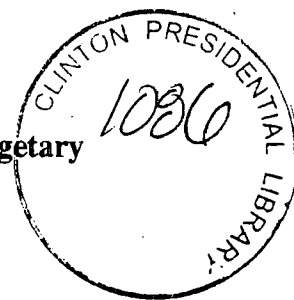


Section 3. **LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED OR LIFTED**

(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;**

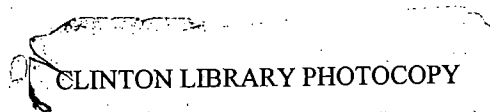


- (2) the estimated fiscal, economic, and budgetary effect of the determination to lift the suspension; and
- (3) all actions, circumstances, and considerations relating to or bearing upon the determination to lift the suspension.

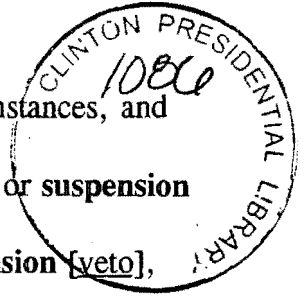
SECTION 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

(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.



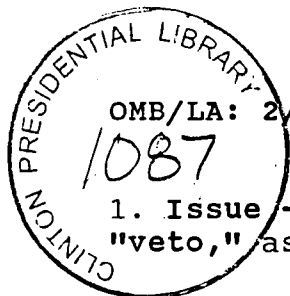
SECTION 6 SEVERABILITY

OPTION 1: IF CURRENT "VETO/REPEAL" LANGUAGE IS MAINTAINED

If the provision of this Act authorizing the President to veto targeted tax benefits is held invalid, the provision of this Act authorizing the President to rescind discretionary budget authority shall not be affected thereby.

OPTION 2: IF "SUSPENSION" LANGUAGE IS USED INSTEAD OF "VETO/REPEAL"

If the provision of this Act authorizing the President to suspend targeted tax benefits is held invalid, the provision of this Act authorizing the President to rescind discretionary budget authority shall not be affected thereby.



OMB/LA: 2/6/95 - Item Veto Meeting

Live Item

Veto

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

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

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

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

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

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

permanent - in effect a cancellation similar to rescission;

or

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

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Abner Mikva from Walter Dellinger. Subject: Line Item Veto Act. (11 pages)	12/21/1994	P5 1088
002. memo	For Janet Reno from Walter Dellinger. Subject: Line Item Veto Act. (11 pages)	01/04/1995	P5 1089

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

Line Item Veto [Folder 1]; Line Item Veto [2]

Van Zbinden
2007-0624-F
vz1205

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)]

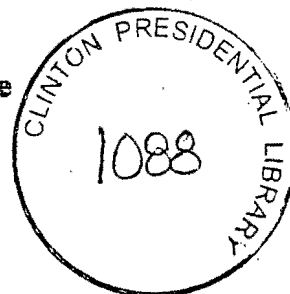
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D. C. 20530

December 21, 1994

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

Re: Line Item Veto Act

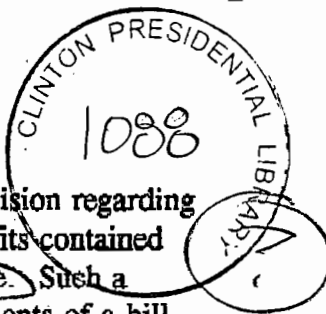
This memorandum sets forth our comments on the proposed Line Item Veto Act (the "Act") that is expected to be introduced by Republicans in the House of Representatives in early January. The Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted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

In our view, the provision of the Act authorizing the President to rescind discretionary budget ^{Authority} is constitutional. We believe that the provisions authorizing the President to "veto" targeted tax benefits and establishing procedural rules for congressional consideration of disapproval legislation raise more significant constitutional concerns. However, we also believe that these concerns can be substantially alleviated through redrafting, proposed below, that would not disturb the essence of the two provisions.

I. Description of the Act

Section 2 of the Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted tax benefit within any revenue bill." The President may only exercise this power if he determines that such a rescission or veto (a) would help reduce the Federal budget deficit; (b) would not impair any essential Government functions; and (c) would not harm the national interest.¹

¹ The term "targeted tax benefit" is defined in the Act to mean "any provision which has the practical effect of providing a benefit in the form of a differential treatment to a particular taxpayer or a limited class of taxpayers, whether or not such provision is limited by its terms to a particular taxpayer or a class of taxpayers. Such term does not include any benefit provided to a class of taxpayers distinguished on the basis of general

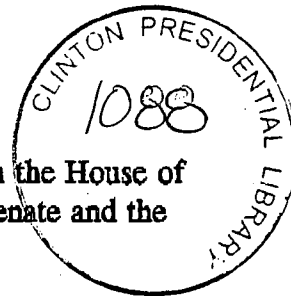


Although it is entitled "The Line Item Veto Act," and although its provision regarding targeted tax benefits speaks in terms of a presidential "veto" of any such benefits contained within a revenue bill, the Act does not operate as a true line item veto measure. Such a measure necessarily would authorize the President to strike out particular segments of a bill at the same time that he signs the remaining portions of the bill into law. Under the Act, however, the President may "rescind" discretionary budget authority or "veto" targeted tax benefits after a bill containing such authority or benefits has been signed into law. Specifically, the Act gives the President a period of "twenty calendar days . . . after the date of enactment" of an appropriations or revenue bill within which to transmit a "special message" notifying Congress of a rescission or "veto." § 2 (emphasis added).² The Act further provides that "any amount of budget authority rescinded . . . shall be deemed canceled," and any targeted tax benefit vetoed "shall be deemed repealed," unless, during a specified period, a majority of each House of Congress passes "disapproval" legislation that would make available the rescinded budget authority or that would restore the tax benefit, and the President signs that legislation. § 3. (A presidential veto of such legislation may itself be overridden by two-thirds of the members of both Houses.) A true line item veto does not "cancel" or "repeal" existing law, because it precludes a vetoed provision from becoming law in the first place. Here, however, the use of the terms "canceled" and "repealed" further indicates that the President may wield his powers under the Act after the discretionary budget authority or targeted tax benefit, along with the rest of the appropriations or revenue bill of which they are a part, has been signed into law.

The final provision of the Act of relevance to the constitutional analysis is Section 5. It has two key components. First, it purports to prescribe the manner in which the Senate is

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

² We assume that the word "enactment" is intended to have its common meaning: "[t]he method or process by which a bill in the Legislature becomes a law." Black's Law Dictionary 526 (6th ed. 1990). A bill becomes law after it is passed by a majority of both Houses of Congress, and is signed by the President. See INS v. Chadha, 462 U.S. 919, 945-51 (1983); see also Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994) (construing legislation that was to take effect upon "enactment," which was understood to mean the day that the President signed the legislation).



to consider legislation disapproving the President's action that it receives from the House of Representatives. Second, it purports to prescribe rules of order in both the Senate and the House of Representatives for proceeding with such legislation.

II. Constitutional Analysis

A. Rescission Authority

for approval
We begin with the provision of the Act that would grant the President the power to rescind discretionary budget authority, unless Congress passes legislation disapproving the President's action within a prescribed period, and the President signs that legislation.

