

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Franklin D. Raines, et al. v. Robert Byrd, et al. 96-1671. Brief for the Appellants. (58 pages)	05/05/1997	P5 1095
002. draft	Franklin D. Raines, et al. v. Robert Byrd, et al. 96-1671. Brief for the Appellants. (26 pages)	04/16/1995	P5 1096
003. draft	Robert C. Byrd et al. v. Franklin D. Raines et al. 97-0001. Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss. (34 pages)	01/16/1997	P5 1097

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bruce Lindsey
OA/Box Number: 19521

FOLDER TITLE:

Line Item Veto

2007-0624-F

vz1209

RESTRICTION CODES

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

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

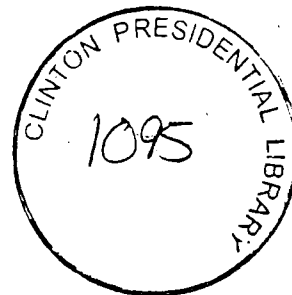
C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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



—
THE WHITE HOUSE
WASHINGTON

5/5

Bruce —

For your long
flight, attached is a
copy of the SG's draft-
brief in the live item
veto case. The brief
is due Friday, 5/9.

Please let me
know of any comments
you have.

Thanks

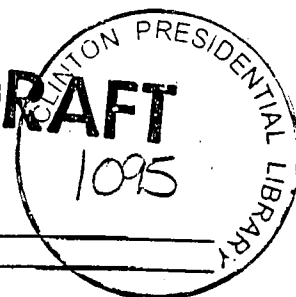
Trey

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No. 96-1671

DRAFT

1095



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

WALTER DELLINGER
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QUESTIONS PRESENTED

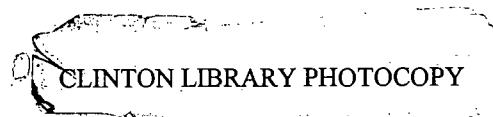
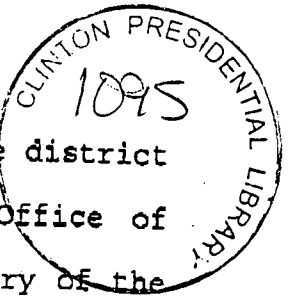
The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 et seq.), gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act.
2. Whether the Act violates Article I of the Constitution.

(I)

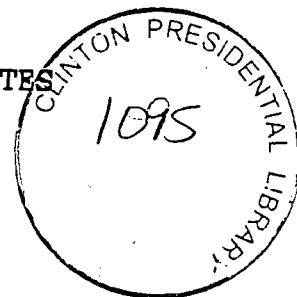
PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are Senator Robert C. Byrd, Senator Daniel Patrick Moynihan, Senator Carl Levin, former Senator Mark O. Hatfield, Representative David E. Skaggs, and Representative Henry A. Waxman.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996



No. 96-1671

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

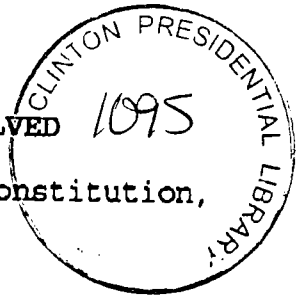
OPINION BELOW

The opinion of the district court (J.S. App. 1a-29a) is not yet reported.

JURISDICTION

The order of the district court was entered on April 10, 1997. A notice of appeal (J.S. App. 30a-31a) was filed on April 11, 1997. This Court noted probable jurisdiction on April 23, 1997. J.A. **. The jurisdiction of this Court rests on Pub. L. No. 104-130, § 3(b), 110 Stat. 1211 (J.S. App. 57a) (to be codified at 2 U.S.C. 692(b)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED



1. The Presentment Clause of the United States Constitution, Art. I, § 7, Cl. 2, provides as follows:

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. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. 691 et seq.), is reproduced at J.S. App. 32a-59a.

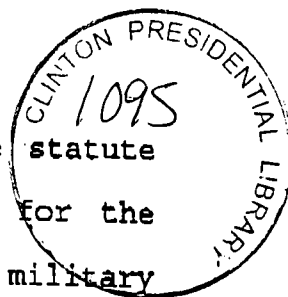
STATEMENT

1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the Executive Branch discretion over the expenditure of appropriated funds.

- a. The first statute ^{which should be considered} appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See

Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. Ibid. The First Congress subsequently enacted two additional general appropriations statutes, which likewise appropriated "sum[s] not exceeding" specified amounts for the government's operations. Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, Presidential Impoundment Part I: Historical Genesis and Constitutional Framework, 62 Geo. L.J. 1549, 1579 (1974).

The appropriations acts of the First Congress gave the President two distinct kinds of discretion over appropriated funds, both of which have become familiar elements of the federal budget process. First, by appropriating sums "not exceeding" specified amounts, Congress gave the President discretion not to obligate the full amount of the appropriations. It has since become a commonplace of federal appropriations law that an appropriation "not exceeding" a specified sum leaves the Executive Branch with discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, e.g., H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity"); 89 Cong. Rec. 10,362 (1943) (Sen. Truman)

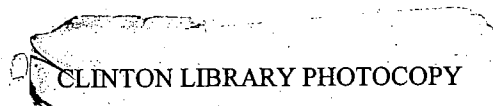
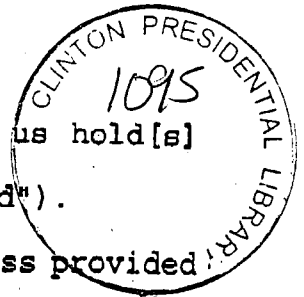


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("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated").

Second, the appropriations acts of the First Congress provided Executive Branch departments with what are now known as "lump-sum" appropriations -- that is, appropriations for the operation of a department that do not specify the particular items for which the funds are to be used. For example, the first appropriations act appropriated "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war." Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The Act did not prescribe any particular outlays to be made by the President from that appropriation. As a result, the President was given discretion not only with respect to the amount of the appropriated sum that would be used, but also with respect to its allocation within the Department of War. This Court recently reaffirmed that "where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that [Congress] does not intend to impose legally binding restrictions" on the allocation of the funds. Lincoln v. Vigil, 508 U.S. 182, 192 (1993) (internal quotation marks omitted).

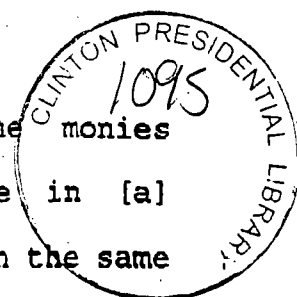
Within a few years, appropriations bills began to make increased use of itemized, rather than lump-sum, appropriations. See Abascal & Kramer, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to transfer itemized appropriations within departments. In 1809, Congress vested the President with recess



authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536. That transfer authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, Presidential Spending Discretion and Congressional Controls, 37 Law & Contemp. Prob. 135, 148 & nn. 71-72 (1972). In addition, Congress continued to resort to lump-sum appropriations, rather than itemized appropriations, when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. Id. at 136 (citing major lump-sum appropriations during Civil War, First World War, and Depression).

Early in the Twentieth Century, Congress began to enact laws that gave the Executive Branch standing authority to control spending on a government-wide basis. In 1905 and 1906, Congress amended the Antideficiency Act (Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251) to give agencies authority to apportion appropriations over the course of a fiscal year, while authorizing them to modify or waive apportionments in exigent circumstances. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1257-1258; Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 48-49.

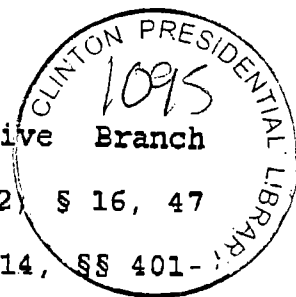
In 1933, in response to the fiscal pressures created by the Great Depression, Congress granted the President broad discretion to refrain from spending appropriated funds. Congress authorized the President to "reduce [governmental] expenditures" by



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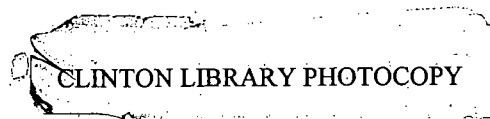
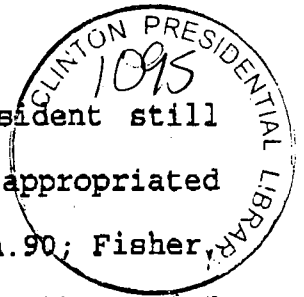
abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1518 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415). All appropriations "unexpended by reason of" the President's exercise of his reorganization authority were to be impounded and returned to the Treasury. 47 Stat. 1519. Congress also conferred discretionary impoundment authority in the Department of War's 1933 appropriations act. Congress authorized the President to impound "[a]ny sums appropriated in this Act for or on account of the Military Establishment, or any portion of such sums, that may not be needed for the purposes for which appropriated." Act of Mar. 4, 1933, ch. 281, § 4, 47 Stat. 1602.

In 1950, Congress amended the Antideficiency Act to provide the Executive Branch with general authority to establish "reserves" -- that is, to withhold appropriated funds -- in order "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments." General Appropriations Act, 1951, ch. 896, § 1211, 64 Stat. 765-766 (1950). Congress directed the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Ibid.* Apart from specifying that the spending reductions not "impair[] national defense," Congress imposed no restrictions on the President's choice of what spending to reduce or how large particular reductions should be. *Id.* § 1214, 64 Stat. 768.



During the Vietnam War, Congress gave the President still greater discretionary authority over expenditures of appropriated funds. See Abascal & Kramer, 62 Geo. L.J. at 1569 & n.90; Fisher, 37 Law & Contemp. Prob. at 160-161. The Revenue Expenditure and Control Act of 1968 imposed strict ceilings on budget outlays and new obligation authority for fiscal year 1969. Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-272. To meet those ceilings, Congress authorized the President to reserve as much as \$6 billion in outlays and \$10 billion in new obligation authority. *Id.* §§ 202(b), 203(b), 82 Stat. 272. Congress placed no restrictions on the President's discretion regarding what spending to reduce. See *d.* § 203(b), 82 Stat. 272. Congress provided the President with similar authority in 1969 and 1970. See Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82 (1969); Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407 (1970).

b. In each of the foregoing instances, the Executive Branch withheld appropriated sums pursuant to authority conferred by Congress. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations to be discretionary. See, *e.g.*, 9 Weekly Comp. Pres. Doc. 110 (1973). The Nixon Administration's effort to impound appropriations for a wide range of federal programs led to a series of lawsuits challenging individual impoundments. See, *e.g.*, City of New Haven v. United States, 634 F. Supp. 1449, 1454-1455 & n.6 (D.D.C. 1986)



(summarizing cases), aff'd, 809 F.2d 900 (D.C. Cir. 1987); Ralph S. Abascal & John R. Kramer, Presidential Impoundment Part II: Judicial and Legislative Responses, 63 Geo. L.J. 149, 151-168 (1974); Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1, 14-30 (1974).

The courts resolved disputes over Executive Branch impoundments by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over expenditure of the impounded funds. For example, in Train v. City of New York, 420 U.S. 35 (1975), this Court held that the President lacked authority to impound funds appropriated for grants under Title II of the Federal Water Pollution Control Act Amendments of 1972. The Court reviewed the text and history of the statute to determine whether "Congress intended to confer any discretion on the Executive to withhold funds from this program." 420 U.S. at 44. The Court and the parties presupposed that Congress could, if it chose, vest the Executive Branch with such discretion; the only issue was whether it had chosen to do so.

In response to the impoundment controversy, Congress enacted the Impoundment Control Act of 1974 (ICA), Pub. L. No. 93-344, Title X, 88 Stat. 297, 332 (codified as amended at 2 U.S.C. 681 et seq.). The ICA distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year) and rescissions (permanent withholding of appropriated funds). See 2 U.S.C. 682(1), 682(3). The Act authorized the President to carry out deferrals, subject to a one-House legislative veto. 2 U.S.C.

684 (1982).¹ The Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982). In addition, the Act amended the Antideficiency Act to narrow the circumstances in which the Executive Branch could place appropriated funds in reserves. See Pub. L. No. 93-344, § 1002, 88 Stat. 367.

2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (1996) (J.S. App. 32a-59a) (to be codified at 2 U.S.C. 691 et seq.). The Act expires on January 1, 2005. Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a). It authorizes the President to "cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, Section 7, of the Constitution of the United States." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a.²

The President's cancellation authority extends to three categories of budget items: (1) "dollar amount[s] of discretionary budget authority," (2) "item[s] of new direct spending," and (3) "limited tax benefit[s]." ICA § 1021(a) (2 U.S.C. 691(a)); J.S.

¹ This Court's decision in INS v. Chadha, 462 U.S. 919 (1983), made clear that the Impoundment Control Act's legislative veto provision was unconstitutional. See City of New Haven v. United States, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of legislative veto provision). Congress subsequently amended the Act to eliminate that provision. Act of Sept. 29, 1987, Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786. ² Section 2 of the Line Item Veto Act adds a new Part C to the ICA. The citations in the text to "ICA §" are to Sections contained in the new Part C.

App. 32a-33a. A "dollar amount of discretionary budget authority" is the entire amount specified for one purpose in an appropriations law, or in another law specifying the allocation of funds in an appropriations law. ICA § 1026(7)(A)(i), (iii) ((2 U.S.C. 691e(7)(A)(i), (iii)); J.S. App. 50a-51a.³ An "item of new direct spending" is a specific provision that will result in an "increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a. A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries or a provision that provides "temporary or permanent transitional relief" to 10 or fewer beneficiaries. ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a-54a.⁴

³ A "dollar amount of discretionary budget authority" also includes any amount "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying [an appropriation] law." ICA § 1026(7)(A)(ii) (2 U.S.C. 691e(7)(A)(ii)); J.S. App. 50a. That provision "is not intended to give increased legal weight or authority to documents that accompany the law that is enacted." H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 32 (1996). Rather, Congress "is choosing to use those documents as a means of allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." Ibid.

⁴ The Act provides for the Joint Committee on Taxation to identify limited tax benefits in future revenue bills. ICA § 1027(a) (2 U.S.C. 691f(a)); J.S. App. 54a. If Congress incorporates the Joint Committee's statement into a revenue bill, the President's authority to cancel limited tax benefits in the bill is confined to the items, if any, identified in the bill. ICA § 1027(b), (c) (2 U.S.C. 691f(b), (c)); J.S. App. 55a-56a.

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Cancellation of a dollar amount of discretionary budget authority operates to rescind that authority. ICA § 1026(4)(A) (2 U.S.C. 691e(4)(A)); J.S. App. 48a. Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled spending or revenue provision without "legal force or effect." ICA § 1026(4)(B) and (C) (2 U.S.C. 691e(4)(B) and (C)); J.S. App. 48a-49a. The President may not use cancelled funds for any purpose other than deficit reduction. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Director of the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. ICA § 1024(a) and (b) (2 U.S.C. 691c(a) and (b)); J.S. App. 37a-38a.

If the President wishes to exercise his cancellation authority, he must submit a special message to Congress within five calendar days (excluding Sundays) after the enactment of the law containing the cancelled item. ICA §§ 1021(a)(B), 1022(c)(1) (2 U.S.C. 691(a)(B), 691a(c)(1)); J.S. App. 33a, 35a-36a. The President may cancel an item only if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a)(A) (2 U.S.C. 691(a)(A)); J.S. App. 33a. The President must also consider "the legislative history, construction, and purposes of the law" containing the items, as

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well as "any specific sources of information referenced in such law." ICA § 1021(b)(1) and (2) (2 U.S.C. 691(a)(B)(1) and (2)); J.S. App. 33a. In addition, the President's special message to Congress must identify, inter alia, the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; his estimate of "the * * * effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and the geographic distribution of the cancelled spending. ICA § 1022(b) (2 U.S.C. 691a(b)); J.S. App. 34a.

A cancellation takes effect upon Congress's receipt of the President's special message. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. The Act provides for highly expedited legislative consideration of "disapproval bills." ICA §§ 1025, 1026(6) (2 U.S.C. §§ 691d, 691e(6)); J.S. App. 39a-47a, 49a-50a. If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. ICA § 1023(a) (2 U.S.C. 691b(a)); J.S. App. 36a. A disapproval bill is not subject to the President's cancellation authority under the Act. ICA § 1021(c) (2 U.S.C. 691(c)); J.S. App. 34a. Congress may exempt any spending or revenue bill from the operation of the Act by including a provision to that effect in the bill itself.

3. The Act took effect on January 1, 1997. See J.S. App. 2a, 58a-59a. Appellees -- six Members of Congress, one of whom has
 duty and spending
 is responsible

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since left office -- filed the present suit the next day.⁵ They named as defendants Franklin D. Raines, the Director of OMB, and Robert E. Rubin, the Secretary of the Treasury. Complaint at 1; see J.S. App. 2a.⁶ Appellees alleged that "the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution." Complaint at 2 (¶ 1). They further alleged that the Act "directly and concretely injures" them by "altering the legal and practical effect" of their votes, by "divesting" them of "their constitutional role in the repeal of legislation," and by "altering the constitutional balance of powers between the Legislative and Executive Branches." *Id.* at 4-5 (¶ 14). The complaint did not allege that the President had exercised his cancellation authority under the Act.

The government moved to dismiss for lack of jurisdiction, and the parties thereafter filed cross-motions for summary judgment. The Senate and the House of Representatives jointly appeared as amici curiae to support the constitutionality of the Act. See J.S. App. 2a-3a. On April 10, 1997, the district court issued a

⁵ A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See National Treasury Employees Union v. United States, 101 F.3d 1423 (D.C. Cir. 1996).

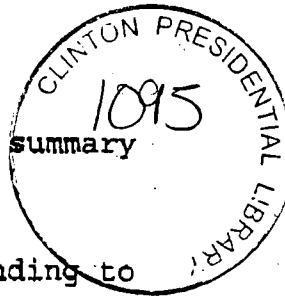
⁶ Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and enforcing the tax laws of the United States." Complaint at 3-4 (¶¶ 11-12).

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memorandum order denying the motion to dismiss and granting summary judgment to appellees. J.S. App. 1a-29a.

The district court first held that appellees had standing to bring their suit. J.S. App. 9a-12a. The court relied on prior D.C. Circuit decisions holding that Members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers," although it recognized that "the Supreme Court has never endorsed the Circuit's analysis of standing in such cases." Id. at 10a-11a. Applying those circuit precedents, the district court held that "[appellees'] claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III." Id. at 11a. By virtue of the Act, the court explained, "[appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." Id. at 11a-12a.

The district court also held that appellees' claims were ripe for adjudication, despite the fact that the President had not yet exercised any cancellation authority under the Act. J.S. App. 12a-15a. The court explained that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." Id. at 14a. The court noted as well that "the budgetary process is already



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underway," and that "appropriations votes are inevitable, and 'certainly impending.'" Ibid. (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).⁷

On the merits, the district court held that the Line Item Veto Act violates the Presentment Clause (U.S. Const. Art. I, § 7, Cl. 2) by delegating to the President the legislative power to repeal Acts of Congress. J.S. App. 16a-29a. The court acknowledged that any appropriations law whose provisions are subject to the President's cancellation power under the Act "will have been 'approved' in accordance with the Presentment Clause." Id. at 20a. The court concluded, however, that "following approval [of an appropriations bill], a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures." Ibid. The court reasoned:

Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

Id. at 21a-22a.

⁷ Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Section 3(c) of the Act directs both the district court and this Court to expedite disposition of such suits "to the greatest possible extent." Id. at 57a (2 U.S.C. 692(c)). The district court construed those provisions as rendering inapplicable any prudential constraints on the court's exercise of jurisdiction, leaving only the requirements of Article III. See id. at 9a n.5, 14a n.8, 16a.

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The district court recognized that the President may be vested with discretionary authority to impound, or to decline to spend, funds previously appropriated by Congress. J.S. App. 22a-23a. However, the court stated that cancellation under the Act "is simply not the same thing as impoundment," but instead "is equivalent to repeal" of the underlying appropriations law. Id. at 24a-25a. The court sought to distinguish the Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that, in its view, the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." Id. at 27a.

SUMMARY OF ARGUMENT

1. Because the implementation of the Line Item Veto Act will cause appellees no judicially cognizable injury, they lack standing to sue in this case. This Court has consistently held that a generalized interest in the proper application of the Constitution and laws is an insufficient basis for invoking the power of the federal courts. Because Members of Congress exercise their official powers on behalf of the people, the President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no personal injury that is not shared by the public generally.

Nor do appellees have standing to sue on behalf of the government. Because Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather

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than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, moreover, a suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. That is particularly true where (as here) the individual Members have attacked the constitutionality of a federal statute rather than seeking to vindicate the legal and policy judgments of Congress as a whole.

Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward at the present time. Until the President has actually exercised his cancellation authority with respect to a particular appropriations bill, the potential of the Act to frustrate appellees' own legislative preferences is too speculative to constitute injury in fact. And while the existing uncertainty concerning the Act's constitutional status may affect the manner in which legislative negotiations are conducted, the bare desire to eliminate legal uncertainty is an insufficient basis for invoking the jurisdiction of a federal court.

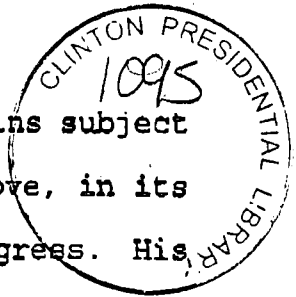
2. The Line Item Veto Act does not violate Article I. Its title notwithstanding, the Act does not authorize the President to approve some provisions of an appropriations bill while preventing

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other provisions from becoming law. The President remains subject to the constitutional obligation to approve or disapprove, in its entirety, an appropriations bill presented to him by Congress. His cancellation authority under the Act comes into existence only after an appropriations bill has been passed by both Houses of Congress and approved, in toto, by the President.