7
Although plausible arguments to the contrary may be made, we believe that the provision is constitutional.³

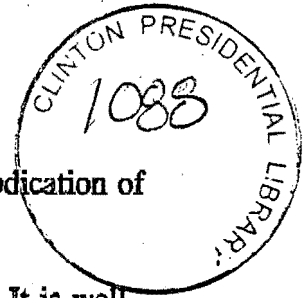
vesting clause?
The chief constitutional argument against the provision is that it would violate general principles of the separation of powers between the branches of government, because it delegates a core legislative function to the Executive Branch. This argument does not rest on the explicit text of the Constitution; the phrase "separation of powers" does not appear in the Constitution.⁴ That concept is, however, embodied in the structure of the Constitution, and is at the center of our system of government. The Constitution creates distinct branches of government, and assigns particular functions to them. Among the functions assigned to the Legislative Branch is the power to appropriate funds.⁵ This "power of the purse" is perhaps the most important of all of Congress' constitutional responsibilities.⁶ Thus, authorizing the

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³ This conclusion is consistent with the prior views of this Office. In a 1983 memorandum in which the Office determined that a true line item veto statute would violate the Constitution, it observed that "Congress could adopt a statute that would provide the President with general authority not to expend any item of appropriation that he determined to be contrary to the national interest." See Memorandum to Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, re: Constitutional Amendment (S.J. Res. 178) and Bill (S. 921) to Allow the President to Veto Items of Appropriation, at 5 (December 21, 1983).

⁴ It could also be argued that the proposed rescission authority in the Act violates the specific textual requirements of Article I, § 7 of the Constitution governing the manner in which laws are made. We do not think that this argument carries substantial weight. We address it below in the context of our discussion of the possible textual problems with the provision of the Act authorizing the President to "veto" targeted tax benefits.

⁵ U.S. Const. art. I, § 9, cl. 2 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

⁶ See The Federalist No. 58 at 359 (James Madison) (Clinton Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.").



may be cited to

President to rescind discretionary budget authority arguably constitutes an abdication of legislative power to the Executive Branch.⁷

In our judgment, however, this argument is ultimately unpersuasive. It is well-established that Congress may delegate sweeping "legislative" powers to the Executive, including powers that relate directly to the Nation's fisc. For example, Congress may authorize the President to raise or lower tariffs,⁸ to set the price of agricultural commodities,⁹ or to recover excess wartime profits.¹⁰ Indeed, on only two occasions -- both of which came nearly sixty years ago -- has the Supreme Court ever struck down a statute on the grounds that it impermissibly delegated legislative power to the President.¹¹

To be sure, a statute cannot delegate legislative power to the President in such a fashion so as to preclude Congress from "accomplishing its constitutionally assigned functions." Nixon v. Administrator, General Services, 433 U.S. 425, 443 (1977).¹² But

⁷ It is on this basis that many members of Congress have, over the past two decades, opposed proposals that would have made presidential rescissions of budget authority (or presidential impoundments of appropriated funds) automatically effective, unless Congress passed legislation disapproving the President's action. See, e.g., 119 Cong. Rec. 15236 (1973) (statement of Sen. Ervin) ("The Constitution of the United States vests the power of the purse in Congress alone, subject to the power of the President to veto any bill authorizing an appropriation or any bill which makes an appropriation that he deems unwise."); *id.* at 39346 (statement of Rep. Anderson) (introducing amendment to proposal making impoundments automatically effective; purpose of amendment was to "preserve the prerogatives of [Congress] when it comes to matters of spending"); 135 Cong. Rec. 28087 (1989) (statement of Sen. Hatfield) ("fundamental issue" posed by automatic rescission proposal "is the shift in the balance of power between the . . . legislative and executive branch" that it would work); *id.* at 28092 (statement of Sen. Sasser) (automatic rescission proposal would "threaten the constitutional principle that the power of the purse -- one of the few checks and balances Congress has on the President short of impeachment -- is vested in the Congress"); 139 Cong. Rec. H2101 (daily ed. April 28, 1993) (statement of Rep. Stokes) (automatic rescission proposal "would have the effect of transferring power from the legislative branch to the executive branch, without the benefit of a constitutional amendment, and weakening Congress' inherent constitutional power of the purse"). See also Bowsher v. Synar, 478 U.S. 714, 763 (1986) (White, J., dissenting) ("Determining the level of spending by the Federal Government is not by nature a function central either to the exercise of the President's enumerated powers or to his general duty to ensure execution of the laws; rather, appropriating funds is a peculiarly legislative function, and one expressly committed to Congress.").

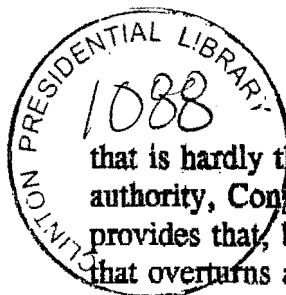
⁸ See J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

⁹ See United States v. Rock Royal Co-operatives, Inc., 307 U.S. 533 (1939).

¹⁰ See Lichter v. United States, 334 U.S. 742 (1948).

¹¹ See Mistretta v. United States, 488 U.S. 361, 373 (1989) ("Until 1935, this Court never struck down a challenged statute on delegation grounds. After invalidating in 1935 two statutes as excessive delegations, we have upheld, again without deviation, Congress' ability to delegate power under broad standards.") (internal citations omitted).

¹² See also Morrison v. Olson, 487 U.S. 654, 691 (1988); CFTC v. Schor, 478 U.S. 833, 856-57 (1986).



that is hardly the case here. In authorizing the President to rescind discretionary budgetary authority, Congress retains a sufficient degree of its legislative prerogative. The Act provides that, by a simple majority of both Houses, Congress can pass disapproval legislation that overturns a presidential rescission.¹³ More fundamentally, nothing in the Act prohibits Congress from exempting particular appropriations from presidential rescission.

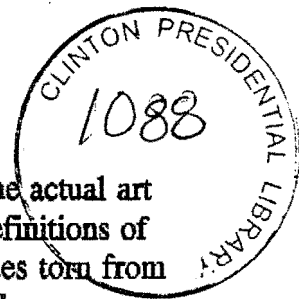
Even where Congress reserves some measure of latitude for itself, a delegation of legislative functions will still violate separation of powers principles if it does not contain "intelligible principles" that serve to direct Executive Branch action.¹⁴ That standard is satisfied here, however. The Act provides that the President may rescind discretionary budget authority only when he makes specific determinations regarding the effect of rescission on the public fisc, government functions, and the national interest.¹⁵ Furthermore, the President may only exercise that authority for a limited period of time -- within twenty days from the date of enactment of the bill containing the budget authority that the President intends to rescind. In short, the President is not granted a roving charter to rescind, at any time he sees fit, a particular appropriations measure just because he disagrees with its purpose. Viewed in this light, the President is not usurping congressional power to pass appropriations laws. The Act simply gives the President a level of discretion in executing those laws.

Finally, historical practice can be a legitimate guide to resolving separation of powers questions where, as is the case here, the matter is not controlled by an "[e]xplicit and

¹³ We concede that Congress would encounter practical hurdles in seeking to pass legislation disapproving the President's exercise of rescission authority. See Neal Devins, Budget Reform and the Balance of Powers, 31 Wm. & Mary L. Rev. 993, 1018 (1990) (Congress will be reluctant to vote for a bill to overturn the "fiscal restraint" that is ostensibly reflected by presidential rescission). In our view, this aspect of the measure does not create a constitutional question, but instead, speaks to the Act's relative merits as a matter of policy. Indeed, we anticipate that supporters of the Act would consider the obstacles to the passage of disapproval legislation as a virtue, not a vice.

¹⁴ Mistretta, 488 U.S. at 372.