The effect of the Line Item Veto Act is to vest the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has authorized will in fact be spent. That grant of authority is fully consistent with historical practice. From the beginning of the Republic, Congress has frequently conferred upon the President substantial discretion over the expenditure of appropriated funds. The First Congress, for example, chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require that the full amount of the appropriation be spent. The settled historical practices of Congress and the Executive Branch regarding spending discretion strongly support the political Branches' shared judgment that the Line Item Veto Act is constitutional.

This Court has repeatedly recognized that Congress may vest the Executive Branch with considerable discretion in the administration of federal laws, so long as the discretion is not so broad and unconstrained as to amount, in practical effect, to the exercise of legislative power. The Line Item Veto Act places constitutionally sufficient limits on the President's exercise of



discretion over federal spending. The President must cancel items "in whole" rather than in part and must devote any cancelled amounts to deficit reduction. The Act also provides meaningful guidance to the President in his decision whether particular items should be cancelled.

Finally, the Line Item Veto Act does not vest the President with the power to repeal any portion of a future appropriations law. This Court has repeatedly upheld federal statutes authorizing the President to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation. Like the statutes previously upheld, the Line Item Veto Act permissibly vests the President with executive rather than legislative power. The fact that the President's cancellation of a particular item is irrevocable unless overturned by Congress does not alter the constitutional analysis. Indeed, that feature of the Act limits rather than expands the scope of the President's authority. The fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws also lacks constitutional significance.

ARGUMENT

I. APPELLEES LACK STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE LINE ITEM VETO ACT

Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

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To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

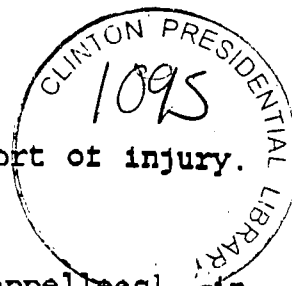
Bennett v. Spear, No. 95-813 (Mar. 19, 1997), slip op. 6. "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984). Rather, Article III "requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,'" Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979)), and that he "stand[s] to profit in some personal interest" by a judgment in his favor, Allen, 468 U.S. at 766 (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 39 (1976)).

"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen, 468 U.S. at 750. The "require[ment] that the party seeking review be himself among the injured," Lujan v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)), ensures that the federal courts resolve disputed legal questions "only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." Valley Forge, 454 U.S. at 471

(quoting Chicago & Grand Trunk R. Co. v. Wellman, 143 U.S. 339, 345 (1892)). Article III's case or controversy requirement thus protects the separation of powers by ensuring that the Judicial Branch does not exercise a general superintendence over the workings of the federal government. See Allen, 468 U.S. at 760 (abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of Executive action") (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)); see also Defenders of Wildlife, 504 U.S. at 576 (role of federal courts is to determine "the rights of individuals").

The legal questions presented by the Line Item Veto Act -- whether the Act violates Article I by enlarging the President's veto power under the Presentment Clause or by vesting the President with the power to repeal federal laws -- are assuredly suitable for judicial resolution. If and when the President exercises his cancellation authority, moreover, his action is likely to impose judicially cognizable injury upon persons who would otherwise be the recipients of the cancelled funds or tax benefits. See, e.g., Train v. City of New York, 420 U.S. 35, 40 (1975).⁸ Persons whose monetary interests are adversely affected by the Act's implementation will possess the prototypical "concrete stake" in the outcome of litigation, and will therefore satisfy the requirements of Article III.

⁸ Suits by potential recipients of federal funds would not be brought against the named defendants in this case, however, but against the agency or agency official charged with the expenditure of the monies in question. See Train, 420 U.S. at 40.



Appellees, however, allege a very different sort of injury.

The complaint in this case alleges that

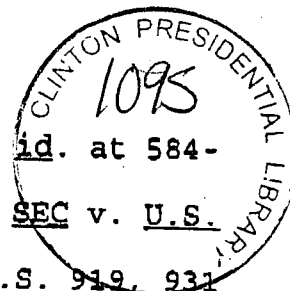
[t]he Act directly and concretely injures [appellees] in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Complaint at 4-5 (¶ 14). Those asserted injuries do not satisfy the case or controversy requirement.

A. Members Of Congress Will Suffer No Judicially Cognizable Injury As A Result Of The Implementation Of The Line Item Veto Act

As we explain above, a private litigant can invoke the federal judicial power only by demonstrating a concrete personal stake in the outcome of the dispute. The United States and its agencies, by contrast, routinely initiate litigation (including criminal prosecutions), or appeal adverse rulings, in order to vindicate a more generalized governmental and public interest in the effective administration of federal law and to fulfill the President's responsibility under Article II to "take care that the laws be faithfully executed." This Court has explained:

Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.



In re Debs, 158 U.S. 564, 584 (1895). See also, e.g., id. at 584-586; Coleman v. Miller, 307 U.S. 433, 441-442 (1939); SEC v. U.S. Realty, 310 U.S. 434, 464 (1940); INS v. Chadha, 462 U.S. 919, 931 (1983); cf. Diamond v. Charles, 476 U.S. 54, 62 (1986) ("a State has standing to defend the constitutionality of its statute"). Even where the named federal party is an individual government official, such a suit (or appeal) is properly regarded as one brought on behalf of the government, not as an effort to redress an injury done to the official in his individual capacity.⁹

⁹ In the context of suits brought against individual government officials, this Court has stressed the need for "careful adherence to the distinction between personal- and official-capacity suits." Kentucky v. Graham, 473 U.S. 159, 165 (1985). "Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of * * * law." Ibid. By contrast, official-capacity suits are in substance suits against the government, and seek relief (e.g., the payment of public funds or the alteration of agency policy) against the government rather than the individual employee. See id. at 166; Hafer v. Melo, 502 U.S. 21, 25-26 (1991); Dugan v. Rank, 372 U.S. 609, 620 (1963).

A similar distinction may be drawn between personal- and official-capacity suits (or appeals) brought by governmental actors. A federal officer or employee, whether or not authorized to conduct litigation on behalf of the United States, has standing to sue in federal court to vindicate such personal interests as an entitlement to federal pay or benefits. See, e.g., Bowsher v. Synar, 478 U.S. 714, 721 (1986) (members of federal employees' union had standing to challenge the constitutionality of Gramm-Rudman-Hollings Act, based on showing that they would "sustain injury by not receiving a scheduled increase in benefits"); cf. Powell v. McCormack, 395 U.S. 486, 495-500 (1969) (suit concerning House of Representatives' refusal to seat an elected Member was not moot where plaintiff retained a claim for back salary). Where the alleged injury is the impairment of governmental functions, however, an official may invoke the jurisdiction of the federal courts only insofar as he is properly authorized to sue or appeal on behalf of the government. See Bender v. Williamsport Area School District, 475 U.S. 534, 543-545 & n.6 (1986) (individual school board member lacked standing to appeal where board decided against appeal of adverse judgment); cf. Karcher v. May, 484 U.S.

(continued...)

Thus, federal courts are authorized to adjudicate private actions brought by plaintiffs who establish a concrete personal interest in the outcome of the dispute, as well as suits brought by governmental entities to vindicate the public interest in the enforcement of the laws. Appellees, however, lack standing to sue under either theory.

1. This Court has

consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

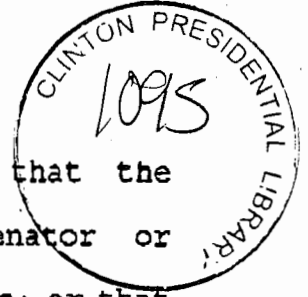
Defenders of Wildlife, 504 U.S. at 573-574. While recognizing that "[i]n some fashion, every provision of the Constitution was meant to serve the interests of all," this Court has emphatically rejected "[t]he proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions." Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 226-227 (1974).

A private plaintiff could establish the existence of a case or controversy by demonstrating that the cancellation of a particular budget item (or limited tax benefit) would adversely affect his own economic interests. See pages ****, supra. A member of the public could not, however, obtain judicial review of an exercise of

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72-77-78 (1987) (individuals who intervened in their capacities as presiding officers of the New Jersey Legislature could not appeal in their other individual and professional capacities after losing their positions as presiding officers).

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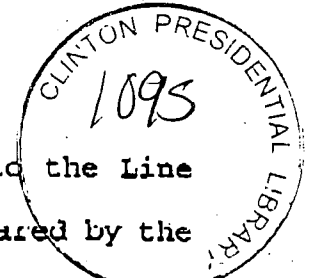


the President's cancellation authority by alleging that the cancellation had negated the vote of his own Senator or Representative; that it had subverted the will of Congress; or that it had improperly shifted the balance of power between the Legislative and Executive Branches. Any such allegation would present a "generalized grievance" plainly insusceptible of judicial resolution. United States v. Richardson, 418 U.S. 166, 171 (1974).

Appellees' claim to standing thus rests on the premise that a Member of Congress has a judicially cognizable personal interest in the proper performance of his legislative duties, in the execution of an Act of Congress, or in the maintenance of the constitutionally prescribed balance of power between the President and Congress, even though his constituents possess no such interest. That premise is contrary to first principles of representative democracy. As then-Judge Scalia explained,

no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred.

Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result), cert. denied, 469 U.S. 1106 (1985). Because Members of Congress exercise their powers as representatives and servants of the people -- the "ultimate beneficiaries" (Reservists, 418 U.S. at 226-227) of the constitutional provisions on which appellees rely -- the

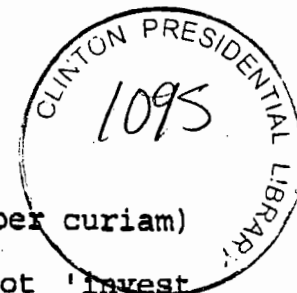


President's cancellation of budgetary items pursuant to the Line Item Veto Act would cause them no injury that is not shared by the public generally.¹⁰ Cf. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (association's standing to sue on behalf of its members requires, inter alia, that "its members would otherwise have standing to sue in their own right").

2. As we explain above (see pages *** and note **, supra), suits to vindicate generalized public interests may be brought by authorized federal officials acting "in their official capacities" -- i.e., on behalf of the government. For two reasons, however, appellees lack standing to sue on that basis.

a. Article II of the Constitution entrusts litigation on behalf of the United States to the Executive rather than the Legislative Branch. The "discretionary power to seek judicial relief" is "authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully

¹⁰ This analysis applies equally to suits brought by individual officials in the other Branches asserting impairment of their own governmental prerogatives. No one would suppose, for example, that a federal district judge would have standing to challenge statutory restrictions on the jurisdiction of the federal courts. The judge would also lack standing to petition for certiorari from a court of appeals decision reversing one of his rulings. Nor could the head of a Cabinet department assert standing to challenge an allegedly unlawful presidential directive regarding the exercise of his official duties.