¹⁵ Those determinations must be set forth, to the "maximum extent practicable," in the message that the President is required to send to Congress that provides notice of his decision to rescind discretionary budget authority. § 5(a)(4), (5). The message must also state the "reasons and justifications" for the rescission. § 5(a)(3). This too helps to cabin the delegation to the President, because it requires an explanation of his actions. We are somewhat troubled, however, by the requirement that the President's message specify "all factions, circumstances, and considerations relating to or bearing upon the rescission" § 5(a)(5) (emphasis added). (We assume that the word "factions" is a mistake, and is meant to be "factors"). Read literally, this provision would obligate the President to say more than is reasonably necessary and appropriate to explain a rescission decision, and thus may constitute an encroachment upon the President's deliberative process. We suggest that the provision be revised to state that the President should comply with the requirement to the "maximum extent practicable."



unambiguous provision[] of the Constitution."¹⁶ As Justice Jackson put it, "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."¹⁷ Therefore, it is salient to the inquiry that the proposed rescission authority granted by the Act is not entirely unprecedented; other statutes have authorized the President to control the outlay of appropriated funds.

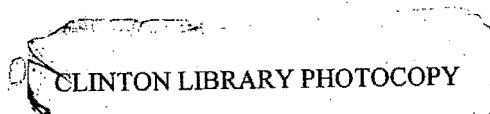
For example, under the Congressional Budget and Impoundment Control Act of 1974 ("CBICA"), the President is authorized to "defer any budget authority provided for a specific purpose or project" until the start of the next year fiscal year, if certain conditions are met. 2 U.S.C. § 684.¹⁸ This provision of the CBICA, which permits the President to withhold appropriated funds from obligation or expenditure,¹⁹ is a perfectly lawful delegation of some of Congress' appropriations power to the President. Another comparable statute is the Anti-Deficiency Act, which establishes a general framework under which the President may, in his discretion, choose not to expend appropriated funds across a range of programs. See 31

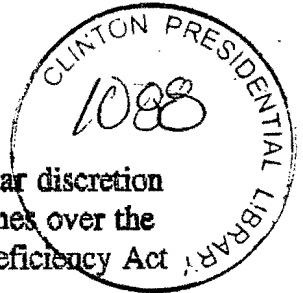
seems little would support for that view
¹⁶ INS v. Chadha, 462 U.S. 919, 945 (1983). In Chadha, the Supreme Court held that a statute that gave either House of Congress the power to override Executive Branch decisions was invalid in light of the "precise terms" of the Constitution, *id.* at 945, that establish a "single, finely wrought and exhaustively considered, procedure" for legislative action -- passage by both Houses of Congress and presentment to the President. *Id.* at 951. Because the constitutional text was unequivocal, the Court dismissed the "utilitarian" argument that the one-House "veto" of Executive Branch action had worked well in practice. *Id.* at 945.

¹⁷ Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). See also Freytag v. C.I.R., 501 U.S. 868, 918 (1991) (Scalia, J., concurring) ("[m]odern practice as well as original practice" supports notion that entities that are not cabinet-level departments of the Executive Branch should nevertheless be considered "Departments" for purposes of the Appointments Clause of Article II of the Constitution).

¹⁸ As originally enacted, the CBICA required the President to make available any deferred budget authority if either House of Congress passed a resolution disapproving the President's deferral. This one-House veto of Executive Branch action was held unconstitutional in light of Chadha. See City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987). In response, Congress amended the deferral provision of CBICA to its current form. See Pub. L. No. 100-119, title II, § 206(a), 101 Stat. 785 (1987).

¹⁹ The term "deferral of budget authority" is defined in the CBICA to include "withholding or delaying the obligation or expenditure of budget authority . . . provided for projects or activities," and "any other type of Executive action which effectively precludes the obligation or expenditure of budget authority" 2 U.S.C. § 682(1). The CBICA also provides that the President may "propose" to rescind budget authority. *Id.* § 683(a). Unlike the grant of deferral power, this provision of CBICA does not authorize the President to withhold appropriated funds from obligation or expenditure. That can only occur if, within a set period, Congress passes legislation approving the President's proposed rescission, and the President signs that legislation. *Id.* § 683(b). The Act shifts the burden of action to Congress: presidential rescission will take effect, unless Congress passes disapproval legislation, and the President signs that legislation.





U.S.C. §§ 1341-42, 1349-51, 1511-19.²⁰ The President has also enjoyed similar discretion under other laws designed to control expenditures that have been enacted at times over the years.²¹ The constitutionality of general framework legislation like the Anti-Deficiency Act and the various expenditure control measures has not been doubted.²²

We should caution that the Act's grant to the President of the power to rescind discretionary budget authority is far broader than any previous statute that has enabled the President to exercise discretion over the outlay of appropriated funds. As we understand it, discretionary budget authority makes up a significant portion of the total federal budget. It encompasses essentially all appropriations for national defense, and most domestic spending (other than spending for entitlement programs, such as Social Security and Medicare, and interest payments on the national debt). See *supra* note 1. Given both the dollar amounts involved and the functions and programs at issue, the Act would constitute the most expansive delegation of authority to the President of any kind, on any subject matter. Nonetheless, we believe that the rescission authority provided by the Act is consistent with applicable constitutional limits on delegations to the Executive Branch.²³

B. Repeal of Targeted Tax Benefits

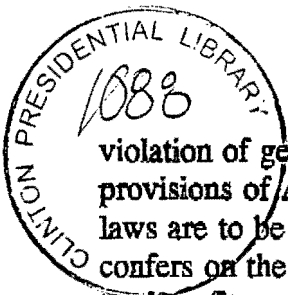
More serious constitutional concerns are raised by the grant to the President of what the Act terms a "veto" that can, in the absence of disapproval legislation, result in the automatic "repeal" (§ 3(a)(2)) of targeted tax benefits after they have been enacted. This may well entail an overly broad delegation of legislative authority to the President in

²⁰ See also *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1118 (8th Cir. 1973) (discussing Anti-Deficiency Act); William Bradford Middlekauff, Note, *Twisting the President's Arm: The Impoundment Control Act as a Tool for Enforcing the Principle of Appropriation Expenditure*, 100 Yale L. J. 209, 210-11 (1990) (same).

²¹ See, e.g., Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 Geo. L.J. 1549, 1569 (1974) (discussing "budget ceiling" measures of the late 1960s and early 1970s).

²² See Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1363-64 & n.97 (1988).

²³ Supporters of the measure are likely to argue that the Act actually would restore a proper balance of power between the Executive and Legislative Branches when it comes to budget matters. In the eyes of some, that balance has been distorted by Congress' practice of aggregating many items of appropriation into a single appropriations bill, including proverbial "pork barrel" items. This places the President in the difficult position of having to choose between approving the bill in its entirety, or vetoing the whole bill — including vital appropriations — simply because of his objection to a particular item. By putting the President in this box, the theory goes, the existing system of appropriations has seriously diminished the power of the presidency because it essentially eliminates the threat of a presidential veto that would otherwise hang over the heads of legislators as they craft appropriations bills. See Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive For a Unitary Executive*, 15 Cardozo L. Rev. 337, 354 n.70 (1993); see also L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 Pepp. L. Rev. 43 (1990).



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violation of general separation of powers principles. It may also violate the plain textual provisions of Article I, section 7 of the Constitution governing the manner in which federal laws are to be made and altered. We believe, however, that recasting the Act so that it confers on the President only the power to suspend (rather than "veto" or "repeal") targeted tax benefits would go a long way toward avoiding these potential constitutional shoals, while preserving the essence of the Act.