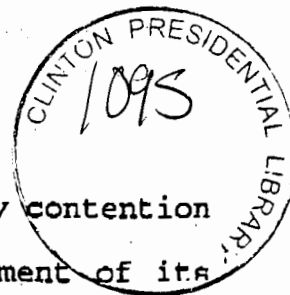


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executed.'" Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam) (quoting Article II, § 3). Because Congress "may not 'invest itself or its Members with either executive power or judicial power,'" Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 274 (1991) (MWAA) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)), neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law. Cf. Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 800 n.10 (1987) (exercise of prosecutorial power by Congress would "eradicate fundamental separation-of-powers boundaries").¹¹

¹¹ The Court in Chadha stated that "Congress is the proper party to defend the validity of a federal statute when an agency of the government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." 462 U.S. at 940; see also Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 1068 n.20 (1997); cf. United States v. Lovett, 328 U.S. 303, 304 (1946) (Congress appeared as amicus curiae). In Chadha, however, the Immigration and Naturalization Service (INS) -- while adhering throughout the litigation to the position that the challenged legislative veto provision was unconstitutional -- had appealed from the court of appeals' decision invalidating that provision, and this Court held that the INS was a proper appellant. 462 U.S. at 929-931. In stating that Congress could appropriately appear in such circumstances to defend the constitutionality of the legislative veto provision, compare, e.g., Ornelas v. United States, 116 S. Ct. 1657, 1661 n.4 (1996) (Court appointed private counsel to appear as amicus curiae in support of the court of appeals' judgment where neither the United States nor the private petitioner espoused the court of appeals' legal theory); Cheng Fan Kwok v. INS, 392 U.S. 206 (1968) (same); Lovett, 328 U.S. at 304, the Court did not suggest that Congress would have had authority to appeal from the court of appeals' decision if the responsible Executive Branch officials had declined to do so. Cf. Young, 481 U.S. at 817 (Scalia, J., concurring in judgment) ("Even complete failure by the executive to prosecute law violators, or by the courts to convict them, has never been thought to authorize congressional prosecution and trial").

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appears
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Separation of powers principles thus foreclose any contention that Congress suffers a judicially cognizable impairment of its lawmaking function if an Executive Branch official fails to give an enacted law its proper legal effect. Indeed, if Congress retained a judicially cognizable interest in the administration of laws that it had enacted, that interest would be equally threatened by private as by Executive Branch noncompliance. If Congress could define noncompliance with federal law as an injury to itself or its Members, it could usurp the President's constitutional responsibility for the execution of the laws.¹²

b. Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, separate and apart from the generalized public interest in Executive Branch

¹² Congress (or one House thereof) may seek judicial redress where the unlawful actions of Executive Branch officials or private parties impede Congress's ability to perform its legislative functions. See, e.g., 2 U.S.C. 288b(b) (Senate Legal Counsel "shall bring a civil action to enforce a subpoena of the Senate or a committee or subcommittee of the Senate * * * when directed to do so by the adoption of a resolution by the Senate"); cf. McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("the power of inquiry -- with process to enforce it -- is an essential and appropriate auxiliary to the legislative function"); Buckley, 424 U.S. at 137-138.

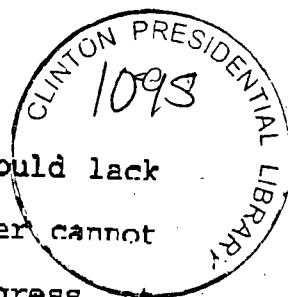
The cancellation authority conferred on the President by the Line Item Veto Act, however, effects no interference with Congress's performance of its lawmaking functions. The Act deals only with the manner in which appropriations bills will be implemented after they have been enacted into law. That would be true, moreover, even if appellees and the district court were correct in characterizing the President's exercise of cancellation authority under the Act as the power to "repeal" portions of appropriations laws. A purported presidential repeal of an enacted law would prevent the law from being faithfully executed, but it would in no way hinder Congress in the performance of its own responsibilities. Because Congress has no constitutional role in the execution of enacted laws, it has no judicially cognizable interest in the Line Item Veto Act's constitutional status. Cf. Buckley, 424 U.S. at 139-140.

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compliance with the Constitution and laws, appellees would lack standing to sue. A suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. The federal legislative "[p]ower is not vested in any one individual, but in the aggregate of the members who compose the body, and [Congress's] action is not the action of any separate member or number of members, but the action of the body as a whole." United States v. Ballin, 144 U.S. 1, 7 (1892). Cf. Bender, 475 U.S. at 544 (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

An Executive Branch official could not sue to vindicate the institutional interests of the agency at which he worked absent some showing of authority to litigate on its behalf. Cf. Federal Election Commission v. NRA Political Victory Fund, 115 S. Ct. 537, 540-543 (1994). Nor could such an official evade the limitations on his governmental litigating authority by suing in his own name and recasting the alleged impairment of agency functions as a personal injury to himself. The same principles apply here.

Appellees' lack of standing is particularly clear in the instant case. Although appellees allege that the Line Item Veto Act "alter[s] the constitutional balance of powers between the

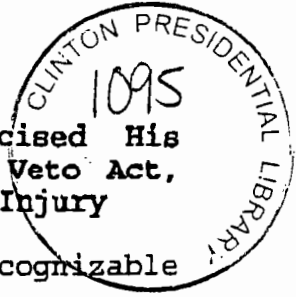


Legislative and Executive Branches," Complaint at 5 (¶ 14), they do not seek to vindicate the legal or policy judgments of Congress as a whole. To the contrary, their suit involves a constitutional challenge to a law that was enacted by Congress and that has been defended in the district court and this Court by the Senate and House of Representatives as amici curiae. Under those circumstances, appellees cannot plausibly claim to have standing to represent the interests of the Legislative Branch.¹³

¹³ Coleman v. Miller, *supra*, is not to the contrary. In Coleman, 21 (out of 40) state senators brought a mandamus action in the Kansas Supreme Court. *Id.* at 436. The gravamen of their suit was that the State's Lieutenant Governor, as presiding officer of the Senate, had improperly cast a tie-breaking vote in support of ratification of a proposed amendment to the United States Constitution. *Id.* at 435-436. The state supreme court entertained the suit on the merits, concluded that the Lieutenant Governor was authorized to cast the deciding vote, and held on that basis that the proposed amendment had been properly ratified by the Kansas Legislature. *Id.* at 437. The plaintiffs then sought review in this Court, which held that "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446. Four Members of the Court would have held that the plaintiffs lacked standing. See *id.* at 460 (Opinion of Frankfurter, J.).

Coleman is distinguishable from the instant case in three significant respects. First, the Court did not address the standing of federal legislators, nor did it hold that the plaintiffs would have had standing to bring their suit in federal court; it simply held that it had jurisdiction to review the state supreme court's decision where the plaintiffs' "interest in maintaining the effectiveness of their votes" had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 438, 446. Because the separation-of-powers principles applicable to the federal government are not binding upon the States, see, e.g., Karcher v. May, 484 U.S. 72, 82 (1987) (New Jersey Legislature was properly authorized under state law to represent the State's interest in litigation), Coleman is not controlling here. See Moore, 733 F.2d at 959 n.1 (Scalia, J., (continued...))

B. Because The President Has Not Yet Exercised His Cancellation Authority Under The Line Item Veto Act, Appellees Can Identify No Actual Or Imminent Injury



Even if Members of Congress possessed a judicially cognizable interest in the proper administration of federal law, appellees' suit could not go forward. This Court has emphasized that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." Whitmore, 495 U.S. at 158 (internal quotation marks omitted); accord, e.g., Defenders of Wildlife, 504 U.S. at 564 & n.2.¹⁴ Appellees acknowledge (Resp. to J.S. 4) that the President has not yet exercised the cancellation authority conferred by the Line Item Veto Act. Rather, the gravamen of their suit is that the President will, in the future, employ that authority so as to frustrate the proper implementation of appropriations bills enacted by Congress. That

¹³ (...continued)
concurring in result). Second, the votes of the Coleman plaintiffs had legal significance as a bloc, since those votes "would have been sufficient to defeat the resolution" under the plaintiffs' view of the Constitution. Id. at 446. The Coleman plaintiffs therefore could plausibly be regarded as acting on behalf of the legislature, and their entitlement to do so was a matter of state rather than federal law. Finally, Coleman involved an asserted impropriety in the process by which votes were counted within the legislature, rather than a defect in the administration of a duly enacted law.

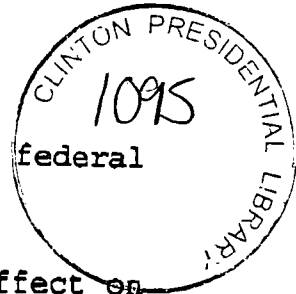
¹⁴ The requirement that a plaintiff's injury be "actual or imminent, not 'conjectural' or 'hypothetical,'" Whitmore, 495 U.S. at 155 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)), is closely related to the requirement that the claim be "ripe" for adjudication. Cf. Reno v. Catholic Social Servs., Inc., 509 U.S. 43, 57 n.18 (1993) (noting that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

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claim is too speculative to provide a basis for federal jurisdiction.

The Line Item Veto Act, taken alone, has no legal effect on appellees or on any private actor. Nor does the Act restrict Congress's discretion in fashioning future appropriations measures. Congress is free to provide that the Act shall not apply to a particular appropriations bill, and to require that the President must spend each item of appropriated funds notwithstanding the Act's provisions. Congress may also provide that the President's cancellation authority does not apply to an individual line item in an appropriations measure that is otherwise subject to the Act. Conversely, Congress may vest the President with heightened discretion in the administration of a particular appropriations bill -- e.g., by authorizing him to cancel budgetary items in part rather than in whole, or by permitting him to cancel items after the expiration of the initial five-day period. The Act simply establishes a "default rule," cf. Landgraf v. USI Film Products, 511 U.S. 244, 272 (1994): it defines the extent of the President's discretion in the administration of appropriations measures in the absence of an express contrary provision contained in a particular bill.

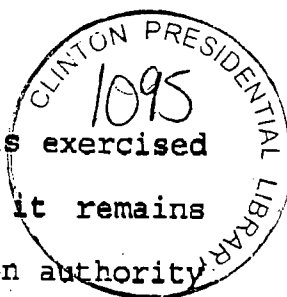
Thus, even the legal effect of the Line Item Veto Act cannot accurately be assessed until an appropriations bill is passed: only then can the scope of the President's discretion in administering that bill be compared to the discretion that he would possess if the Act were not the law. The Act's practical consequences,



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moreover, cannot be determined until the President has exercised his cancellation authority. At the present time, it remains unclear when the President will invoke the cancellation authority contained in the Line Item Veto Act; what items of spending, or limited tax benefits, he will choose to cancel; and whether those items will be reenacted into law through a disapproval bill. It is, in particular, unclear when or whether legislative measures supported by appellees themselves will be cancelled pursuant to the Act's procedures. Thus, even if a Member of Congress could be said to suffer a judicially cognizable injury through the frustration of his own legislative preferences, no such injury is either present or imminent in the instant case.