The starting point in the analysis is the Supreme Court's decision in INS v. Chadha, 462 U.S. 919 (1983), for it reveals the interplay between the general separation of powers limits on the delegation of legislative power and the specific textual commands of the Constitution governing the method by which laws are to be enacted. In Chadha, the Court admonished that "[e]xplicit and unambiguous provisions" of Article I, section 7, prescribe "a single, finely wrought and exhaustively considered, procedure" for the enactment of legislation. Id. at 945, 951.²⁴ Under that procedure, each House of Congress must pass a bill by majority vote. Id. at 948. After bicameral passage, the bill must be presented to the President for his signature or veto. Id. at 946-47. This same procedure must be followed with respect to efforts to repeal or amend existing legislation. Id. at 954 ("Amendment and repeal of statutes, no less than enactment, must conform with Art. I.").

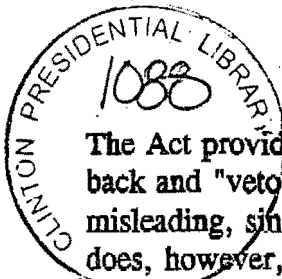
At issue in Chadha was a statute that provided that either House of Congress could adopt a resolution overriding Executive Branch action with respect to certain matters involving the deportation of aliens. This "one-House veto" had the effect of remaking the law under which the Executive Branch made deportation decisions; hence, it was a form of legislative action. Id. at 952. In invalidating the one-House veto, the Court stated that Congress may take legislative action only pursuant to the fixed procedures of Article I, section 7 -- bicameral passage and presentment to the President. Chadha may also be characterized as a delegation case: Congress delegated its legislative power to one of its Houses in violation of general separation of powers principles.²⁵

Similarly, the specific text of Article I, section 7 and general delegation principles may call into question the provisions of the Act regarding the repeal of targeted tax benefits.

²⁴ In pertinent part, Article I, section 7 of the Constitution provides:

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

²⁵ See Bowsher v. Synar, 478 U.S. 714, 755 (1986) (Stevens, J., concurring) (through one-House veto, Congress attempted to "delegate its policymaking authority to one of its components"); Laurence H. Tribe, American Constitutional Law § 4.3, at 216 (2d ed. 1988) (Chadha supports the proposition that Congress may not "delegate[]" legislative power "to itself"); see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 275 (1991) ("Congress may not delegate the power to legislate to its own agents or its own Members.") (discussing Chadha).



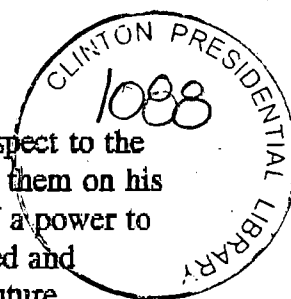
The Act provides that after a revenue bill has been enacted into law, the President may go back and "veto" any targeted tax benefits contained therein. The term "veto" is somewhat misleading, since the President cannot "veto" something that is already law. What the Act does, however, is to bestow on the President the power to repeal part of a law unless a majority of each House of Congress passes legislation disapproving the repeal, and the President signs the disapproval legislation. A presidential veto of that legislation can be overridden by 2/3 of the members of each House of Congress.²⁶ In effect, the Act empowers the President to make -- or, more accurately, "unmake" -- the Nation's revenue laws.²⁷ This may conflict with the express constitutional procedures for enacting legislation, and may amount to an impermissible delegation of legislative power to the President.²⁸

This possible constitutional infirmity could be avoided if the Act were read to give the President only the authority to decline to enforce or apply targeted tax benefits, rather than permanently repeal them. We do not find such a construction convincing, however, given that the Act specifically states that targeted tax benefits will be "repealed" in the wake of a presidential "veto." Accordingly, we recommend that the terms "veto" and "repeal" be eliminated from the Act. Instead, we recommend that the Act state that, after signing a revenue bill into law, the President would have the authority to suspend the implementation of any targeted tax benefits within the bill.

²⁶ See Missouri Pac. Ry. Co. v. Kansas, 248 U.S. 276, 280 (1919) (two-thirds of quorum, not of full membership of House, suffices to overcome a Presidential veto).

²⁷ By contrast, the Act provides that rescinded discretionary budget authority is "cancelled," not "repealed." § 3(a)(1). While the terms "repeal" and "cancel" may mean the same thing in some contexts, we do not believe that is the case here. As we interpret the Act, the grant of rescission authority gives the President the discretion to spend less than the dollar amount designated in an appropriations measure, thereby "cancelling" that figure. If the President exercises that discretion, however, the appropriations measure itself and the budget authority contained therein would not be repealed. We expect that the sponsors of the legislation will make this point clear when they introduce and debate the Act.

²⁸ A true line item veto statute suffers from a different constitutional defect. By its terms, Article I, section 7 does not permit the President to reject segments of a bill while signing the remainder into law. It only allows for two options: the President must either sign or reject the whole bill. See Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, re: The President's Veto Power, 12 Op. O.L.C. 159, 160 (preliminary print 1988) ("The President then has two, but only two, options with respect to the instrument presented: to 'approve . . . it' or 'not.'"); accord Statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Before the Subcomm. on the Constitution, Senate Comm. on the Judiciary, 103d Cong. 2d Sess. (June 15, 1994); Memorandum for the Attorney General, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, re: Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. 28 (1985). Thus, the problem with a line item veto statute is that it augments the President's veto power beyond what is specified in the Constitution. The targeted tax benefit provision of the Act may have other flaws, but the augmentation problem that plagues the line item veto is not among them.



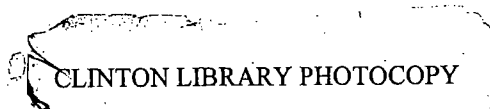
Were the Act so redrafted, the President would be given leeway with respect to the administration of our revenue laws, but he would not have the power to change them on his own. Suspension could take one of two forms. First, it could take the form of a power to stay implementation of targeted tax benefits; the stay subsequently could be lifted and reinstated, either by the President who imposed it in the first instance or by a future President. Alternatively, the Act could provide the President with only one bite at the apple, and preclude him or any of his successors from lifting the suspension once it is imposed. Cf. The Orono, 18 F. Cas. 830 (C.C.D. Mass. 1812) (Story, J.) (statute did not authorize the President to revive embargo laws once they were revoked by him). Either approach would, in our view, be constitutional.

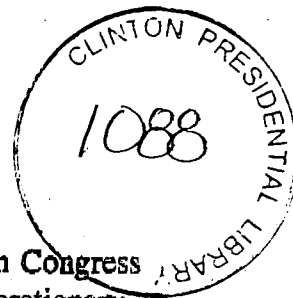
Whichever way the Act is redrafted, some might assert that authorizing the President to suspend targeted tax benefits (and to rescind discretionary budget authority, for that matter) allows the President unilaterally to modify laws in contravention of Chadha.²⁹ In our view, this contention misses the mark because it overlooks the distinction between presidential action that amends or eliminates a duly enacted law, and presidential action that maintains a law but affects its implementation. In authorizing the President to suspend targeted tax benefits, Congress would have delegated to him the authority to administer the law by declining to enforce it; the suspended benefit would still remain the law, however.³⁰ The President's exercise of this suspension authority would not implicate the specific textual requirements of Article I, section 7, because they simply do not apply to administration of the laws by the Executive Branch. Chadha, 462 U.S. at 953 n.16. This would leave delegation principles as the only possible constitutional objection to suspension of targeted tax benefits. See id. (the Executive's administration of the laws "involves only a question of delegation doctrine"). But any such objection would be no more substantial than the delegation arguments that we considered and rejected above in connection with the Act's grant of presidential rescission authority. See Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223 (1989) ("[T]he delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges.").