In explaining its contrary conclusion, the district court stated that, "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." J.S. App. 14a; see also id. at 12a ("Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."). Appellees are free, however, to vote and to participate in legislative negotiations on the basis of their own stated conviction that the Act is unconstitutional and that any exercise of the President's cancellation authority will therefore be a legal nullity. No alteration in "the dynamic of lawmaking" is compelled by the Line Item Veto Act. Rather, any such change will

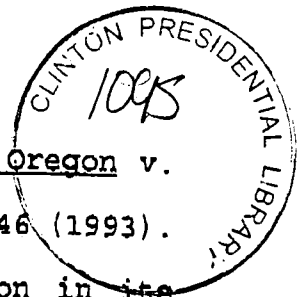




result from the fact that other participants in the legislative process do not share appellees' view that the Act is constitutionally deficient. See Eastern Kentucky Welfare Rights Org., 426 U.S. at 42 ("case or controversy" requirement is not satisfied where plaintiff's injury "results from the independent action of some third party not before the court").¹⁵

Legislative deliberations frequently take place against a backdrop of substantial disagreement or uncertainty regarding the existing state of the law. Neither the President nor Congress (or its individual Members) could unilaterally obtain an advisory opinion from this Court or a lower federal court regarding the constitutionality of the Line Item Veto Act, even if the request for such an opinion was motivated by a desire to eliminate legal uncertainty about the manner in which they should exercise their respective powers and responsibilities. See Correspondence of the Justices, reprinted in 3 The Correspondence and Public Papers of John Jay 486-489 (H. Johnston ed. 1891); Muskrat v. United States,

¹⁵ The district court's reliance (see J.S. App. 13a) on MWAA was misplaced. Plaintiffs in MWAA asserted that the power of the MWAA's Board of Review to veto actions of the MWAA's Board of Directors was unconstitutional because the Board of Review was composed of Members of Congress, in violation of separation-of-powers principles. See id. at 259, 262. Plaintiffs filed suit, however, after the Airports Authority had adopted a "master plan" for the construction of a new terminal at national Airport. See id. at 261-262. Plaintiffs "alleged that the master plan allows increased air traffic at national and a consequent increase in accident risks, noise, and pollution." Id. at 264. Although the Court held that the plaintiffs were not required to await an actual exercise of the Board of Review's veto power before filing suit, see id. at 265 n.13, it did not suggest that the existence of the veto power was sufficient, standing alone, to constitute an injury in fact.



219 U.S. 346, 354 (1911); United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 446 (1993).

That issue is no more suitable for judicial resolution in its present posture merely because several individual Members of Congress have written their request in the form of a complaint and named as defendants two officers of the other political Branch who happen to hold a contrary view of the constitutional question.

II. THE LINE ITEM VETO ACT DOES NOT VIOLATE ARTICLE I

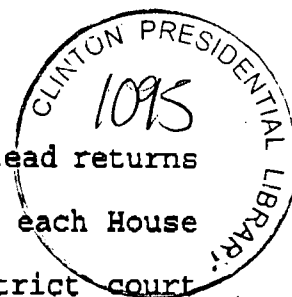
A. The Act Does Not Conflict With The Constitutional Requirement That The President Approve Or Disapprove In Toto A Bill Presented To Him By Congress

The Presentment Clause requires that "[e]very Bill" passed by Congress "shall, before it become a Law, be presented to the President." Art. I, § 7, Cl. 2.¹⁶ When a bill is presented to the President, the Presentment Clause gives him two options: if he "approve[s]" the bill, "he shall sign it," and if he does not approve the bill, "he shall return it, with his Objections to that House in which it shall have originated."¹⁷ If the President

¹⁶ Article I actually has two Presentment Clauses: Article I, § 7, Cl. 2, which applies to "Bill[s]," and Article I, § 7, Cl. 3, which applies to all "Order[s], Resolution[s], or Vote[s] to Which The Concurrence of the Senate and House of Representatives may be necessary." Art. I, § 7, Cl. 3 was adopted to prevent evasion of the presentment requirement "by the simple expedient of calling a proposed law a 'resolution' rather than a 'bill.'" Chadha, 462 U.S. at 947. For the sake of simplicity, we refer exclusively to Art. I, § 7, Cl. 2 in the text, but the discussion applies equally to both Presentment Clauses.

¹⁷ If the President neither signs the bill nor returns it within 10 days, the bill "shall be a Law, in like Manner as if he had signed it," unless Congress has by its adjournment prevented the bill's return, in which case the bill "shall not become a Law." Art. I, § 7, Cl. 2; see generally The Pocket Veto Case, 279 U.S. 655 (1929).

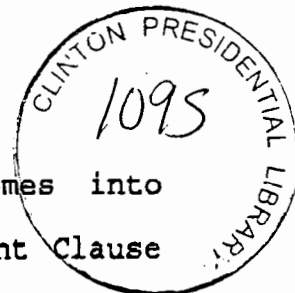
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signs the bill, it becomes a law. If the President instead returns the bill, it does not become law unless two-thirds of each House vote to override the President's veto. As the district court correctly recognized, see J.S. App. 5a-6a & n.3, 18a-19a, the President is required to approve or disapprove, in toto, a bill presented to him by Congress; he is not empowered to approve some portions of the bill and disapprove others.

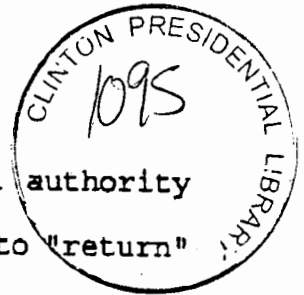
The Line Item Veto Act is consistent with that requirement. Its title notwithstanding, the Act does not authorize the President to approve some provisions of an appropriations bill while preventing other provisions from becoming law.¹⁸ When a spending bill is presented to the President, he must "sign" or "return" it in toto. By its terms, the Act applies only to "bill[s] or joint resolution[s] that ha[ve] been signed into law pursuant to Article I, Section 7, of the Constitution of the United States." ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a. When the President signs a bill, "[the] bill when so signed becomes from that moment a law." La Abra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899); United States v. Will, 449 U.S. 200, 224-225 n.28 (1980) (President's signature marks "the precise time the statute became law").

¹⁸ Although the word "veto" is commonly used to describe the President's power to "return" a disapproved bill to the House of Congress in which it originated, see Chadha, 462 U.S. at 925, the word "veto" does not appear in the Presentment Clause, or anywhere else in the Constitution. The presence of the term in the title of the Act has the same constitutional significance as the absence of the term from the Presentment Clause -- none.



Thus, the President's cancellation authority comes into existence only after the requirements of the Presentment Clause have been satisfied. See H.R. Conf. Rep. No. 491, 104th Cong., 2d Sess. 20 (1996) ("the cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety"). The district court therefore correctly held that "statutes subject to cancellation will have been 'approved' [by the President] in accordance with the Presentment Clause." J.S. App. 20a. Because the cancellation authority created by the Act does not prevent any portion of an appropriations bill from becoming law, it is fundamentally different from the President's constitutional authority to "return" to Congress bills of which he disapproves.¹⁹

¹⁹ There is no constitutional significance to the fact that the President must exercise his cancellation authority, if at all, within five days after the bill has become law. A prompt decision is necessary to assure orderly implementation of appropriations acts and to avoid the potential disruption of federal spending programs that could arise from belated cancellations. It is hardly unprecedented for federal laws to require the Executive Branch to make determinations and exercise discretionary authority within a strictly limited period of time. For example, the Shipping Act of 1984 gives the President the power to suspend certain rate orders of the Federal Maritime Commission if he determines that a suspension is required "for reasons of national defense or foreign policy," but he must act within 10 days after the receipt or effective date of the Commission order. 46 U.S.C. App. 1708(e). Similarly, the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 authorized the Attorney General temporarily to employ specified transitional rules for the detention and release of criminal aliens, but only if she notified Congress within 10 days of the enactment of the Act. Pub. Law No. 104-208, Tit. III, Div. C, § 303(b)(2), 110 Stat. 3009-586 (1996). In any event, the length of time that passes between the President's approval of an appropriations bill and his subsequent cancellation of particular items contained therein cannot possibly be relevant to the question whether the cancellation prevents those items from becoming law.



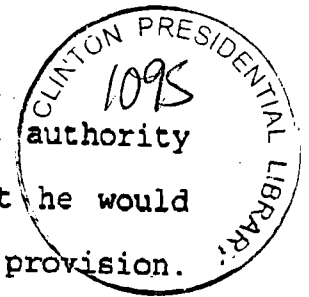
In another significant respect, the cancellation authority conferred by the Act differs from the President's power to "return" a disapproved bill to Congress. A bill returned to Congress can be enacted into law if, but only if, it is subsequently approved by two-thirds of each House. U.S. Const. Art. I, § 7, Cl. 2. A presidential cancellation pursuant to the Line Item Veto Act, by contrast, can be overturned by new legislation passed by a simple majority of each House, see ICA § 1026(6) (2 U.S.C. 691e(6)); J.S. App. 49a-50a, subject to a possible presidential veto and subsequent override. That is the method that Congress is required to employ whenever it disapproves of the manner in which the Executive Branch has exercised discretionary authority conferred by statute. See Chadha, 462 U.S. at 954-955, 958. The mechanism by which Congress is authorized to overturn the President's decision reinforces the conclusion that cancellation under the Act is not equivalent to the "return" of selected provisions in a bill that has otherwise been signed into law.²⁰

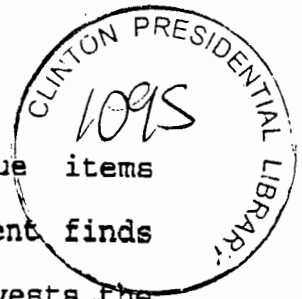
²⁰ The significance of this distinction is highlighted by a comparison of the Line Item Veto Act with statutory and state constitutional provisions that confer true "item veto" (i.e., partial "return") authority. The Organic Act, which formerly governed the Philippine Islands, stated that "[t]he Governor General shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. The item or items objected to shall not take effect except in the manner heretofore provided in this section as to bills and joint resolutions returned to the legislature without his approval." Organic Act of August 29, 1916, § 19, 39 Stat. 655; see Rengzon v. Secretary of Justice, 299 U.S. 410 (1937). See also Calif. Const. Art. 4, § 10(b) ("The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. * * * Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.").

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The Act does, we acknowledge, give the President authority that is similar in practical effect to the power that he would possess under a true item veto (i.e., partial "return") provision. That does not mean, however, that the Act is an effort to "evade" (Resp. to J.S. at 5) the requirements of the Presentment Clause. The President's cancellation authority under the Act might equally well be analogized to the power that he would possess if Congress chose to enact each item of spending as a separate bill, which the President could "approve" or "return." The difference between that (unquestionably constitutional) practice and a partial "return" provision is not that the latter confers greater practical authority upon the President; it is that one is consistent with the formal requirements of the Presentment Clause and the other is not. In light of the practical infeasibility of passing separate legislation governing each budgetary item, Congress sought in the Line Item Veto Act to devise an alternative mechanism for accomplishing the same end. In so doing, Congress was of course required to comply scrupulously with the terms of the Presentment Clause; but there is nothing remotely suspect about the underlying objective.

Because the Line Item Veto Act governs the implementation of appropriations statutes after they have become law, rather than the process by which they are enacted, the Act presents no genuine Presentment Clause ^{as "programs" or "issues"} ~~issue~~. Rather, the Act must be scrutinized ^{as "direct" spending} under the standards governing statutory grants of discretion to the Executive Branch in its administration of enacted laws. The Act





operates to make the specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met.²¹ The Act thus vests the President with authority to determine, in accordance with statutorily prescribed standards and procedures, whether items of spending that Congress has authorized will in fact be spent. As we explain below, that grant of authority is fully consistent both with historical practice and with this Court's precedents.

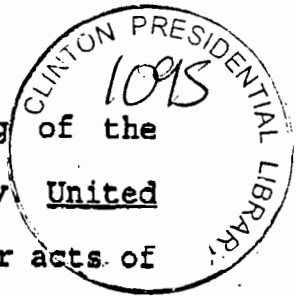
B. The Act Is Consistent With The Historical Understanding of Congress's Power To Confer Spending Discretion On The Executive Branch

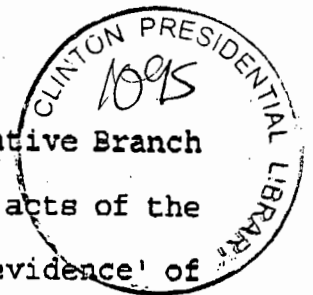
"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. The Pocket Veto Case, 279 U.S. 655, 689 (1929); see also Mistretta v. United States, 488 U.S. 361, 401 (1989) ("traditional ways of conducting government * * * give meaning' to the Constitution") (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). As we explain above, the conferral upon the President of substantial discretion over the expenditure of appropriated funds has been a recurring practice of

²¹ In discussing the effect of the Act on future spending bills, we use the terms "discretionary" and "mandatory" to distinguish between spending authority that the Executive Branch has discretion not to exercise and spending authority that the Executive Branch is legally obligated to exercise. Those terms are often used in a different sense in the federal budget process: "discretionary" spending signifies "programs that are subject to annual funding decisions in the appropriations process," while "mandatory" spending (also known as "direct" spending) means "all spending that is made pursuant to laws other than appropriations laws." Senate Comm. on the Budget, The Congressional Budget Process: An Explanation, S. Print No. 104-70, 104th Cong., 2d Sess. 5, 6 (1996).

Congress under the Spending Clause from the beginning of the Republic. See pages **-**, supra; Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated governmental agencies.").

Congress has sometimes conferred that discretion in individual appropriations acts. At other times, Congress has given the President broad authority to withhold appropriated funds on a government-wide basis in order to pursue overarching budgetary goals of Congress's choosing. See pages **-**, supra. When Congress has given the President discretion over appropriated funds, it often has chosen not to impose binding restrictions on how that discretion is to be exercised. Thus, when Congress has passed lump-sum appropriations bills, see Lincoln v. Vigil, 508 U.S. 182, 192 (1993), or when it has given the President general authority to reduce government spending below appropriated levels, see pages **-**, supra, the President has been left largely free to exercise his own judgment regarding which spending programs to reduce and how much to reduce them. The degree of authority vested in the President has varied from time to time, in response to changing legislative judgments about the need for Executive Branch discretion. The extent of the Executive Branch's spending discretion in any particular instance has always been regarded, however, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.





The practices of the First Congress regarding Executive Branch spending discretion are particularly instructive. The acts of the First Congress "provide[] 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" Bowsher v. Synar, 478 U.S. 714, 723-724 (1986) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)). As we explain above (see page **, supra), the First Congress chose to fund the general operations of the federal government through lump-sum appropriations acts that did not require the Executive Branch to spend the full amount of the appropriations. See, e.g., Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (appropriating "a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war").²² The Members of the First Congress evidently saw no constitutional impediment to vesting the Executive Branch with broad discretion over the disposition of appropriated funds.

Viewed against this historical background, the Line Item Veto Act can hardly be characterized as "revolutionary." J.S. App. 25a. Like its many statutory predecessors, the Act simply gives the President a measure of discretion over the expenditure of

²² The lump-sum appropriations passed by the First Congress did not vest the President with unlimited discretion over the use of the appropriated sums. Other statutes, such as those fixing the salaries of federal officers, obligated the expenditure of a portion of the appropriations. See, e.g., Act of Sept. 11, 1789, ch. 13, §§ 1-2, 1 Stat. 67-68 (salaries of executive officers). Nevertheless, Congress left the President free to decide how (and whether) to spend the remainder of the appropriated funds.

appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations imposed by Congress. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion add "great weight," Pocket Veto Case, 279 U.S. at 689, to the political Branches' shared judgment that the line Item Veto Act satisfies the requirements of Article I.

C. The Act Does Not Delegate Legislative Power To The President

The district court held that the Act violates the Presentment Clause by vesting the President with legislative power -- specifically, the power to repeal laws. See J.S. App. 24a-26a. That holding was incorrect. When the President employs the cancellation authority conferred by the Act, he is not exercising legislative power, but is carrying out his core Article II function of "faithfully execut[ing]" the laws.

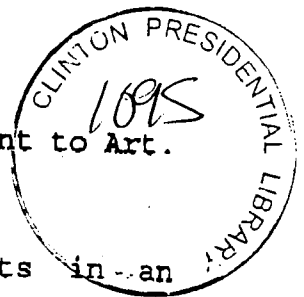
1. The requirements of the Presentment Clause do not apply to the President's administration of enacted laws. As the Court explained in Chadha, "[e]xecutive action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require." 462 U.S. at 953 n.16. The lawmaking procedures required by the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the

statute that created it -- a statute duly enacted pursuant to Art.

I, §§ 1, 7." Ibid.

When the President acts, "he presumptively acts in an executive or administrative capacity as defined in Art. II." Chadha, 462 U.S. at 951. The Article II character of the President's actions does not change when, as here, the President is exercising discretionary authority in the implementation of federal laws. While Article I vests "[a]ll legislative Powers" in Congress (Art. I, § 1), it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches." Mistretta, 488 U.S. at 372. Instead, Congress is free to "leav[e] a certain degree of discretion to executive * * * actors" in the execution of federal laws. Touby v. United States, 500 U.S. 160, 165 (1991). Accordingly, this Court has long recognized that "no valid objection can be made" to "conferring authority or discretion [on the President] as to execution [of a federal law], to be exercised under and in pursuance of the law." Field v. Clark, 143 U.S. 649, 693-694 (1892) (internal quotation marks omitted).

Although Congress may vest the Executive Branch with considerable discretion in the administration of federal laws, it may not -- either expressly or in practical effect -- delegate to other Branches the "lawmaking function" vested in it by Article I. See, e.g., Loving v. United States, 116 S. Ct. 1737, 1744 (1996) ("the lawmaking function belongs to Congress * * * and may not be conveyed to another branch"); id. at 1752 (Scalia, J., concurring in part and concurring in the judgment) ("Legislative power is



nondelegable"); Touby, 500 U.S. at 165. Where Congress is alleged to have impermissibly delegated its legislative powers to other officials, "[t]he focus of controversy * * * has been whether the degree of generality contained in the authorization for exercise of executive or judicial powers in a particular field is so unacceptably high as to amount to a delegation of legislative powers." Mistretta, 488 U.S. at 419 (Scalia, J., dissenting). The nondelegation doctrine thus serves to ensure that the President's executive authority is not so broad and unconstrained as to amount in practical effect to the exercise of legislative power.

In applying the nondelegation doctrine, this Court "has deemed it 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority.'" Mistretta, 488 U.S. at 372-373 (quoting American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946)). The touchstone of analysis is whether Congress has provided an "intelligible principle" for the exercise of executive discretion. Mistretta, 488 U.S. at 372; J.W. Hampton, 276 U.S. at 406. Applying the "intelligible principle" standard, the Court has repeatedly sustained the constitutionality of laws that vest the Executive Branch with discretion over the implementation of federal statutes and programs.²³ The Court has approved grants of

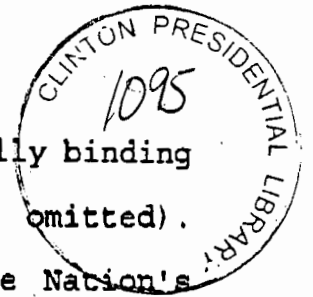
²³ See, e.g., Loving, *supra*; Touby, *supra*; Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989); Mistretta, *supra*; FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); Lichter v. United States, 334 U.S. 742, 785 (1948); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Yakus v. United States, 321 U.S. 414 (1944); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); NBC v. United States. (continued...)

discretionary authority "under [statutory] standards phrased in sweeping terms," Loving, 116 S. Ct. at 1750, sustaining the constitutionality of laws giving the Executive Branch the authority to regulate broadcast licensing as required by "public interest, convenience, or necessity," NBC, 319 U.S. at 194, 225-226; to approve consolidation of carriers "in the public interest," New York Central Securities Corp., 287 U.S. at 24; to recover "excessive profits" on military contracts, Lichter, 334 at 778-786; to fix prices that "will be generally fair and equitable and will effectuate the purposes" of the law, Yakus, 321 U.S. at 420, 426-427; and to determine "just and reasonable" natural gas rates, Hope Natural Gas Co., 320 U.S. at 600-601.

2. It is far from clear that congressional appropriations of money are subject to the "intelligible principle" standard that generally applies to regulation of private conduct. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" Lincoln v. Vigil, 508 U.S. 182, 191 (1993). "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear

23 (...continued)

319 U.S. 190 (1943); New York Central Securities Corp. v. United States, 287 U.S. 24 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928); Field, supra; Synar v. United States, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam) (three-judge court) (citing cases), aff'd sub nom. Bowers v. Synar, 478 U.S. 714 (1986).



inference arises that it does not intend to impose legally binding restrictions." Id. at 192 (internal quotation marks omitted). Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." Cincinnati Soap Co., 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see OPM v. Richmond, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if an appropriations statute placed no further constraints on Executive Branch discretion. Even if the "intelligible principle" standard articulated in Mistretta is assumed to apply in this context, however, the Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.

a. To begin with, the Act permits the President to cancel items only "in whole," ICA § 1021(a) (2 U.S.C. 691(a)); J.S. App. 32a, not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 33 (1996). And because the Act's "lockbox" feature (see page *, supra) requires the President to devote any cancelled amounts to deficit reduction, the President has no authority to spend money on any project beyond the specific amount appropriated by Congress. The Act's requirement that each budgetary item must be devoted (in

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its entirety) either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion. Indeed, that is essentially the choice with which the President would be faced if Congress adopted the (unquestionably constitutional) practice of passing individual line items as separate bills.

b. In addition, the Act provides meaningful guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." ICA § 1021(a) (A) (2 U.S.C. 691(a) (A)); J.S. App. 33a. The Act thereby "establishes clear preconditions to Presidential action," Algonquin SNG, 426 U.S. at 559, using criteria that are at least as "intelligible" as those previously approved by this Court. See pages **--** and note **, supra.