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²⁹ See Legislative Line-Item Veto Proposals, Hearings Before the Subcomm. on the Legislative Process, House Comm. on Rules, 102d Cong. 2d Sess. 304 (1992) (statement of Louis Fisher, Congressional Research Service) (proposal to make presidential rescissions automatically effective would be at odds with constitutional strictures regarding the making of laws); cf. Abner J. Mikva & Michael F. Hertz, Impoundment of Funds - The Courts, The Congress and The President: A Constitutional Triangle, 69 Nw. U. L. Rev. 335, 381 (1974) ("If the President does not have the power to sever a provision before he signs the bill into law, then it can hardly be contended that such [inherent] power accrues to him after the bill has become law.").

³⁰ Although the "permanent suspension" alternative looks like a permanent repeal, the suspended law would remain on the books. Permanent suspension is akin to a statute that creates a targeted tax benefit, but makes the operation of the benefit contingent on a specific presidential determination of some sort. If the President does not make that determination, the benefit will not exist.





C. Procedures for Congressional Consideration of Disapproval Legislation

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

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

The Constitution vests in the Houses of Congress the power to "determine the Rules of [their] Proceedings." U.S. Const., art. I, § 5, cl. 2. It is generally understood that "[e]ach House has the power to act alone in determining specified internal matters." Chadha, 462 U.S. at 955-56, n.21.³¹ We doubt that an Act of Congress can deprive either House of its power to control that House's internal procedural rules through its own independent action. "The rules power is one of several powers that the houses possess independently to make their legislative powers effective. The House of Representatives and the courts have long maintained that a house's power to exercise its ancillary functions cannot be abridged by a statute passed by both houses and signed by the President that attempts to channel or regulate those powers."³² Accordingly, if the Act were construed to put the procedures prescribed in section 5 beyond the power of each House to modify by unilateral action, it would present a constitutional question. To preclude this possibility, we recommend that the Act include an explicit provision to the effect that nothing in it is intended to limit or displace each House's authority to revise its own procedural rules by unilateral action.³³ Disclaimers of this sort are frequently found in federal statutes. See, e.g., 19 U.S.C. §§ 2191(a), 2903(d).

³¹ See also United States v. Ballin, 144 U.S. 1, 5 (1892).

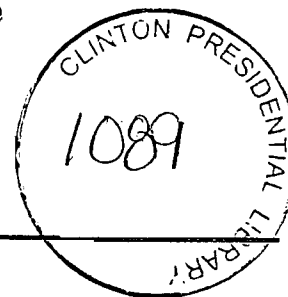
³² Paul R.Q. Wolfson, Note, Is a Presidential Item Veto Constitutional?, 96 Yale L.J. 838, 855 (1987).

³³ While such a disclaimer might be considered surplusage, it would serve to eliminate any question of Congress' intent.



U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 4, 1995

**MEMORANDUM FOR JANET RENO
ATTORNEY GENERAL**

From: Walter Dellinger 
Assistant Attorney General

Re: The Line Item Veto Act

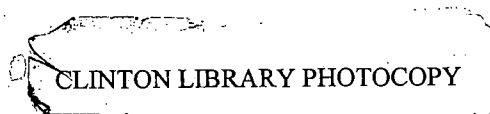
This memorandum sets forth our comments on the proposed Line Item Veto Act (the "Act") that is expected to be introduced shortly in the House of Representatives.¹ The Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted tax benefit within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

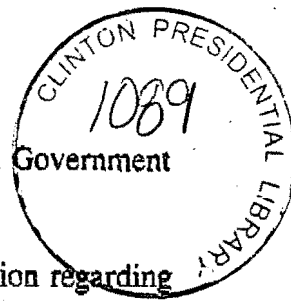
In our view, the provision of the Act authorizing the President to rescind discretionary budget items is constitutional. Although the provisions authorizing the President to "veto" targeted tax benefits and establishing procedural rules for congressional consideration of disapproval legislation raise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

I. Description of the Act

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

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





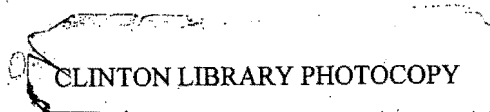
would help reduce the Federal budget deficit: (b) would not impair any essential Government functions; and (c) would not harm the national interest.²

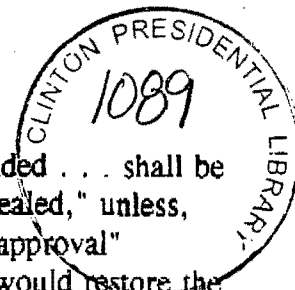
Although it is entitled "The Line Item Veto Act," and although its provision regarding targeted tax benefits speaks in terms of a presidential "veto" of any such benefits contained within a revenue bill, the Act does not authorize the President to strike out particular segments of a bill at the same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

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

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

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





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

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

II. Constitutional Analysis

A. Discretionary Budget Authority

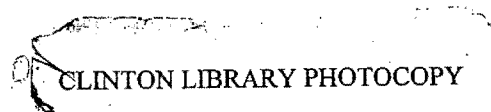
We begin with the provision of the Act that would grant the President the power to rescind discretionary budget authority, unless Congress passes legislation disapproving the President's action within a prescribed period, and the President signs that legislation or it is passed over his veto by a two-thirds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

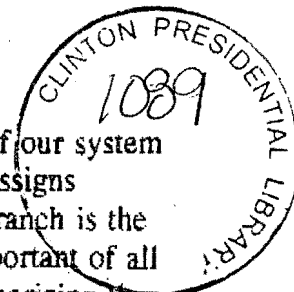
The chief constitutional argument against the provision is that it would violate general principles of the separation of powers between the branches of government, because it delegates a core legislative function to the Executive Branch.⁷ The concept of the separation

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

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

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





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

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

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

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

⁹ See The Federalist No. 58 at 359 (James Madison) (Clinton Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.").

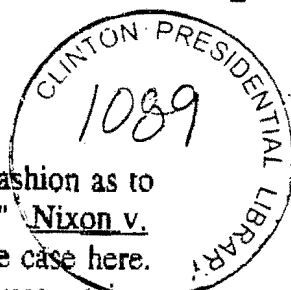
¹⁰ It is on this basis that some members of Congress have opposed proposals that would have made presidential rescissions of budget authority (or presidential impoundments of appropriated funds) automatically effective, unless Congress passed legislation disapproving the President's action. See, e.g.,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

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

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

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

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



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

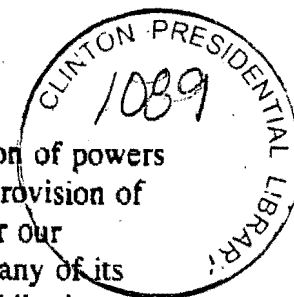
Even where Congress reserves some measure of latitude for itself, a delegation of authority to the President will still violate separation of powers principles if it does not contain "intelligible principles" that serve to direct Executive Branch action.¹⁷ That standard is satisfied here, however. The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

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

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

¹⁷ Mistretta, 488 U.S. at 372.