The Act also requires the President to provide his estimate of the "fiscal, economic, and budgetary effect" of the cancellation; to estimate the "effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided"; and to set forth the geographic distribution of the cancelled spending. ICA § 1022(b) (2 U.S.C. 691a(b)); J.S. App. 34a-35a. By directing the President to consider those additional matters, Congress has offered further guidance as to the factors that should inform his decision. The requirement that the

President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co., 463 U.S. 29, 43 (1983). Finally, the Act places a substantial portion of the federal budget outside the scope of the President's cancellation authority altogether, by excluding current levels of spending for entitlement programs and other "direct spending." ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a ("item of new direct spending" defined as "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending") (emphasis added). Because "Congress [has] clearly delineate[d] the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," Mistretta, 488 U.S. at 372-373 (internal quotation marks omitted), the exercise of cancellation authority under the Act represents the Article II power to execute the laws of the United States, not the legislative power vested in Congress by Article I.²⁴

²⁴ The district court sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court under the nondelegation doctrine on the ground that the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." J.S. App. 27a. The precise import of those statements is unclear. If the court meant that the fashioning of budgetary priorities is an inherently legislative (and thus non-delegable) function, the court's analysis cannot be squared with Congress's consistent (and heretofore unquestioned) practice of authorizing the Executive Branch to exercise considerable discretion over the expenditure of appropriated funds. Contrary to the district court's apparent belief (see id. at 27a-28a), it is neither unprecedented nor unconstitutional for Congress to give the President discretion over "which programs to preserve and which to cut." If the district

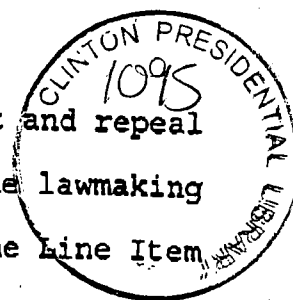
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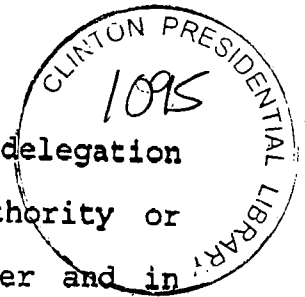
3. It is, of course, undisputed that "[a]mendment and repeal of laws, no less than enactment, must conform with [the lawmaking requirements] of Art. I." Chadha, 462 U.S. at 954. The Line Item Veto Act, however, does not authorize the President to repeal legislation. Instead, by making individual items in spending legislation permissive rather than mandatory (see pages **-**, supra), it simply gives the President discretionary authority over the implementation of future appropriations acts. This Court's precedents make clear that this kind of power, exercised pursuant to statutory authorization, is not tantamount to legislative repeal under Article I.

a. In Field, importers challenged the constitutionality of a section of the Tariff Act of 1890 that authorized the President to "suspend" the Act's provisions (thereby raising tariffs) if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on specified commodities. Act of Oct. 30, 1890, ch. 1244, § 3, 26 Stat. 567, 612. The importers argued that the suspension provision unconstitutionally delegated lawmaking power to the President. 143 U.S. at 681. The Court rejected that contention, holding that Congress may provide for "the suspension of an act upon a contingency to be ascertained by the president, and made known by his proclamation." Id. at 683. The Court explained that "[t]he

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court meant that the discretion conferred by the Line Item Veto Act is standardless or otherwise unduly broad, it was incorrect for the reasons stated at pages **-**, supra.



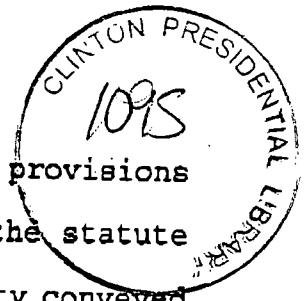


true [constitutional] distinction * * * is between the delegation of power to make the law * * * and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." Id. at 693-694 (internal quotation marks omitted).

The Court has also sustained the related congressional practice of vesting the Executive Branch with discretionary authority to create exemptions from federal laws or otherwise limit their scope. For example, the former Interstate Commerce Act, while generally prohibiting carriers from offering long-haul discounts, "gave an authority to the Interstate Commerce Commission * * * to grant relief from this prohibition," authority that was "undefined except as the general purposes of that Act implied the basis for affording exemption." Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 616 (1944). In the Intermountain Rate Cases, 234 U.S. 476, 486-489 (1914), the Court squarely rejected a claim that Congress had conveyed Article I legislative power to the Executive Branch by authorizing the Commission to create exemptions from the long-haul discount prohibition.

A wide variety of federal laws currently authorize the Executive Branch to suspend their provisions, grant exemptions from their requirements, or otherwise modify their operation.²⁵ When

²⁵ See, e.g., Touby, 500 U.S. at 162 (upholding statutory provision that authorizes Attorney General to remove substances from, as well as add substances to, statutory schedules of Controlled Substances Act); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114, § 306(c), 110 Stat. 785, 821-822 (to be codified at 22 U.S.C. 6085(c)) (authorizing (continued...))

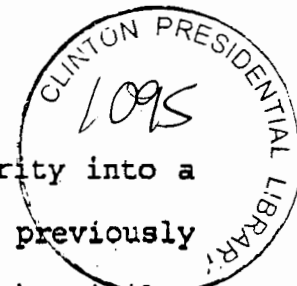


the Executive Branch suspends the operation of statutory provisions (as in Field) or otherwise modifies the operation of the statute (as in the Intermountain Rate Cases) pursuant to authority conveyed in the statute itself, no Presentment Clause problem arises: the President is simply exercising his Article II power to "faithfully execute" the law according to its terms. See Field, 143 U.S. at 693 (President's suspensory power "was a part of the law itself, as it left the hands of congress"). As noted above, the lawmaking procedures of the Presentment Clause are "not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I, §§ 1, 7." Chadha, 462 U.S. at 953 n.16.

b. The district court found it significant that cancellation under the Act "rescind[s]" cancelled discretionary budget authority and renders cancelled items of new direct spending and limited tax benefits without "legal force or effect." ICA § 1026(4)(A)-(C) (2 U.S.C. 291e(4)(A)-(C)); see J.S. App. 25a. Contrary to the district court's suggestion, Congress's use of that terminology

25 (...continued)

President to suspend provision of Helms-Burton Act exposing foreign firms to civil liability for use of confiscated American property in Cuba); 5 U.S.C. 5303a(b)(1), 5304a(a) (authorizing President to replace statutory formula for federal employee pay increases with formula chosen by President); 10 U.S.C. 7309(b) (authorizing President to make exceptions to ban on foreign construction of military vessels); 15 U.S.C. 781 (authorizing SEC to "exempt in whole or in part any issuer or class of issuers" from specified provisions of Securities Exchange Act of 1934); 47 U.S.C. 227(b)(2) (authorizing FCC to establish exemptions from federal ban on prerecorded telemarketing calls).



does not transform the President's cancellation authority into a power of statutory repeal. Indeed, this Court has previously discussed with approval statutory provisions phrased in similar terms. In Field, for example, this Court cited the example of a customs statute providing that specified tariff acts "shall be repealed" if the President declared that discriminatory foreign tariffs had been abolished. See 143 U.S. at 687 (citing Act of May 31, 1830, ch. 219, § 2, 4 Stat. 425). Field also cited an import statute authorizing the President to "declare the provisions of this act to be inoperative, and the same shall be hereafter inoperative and of no effect from said proclamation." Id. at 688 (citing Act of Mar. 6, 1866, ch. 12, 14 Stat. 3). Far from regarding those statutes as constitutionally deficient, the Court cited them as historical support for the constitutionality of the tariff act at issue in Field.

c. Nor does any constitutional infirmity result from the fact that the President's cancellation of a particular item is irrevocable unless overturned by a subsequent disapproval bill.²⁶ There is, in particular, no basis for the district court's suggestion that this feature of the Line Item Veto Act effects a

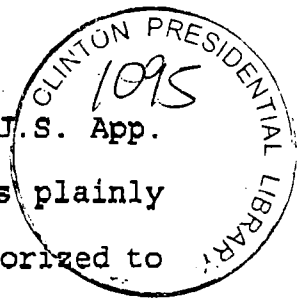
²⁶ Thus, while the decision whether to undertake a criminal prosecution "has long been regarded as the special province of the executive Branch," Heckler v. Chaney, 470 U.S. 821, 832 (1985), prosecutorial officials may by their actions effectively preclude themselves from proceeding in a particular case -- e.g., by entering into a plea agreement, cf. Santobello v. New York, 404 U.S. 257 (1971), or by failing to obtain an indictment within the statutory limitations period. See also note **, supra (examples of laws requiring that Executive Branch discretion be exercised, if at all, within a narrow period of time).

particularly "expansive * * * delegation[] of power." J.S. App.

25a. To the contrary, the discretion thus conferred is plainly narrower than would be the case if the President were authorized to revisit the question whether particular expenditures should be made.

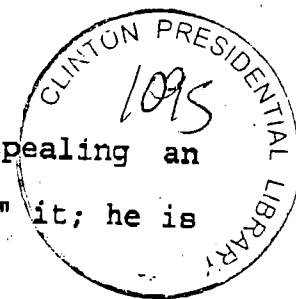
d. Finally, the fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws is of no constitutional significance. As we explain above, the Line Item Veto Act creates a "default rule" that budgetary items within its purview will be discretionary rather than mandatory to the extent provided by the Act. Congress is free, however, to render the Act's provisions inapplicable, or otherwise to alter the scope of the President's discretion, with respect to any particular appropriations bill. See page **, supra.

There is consequently no basis for appellees' assertion that under the Line Item Veto Act, "the President's signature [on an appropriations bill] no longer signifies his approval of the whole [appropriations] Act as one he will faithfully execute." Resp. to J.S. 6. Because Congress is presumed to legislate with an awareness of existing law, see, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184-185 (1988), an appropriations bill that does not otherwise specify the scope of the President's discretion must be understood to authorize him either to spend, or to cancel, each item covered by the Act. Thus, where the President exercises the cancellation



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authority conferred by the Act, he is neither repealing an appropriations law nor refusing to "faithfully execute" it; he is administering it in accordance with its terms.



CONCLUSION

The judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

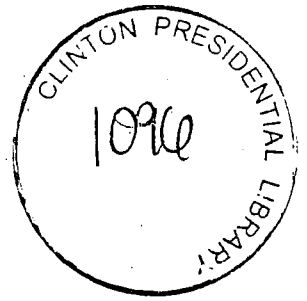
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Attorneys

MAY 1997

ONE OF A SERIES
ISSUED IN 1997
WAS NOT RECORDED



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THE WHITE HOUSE
WASHINGTON

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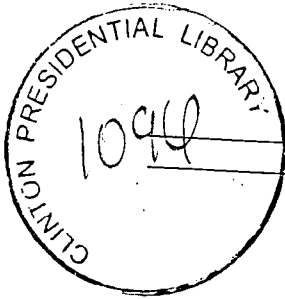
Bruce -

Attached is a draft of
DOJ's jurisdictional
statement in the line item
veto care. Please let me
know of any comments
you have as soon as
possible.