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



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

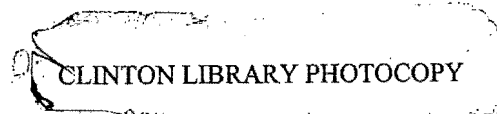
For example, under the Congressional Budget and Impoundment Control Act of 1974 ("CBICA"), the President is authorized to "defer any budget authority provided for a specific purpose or project" until the start of the next year fiscal year, if certain conditions are met. 2 U.S.C. § 684.²¹ This provision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

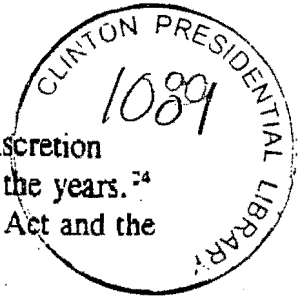
¹⁹ Cf. INS v. Chadha, 462 U.S. 919, 945 (1983) (dismissing "utilitarian" argument that statutes authorizing one House of Congress to "veto" Executive Branch decisions had worked well in practice, where explicit text of Constitution rendered that form of legislative action invalid).

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

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

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





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

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

B. Targeted Tax Benefits

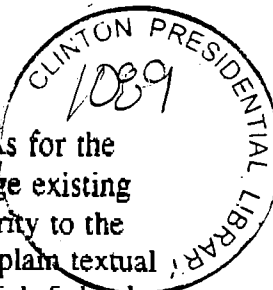
Just as the provision of the Act granting rescission authority is intended to give the President discretion with respect to the expenditure of funds, the provision dealing with targeted tax benefits seeks to give the President discretion with respect to taxation. It does so by purporting to authorize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

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

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

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

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



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

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

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

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

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

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

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

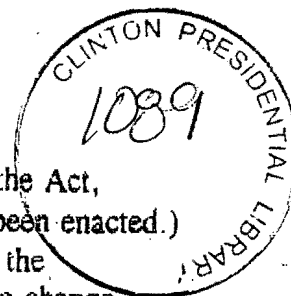
Accordingly, we recommend that the Act be redrafted so that it states that, after signing a revenue bill into law, the President would have the authority to suspend the implementation of any targeted tax benefits within the bill, rather than the power to "repeal"

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

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

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

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



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

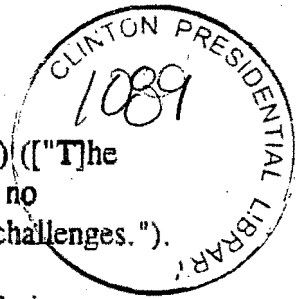
Whatever form that suspension takes, some might assert that authorizing the President to suspend targeted tax benefits (and to rescind discretionary budget authority, for that matter) allows the President unilaterally to modify laws in contravention of Chadha.³³ This contention misses the mark because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

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

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

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

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



C. Procedures for Congressional Consideration of Disapproval Legislation

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

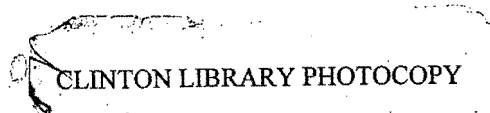
The Act requires that, whenever the President rescinds any budget authority or vetoes any targeted tax benefit, he must transmit a special message to each House. The President's message triggers procedural consequences. Among them, a "rescission/receipts disapproval bill" (§ 5(d)) may then be introduced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

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

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

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

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



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo

For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject:
Line Item Veto proposals/S.4, S.14 and S.137. (5 pages)

03/14/1995

P5

1090

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Letter
OA/Box Number: 8292

FOLDER TITLE:

Line Item Veto [Folder 2]

Van Zbinden
2007-0624-F
vz1206

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)]

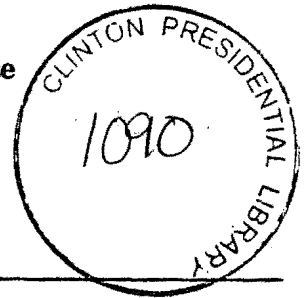
- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or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

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**DRAFT**

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 14, 1995

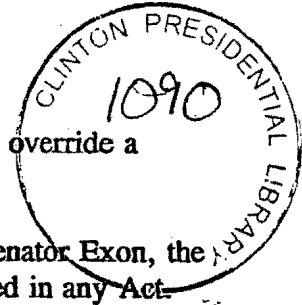
**MEMORANDUM FOR ABNER J. MIKVA
COUNSEL TO THE PRESIDENT****DRAFT****ALICE M. RIVLIN****DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET**From: Walter Dellinger
Assistant Attorney General

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

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

S.4 and S.14

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

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

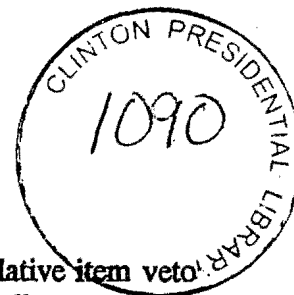
Under S.14, which has been introduced by Senator Domenici and Senator Exon, the President may propose to Congress the cancellation of budget items provided in any Act. Within prescribed time limits, the President may transmit a special message to Congress proposing such a cancellation and submitting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

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

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

Dellinger Statement at 9.

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

DRAFTS.137

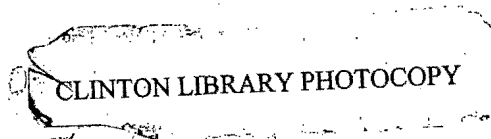
You have also asked for our views on S.137, a bill "[t]o create a legislative item veto by requiring separate enrollment of items in appropriations bills and tax expenditure provisions on revenue bills."

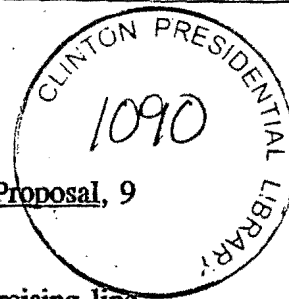
S.137 would amend the Congressional Budget and Impoundment Control Act of 1974 by adding a new title XI, the substance of which is as follows. Whenever any general or special appropriation bill, any supplemental, deficiency, or continuing appropriation bill or joint resolution, or any revenue bill containing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

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

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

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



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

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

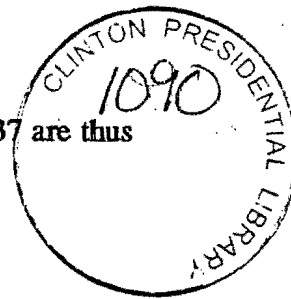
We have not been convinced of the constitutionality of this approach in the past, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. at 30, and we continue to question its validity. On what seems to us to be the best reading of the Presentment Clause, what must be presented to the President is the "bill" in exactly the form in which it was voted on and passed by both the House of Representatives and the Senate, rather than a measure or a series of measures that subsequently has been abstracted from that bill by the clerk of the relevant House.

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

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

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



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

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Robert Damus from Walter Dellinger. Subject: Line Item Veto/Proposed Changes to S.4 and S.14. (3 pages)	01/20/1995	P5 1091
002. memo	For Janet Reno from Walkter Dellinger. Subject: The Line Item Veto Act. (11 pages)	01/04/1995	P5 1092
003a. note	To Shelia Anthony, Jamie Gorelick, Joel Klein, et al. from Walter Dellinger. Subject: Line Item Veto/H.R.2. (1 page)	02/03/1995	P5 1093
003b. draft	Letter to Newt Gingrich. (2 pages)	02/03/1995	P5 1094

COLLECTION:

Clinton Presidential Records
Counsel's Office
Doug Letter
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FOLDER TITLE:

Line Item Veto [Folder 3] [1]

Van Zbinden
2007-0624-F
vz1207

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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- 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.

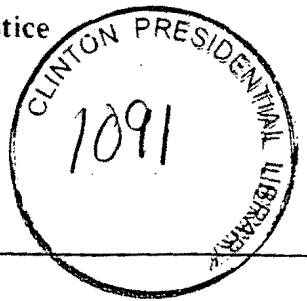
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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]

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Office of the
Assistant Attorney General

Washington, D. C. 20530

January 20, 1995

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

From: Walter Dellinger *WD*
Assistant Attorney General

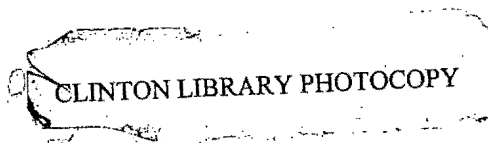
Re: Line Item Veto/Proposed Changes to S.4 and S.14

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

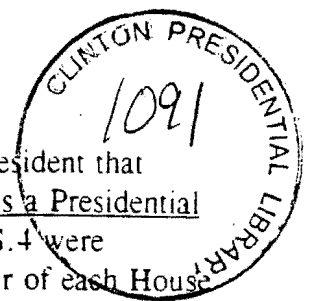
S.4

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

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



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



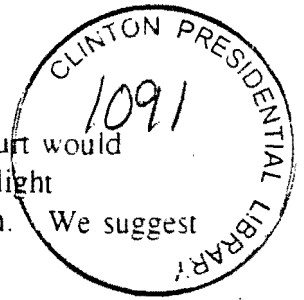
2. The "reasons and justifications" for the President's determination to rescind budget authority must be set forth in the message that the President is required to send to Congress that provides notice of his decision to rescind the budget authority. Section 1111(3). This helps to cabin the delegation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

S.14

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

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

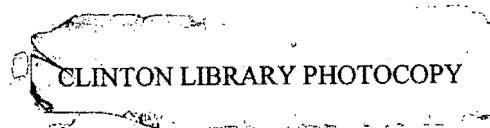
952 (1983). Although we believe that this argument is unsound, and that a court would likely conclude that S.14 does not entail a one-House veto, we recommend a slight modification to Section 2(e) so that it avoids any reference to one-House action. We suggest that the provision be changed to read as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



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

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

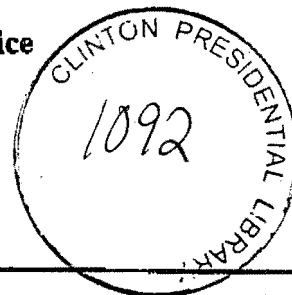
cc: Abner J. Mikva





U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 4, 1995

**MEMORANDUM FOR JANET RENO
ATTORNEY GENERAL**

From: Walter Dellinger 
Assistant Attorney General

Re: The Line Item Veto Act

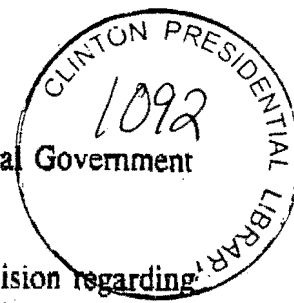
This memorandum sets forth our comments on the proposed Line Item Veto Act (the "Act") that is expected to be introduced shortly in the House of Representatives.¹ The Act would authorize the President to "rescind all or part of any discretionary budget authority or veto any targeted tax benefit within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

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

I. Description of the Act

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

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



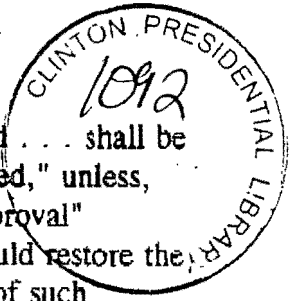
would help reduce the Federal budget deficit; (b) would not impair any essential Government functions; and (c) would not harm the national interest.²

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

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

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

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



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

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

II. Constitutional Analysis

A. Discretionary Budget Authority

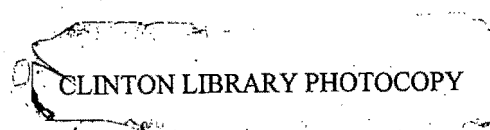
We begin with the provision of the Act that would grant the President the power to rescind discretionary budget authority, unless Congress passes legislation disapproving the President's action within a prescribed period, and the President signs that legislation or it is passed over his veto by a two-thirds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

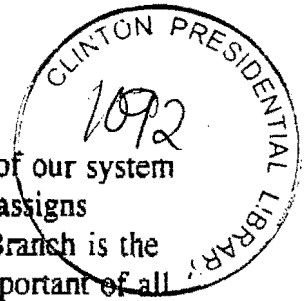
The chief constitutional argument against the provision is that it would violate general principles of the separation of powers between the branches of government, because it delegates a core legislative function to the Executive Branch.⁷ The concept of the separation

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

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

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





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

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

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

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

⁹ See The Federalist No. 58 at 359 (James Madison) (Clinton Rossiter ed. 1961) ("This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.").

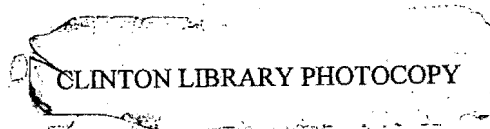
¹⁰ It is on this basis that some members of Congress have opposed proposals that would have made presidential rescissions of budget authority (or presidential impoundments of appropriated funds) automatically effective, unless Congress passed legislation disapproving the President's action. See, e.g.,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

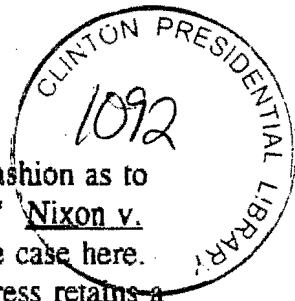
¹¹ See J.W. Hampton & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892).

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

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

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





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

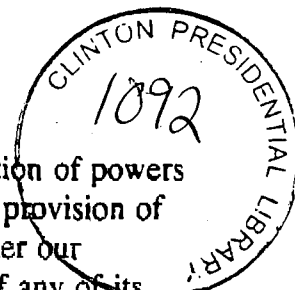
Even where Congress reserves some measure of latitude for itself, a delegation of authority to the President will still violate separation of powers principles if it does not contain "intelligible principles" that serve to direct Executive Branch action.¹⁷ That standard is satisfied here, however. The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

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

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

¹⁷ Mistretta, 488 U.S. at 372.

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



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

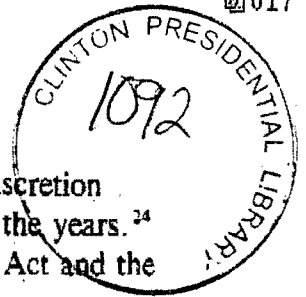
For example, under the Congressional Budget and Impoundment Control Act of 1974 ("CBICA"), the President is authorized to "defer any budget authority provided for a specific purpose or project" until the start of the next year fiscal year, if certain conditions are met. 2 U.S.C. § 684.²¹ This provision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

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

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

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

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



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

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

B. Targeted Tax Benefits

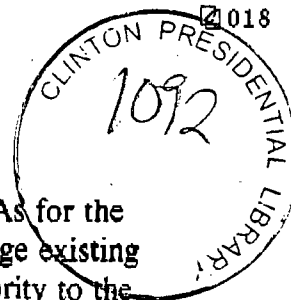
Just as the provision of the Act granting rescission authority is intended to give the President discretion with respect to the expenditure of funds, the provision dealing with targeted tax benefits seeks to give the President discretion with respect to taxation. It does so by purporting to authorize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

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

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

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

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



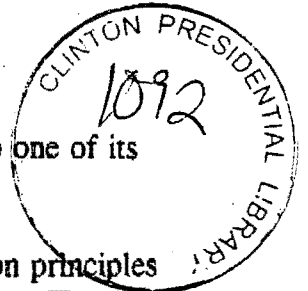
President only can exercise his "veto" power before a provision becomes law. As for the word "repeal," it suggests that the President is being given authorization to change existing law on his own. This arguably would entail an overly broad delegation of authority to the President in violation of general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

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

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

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

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



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

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

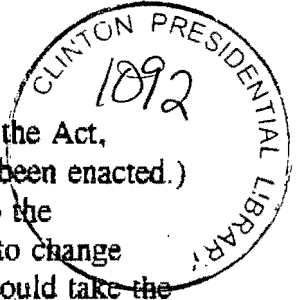
Accordingly, we recommend that the Act be redrafted so that it states that, after signing a revenue bill into law, the President would have the authority to suspend the implementation of any targeted tax benefits within the bill, rather than the power to "repeal"

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

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

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

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



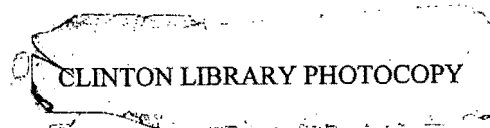
those benefits.³² (We also recommend that the term "veto" be eliminated from the Act, because it is inaccurate to say that a President can veto a provision after it has been enacted.) Were the Act so redrafted, the President would be given leeway with respect to the administration of our revenue laws,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

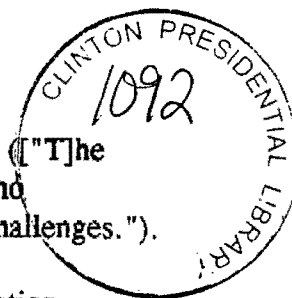
Whatever form that suspension takes, some might assert that authorizing the President to suspend targeted tax benefits (and to rescind discretionary budget authority, for that matter) allows the President unilaterally to modify laws in contravention of Chadha.³³ This contention misses the mark because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

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

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

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





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

C. Procedures for Congressional Consideration of Disapproval Legislation

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

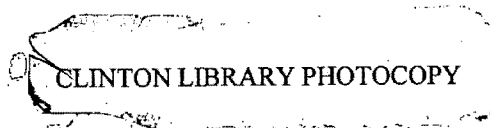
The Act requires that, whenever the President rescinds any budget authority or vetoes any targeted tax benefit, he must transmit a special message to each House. The President's message triggers procedural consequences. Among them, a "rescission/receipts disapproval bill" (§ 5(d)) may then be introduced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

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

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

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

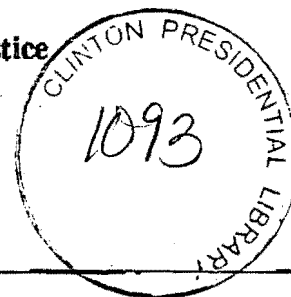
³⁷ While such a disclaimer might be considered surplusage, it would serve to eliminate any question of Congress' intent.





U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

Washington, D.C. 20530

February 3, 1995

NOTE TO: SHEILA ANTHONY
JAMIE GORELICK
JOEL KLEIN
CHUCK KONIGSBERG
CLIFF SLOAN

From: Walter Dellinger
Assistant Attorney General

Re: Line Item Veto\H.R. 2

I think that the attached letter on H.R. 2, the Line Item Veto Act, should be the sent to the Speaker of the House today.



February __, 1995

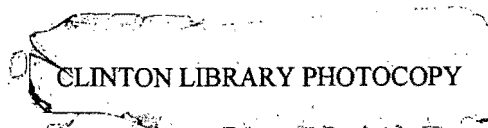
The Honorable Newt Gingrich
Speaker
U.S. House of Representatives
Washington, D.C. 20510

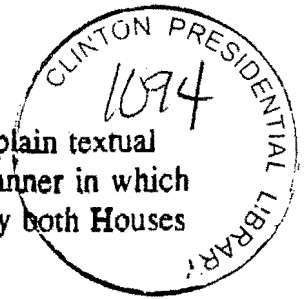
Re: H.R. 2/Line Item Veto Act

Dear Mr. Speaker:

As you know, President Clinton strongly supports the line item veto as a tool to reduce wasteful government spending and promote political accountability. The Justice Department is committed to working with Congress towards the development of an effective line item veto statute that can be promptly put into place, and that can withstand constitutional challenge. To that end, we have conducted a thorough review of H.R. 2, the Line Item Veto Act. The Act would authorize the President to "rescind" all or part of any discretionary budget authority or "veto" any targeted tax benefit, within twenty days after enactment of the appropriations or revenue bill in which such budget authority or tax benefit is contained. The Act provides that any amount of budget authority that the President rescinds is deemed "cancelled," and that any targeted tax benefit that the President "vetoes" is deemed "repealed."

The provisions of the Act dealing with rescission of budget authority give the President discretion with respect to the expenditure of appropriated funds. In our view, these provisions constitute an entirely permissible delegation of power to the President. Similarly, the provisions of the Act dealing with targeted tax benefits seek to give the President discretion with respect to implementation of our nation's tax laws. This too would be a constitutional delegation of power to the President. However, the use of the terms "veto" and "repeal" in the targeted tax benefits provisions of the Act is subject to misunderstanding and, more fundamentally, raises constitutional concerns that are not posed by the budget authority provisions. Article I, section 7, clause 2 of the Constitution 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 as drafted, H.R. 2 purports to authorize the President to veto targeted tax benefits after they have become law. As for the use of the word "repeal," 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, section 7, clause 2 of the Constitution governing the manner in which laws are to be changed (specifically, through passage of amending legislation by both Houses of Congress and presentment to the President for his approval).

To clarify the intent of the Act, and to avoid potential constitutional problems, we recommend that the targeted tax benefit provisions be slightly recast so that they confer on the President the authority to "suspend" the operation of a targeted tax benefit within twenty days after its enactment, rather than the authority to exercise a "veto" that results in the "repeal" of the benefit. (There is no need to eliminate the word "veto" from the name of the Act, however.) The technical change that we are proposing would preserve what we understand to be the purpose of the targeted tax benefit provisions of H.R. 2: an attempt to give the President discretion with respect to the implementation of targeted tax benefits, after they are enacted. This change would align the targeted tax benefits provisions of the Act with the provisions regarding rescission of discretionary budget authority. Moreover, the change would place the targeted tax benefit provisions of the Act on far more secure constitutional footing. Indeed, the Supreme Court long ago ruled that Congress may authorize the President to suspend the operation of a statute. See Field v. Clark, 143 U.S. 649 (1892).

~~If the language of the targeted tax benefit provisions of the Act is not modified, there is a substantial risk that a court would strike down these provisions and, in the absence of a severability clause, perhaps the budget authority rescission provisions of the Act as well. Therefore, we urge the adoption of the technical change that we have proposed herein.~~

Again, we are committed to the enactment of a strong and effective line item veto measure, and look forward to working closely with Congress in this regard.

Sincerely,

~~And to put the statute on the strongest possible footing~~

~~for the future~~

In order to put the statute on the strongest possible footing,