Thanks

Trey

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No.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

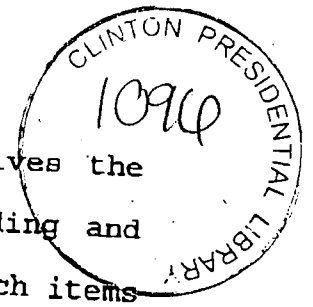
WALTER DELLINGER
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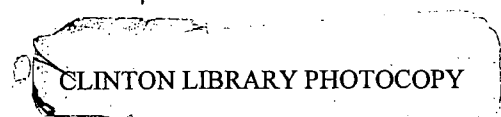
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Department of Justice
Washington, D.C. 20530-0001
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QUESTIONS PRESENTED

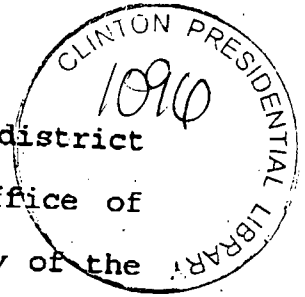
The Line Item Veto Act, 2 U.S.C. 691 et seq., gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act, when the President has neither exercised the authority conferred by the Act nor identified any bill with respect to which he intends to exercise that authority.
2. Whether the Act violates the Presentment Clause of the Constitution, Article I, Section 7, Clause 2.



PARTIES TO THE PROCEEDINGS

The appellants here, who were the defendants in the district court, are Franklin D. Raines, the Director of the Office of Management and Budget, and Robert E. Rubin, the Secretary of the Treasury. The appellees here, who were the plaintiffs below, are Senator Robert C. Byrd, Senator Daniel Patrick Moynihan, Senator Carl Levin, former Senator Mark O. Hatfield, Representative David E. Skaggs, and Representative Henry A. Waxman.



IN THE SUPREME COURT OF THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., infra, 1a-29a) is not yet reported.

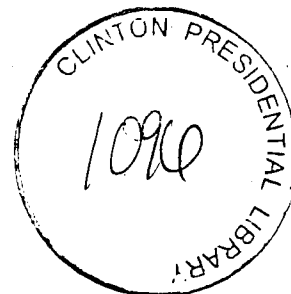
JURISDICTION

The order of the district court was entered on April 10, 1997. A notice of appeal (App., infra, 30a-31a) was filed on April 11, 1997. The jurisdiction of this Court is invoked under Pub. L. No. 104-130, § 3, 104 Stat. 1211 (App., infra, 57a) (to be codified at 2 U.S.C. 692(b)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Presentment Clause of the United States Constitution, Article 1, Section 7, Clause 2, provides as follows:

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



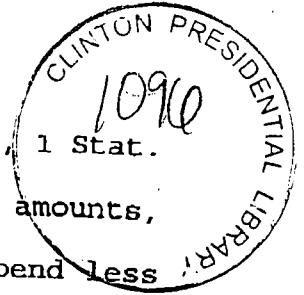
the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 et seq. (1996) (to be codified at 2 U.S.C. 691 et seq.), is reproduced at App., infra, 32a-59a.

STATEMENT

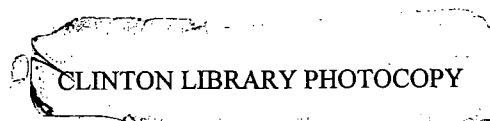
This case involves a challenge to the constitutionality of the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 et seq. (1996) (to be codified at 2 U.S.C. 691 et seq.). Although the authority vested in the President by the Line Item Veto Act has never been exercised, the district court permitted several Members of Congress to proceed with a constitutional challenge to the Act. On the merits, the court concluded that the Act authorizes the President to "repeal" Acts of Congress, in violation of the Presentment Clause, U.S. Const., Art. I, Sec. 7, Cl. 2, and is therefore unconstitutional. Congress has vested this Court with immediate appellate jurisdiction over the district court's decision. App., infra, 57a.

1. Beginning in 1789, and continuing into the Nineteenth and Twentieth Centuries, Congress established the basic practice of passing appropriation laws that provide for expenditures "not exceeding" specified amounts. See, e.g., Act of Sept. 29, 1789,



ch. 23, § 1, 1 Stat. 95; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. By appropriating funds "not exceeding" fixed amounts, Congress left the Executive Branch with discretion to spend less than the appropriated amount if the full measure of the appropriation proved unnecessary. See, *e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) ("[a]ppropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity"); 89 Cong. Rec. 10362 (1943) (Sen. Truman) ("When the Congress appropriates funds * * * none of us hold[s] that we give a mandate to expend the funds appropriated"). In addition, from an early date, Congress conferred further discretion over spending by authorizing the transfer of appropriated funds within departments of the Executive Branch. See, *e.g.*, Act of Mar. 3, 1809, ch. 28, §§ 1-2, 2 Stat. 535, 535-536; Act of May 1, 1820, ch. 52, § 5, 3 Stat. 567, 568; Act of Aug. 26, 1842, ch. 202, § 5, 5 Stat. 523, 533; Act of Feb. 12, 1868, ch. 8, § 2, 15 Stat. 35, 36 (repealing transfer authority). Congress gives the Executive Branch similar discretion whenever it passes "lump-sum" appropriation bills. See *Lincoln v. Vigil*, 508 U.S. 182, 191-192 (1993).

During the early 1970s, the Nixon Administration attempted to assert broad Executive Branch control over spending by impounding appropriated funds for a wide variety of federal programs. That effort led to a series of lawsuits challenging various impoundments. See *City of New Haven v. United States*, 634 F. Supp. 1449, 1454-1455 (D.D.C. 1986) (summarizing cases), *aff'd*, 809 F.2d

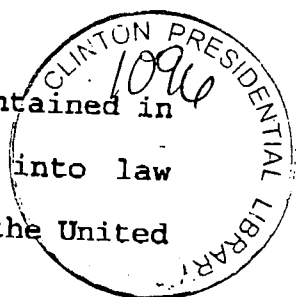


900 (D.C. Cir. 1987). The courts resolved those disputes by construing the applicable appropriations statutes to determine whether Congress intended for the President to have discretion over the impounded funds. See, e.g., Train v. City of New York, 420 U.S. 35, 44-46 (1975).

In response to the impoundment controversy, Congress enacted the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, Title X, 88 Stat. 297, 332 (codified as amended at 2 U.S.C. 681 et seq.). The Impoundment Control Act distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year) and rescissions (permanent withholding of appropriated funds). See 2 U.S.C. 682(1), 682(3). The Act authorized the President to engage in deferrals but made that authority subject to a one-House legislative veto. 2 U.S.C. 684.¹ The Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683.

2. The Line Item Veto Act, enacted in April 1996 as an amendment to the Impoundment Control Act, is designed to enhance the limited rescission authority provided in that Act. To that end, the Line Item Veto Act gives the President the authority to

¹ This Court's decision in INS v. Chadha, 462 U.S. 919 (1983), made clear that the Impoundment Control Act's legislative veto provision was unconstitutional. See City of New Haven v. Pierce, 809 F.2d 900, 905 (D.C. Cir. 1987) (government conceded unconstitutionality of Section 684's legislative veto provision). Congress subsequently amended the Act to eliminate that provision. Pub. L. No. 100-119, § 206(a), 101 Stat. 785-786 (1987).

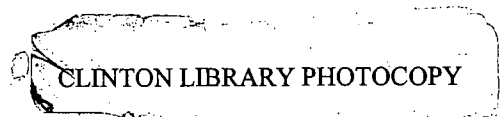


"cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, Section 7, of the Constitution of the United States." § 1021(a); App., infra, 32a.²

The President's authority under the Act extends to three budgetary categories: "dollar amount[s] of discretionary budget authority," "item[s] of new direct spending," and "limited tax benefit[s]." § 1021(a); App., infra, 32a-33a. A "dollar amount of discretionary budget authority" is the entire amount specified for one purpose in an appropriations law, accompanying committee report or statement of managers, or authorizing law. § 1026(7); App., infra, 50a-51a. An "item of new direct spending" is a specific provision that will result in an "an increase in budget authority or outlays" for entitlements, food stamps, or other programs funded other than through annual appropriations. § 1026(8); App., infra, 51a. A "limited tax benefit" is a revenue-losing provision that gives a tax reduction to 100 or fewer beneficiaries, or a provision that provides "temporary or permanent transitional relief" to 10 or fewer beneficiaries. § 1026(9); App., infra, 52a-54a.

Cancellation of a dollar amount of discretionary budget authority operates to rescind that authority. § 1026(4)(A); App., infra, 48a. Cancellation of an item of new direct spending or a limited tax benefit prevents the cancelled spending or revenue provision from having "legal force or effect." § 1026(4)(B) and

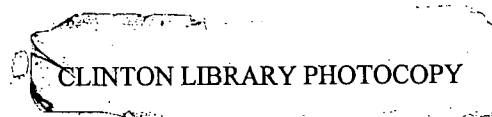
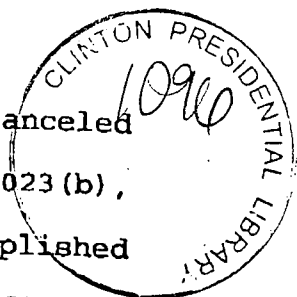
² Section 2 of the Line Item Veto Act added a new Part C to Title X of the Impoundment Control Act. The "\$" citations in the text are to Sections of that new Part C.

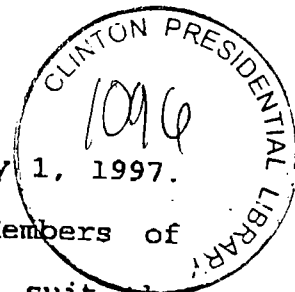


(C); App., infra, 48a-49a. The President may not use canceled funds for any purpose other than deficit reduction. §§ 1023(b), 1024; App., infra, 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Office of Management and Budget (OMB) must calculate the deficit reduction from the cancellation and "lock in" the savings by adjusting the calculations submitted to Congress under the Gramm-Rudman-Hollings Act. § 1024(a) and (b); App., infra, 37a-38a.

The President is authorized to cancel an item if he determines that doing so will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." § 1021(a)(A); App., infra, 33a. The President must notify Congress of any cancellation within five calendar days after the enactment of the law providing the item that is being cancelled. § 1021(a)(B); App., infra, 33a.

A cancellation under the Act takes effect upon Congress's receipt of the President's notification. § 1023(a); App., infra, 36a. The Act provides for highly expedited consideration by each House of Congress of a bill to set aside a cancellation after receipt of the President's notification. § 1025, 1026(6); App., infra, 39a-48a, 49a-50a. If a disapproval bill is enacted into law, all disapproved cancellations become null and void and the cancelled items become effective. § 1023(a); App., infra, 36a. A disapproval bill, if it is approved by the President or becomes law without his approval, is not subject to the President's cancellation authority under the Act. § 1021(c); App., infra, 34a.





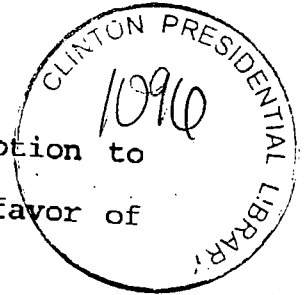
3. The Line Item Veto Act took effect on January 1, 1997. See App., infra, 2a, 58a-59a. Appellees -- six Members of Congress, one of whom has since left office -- filed suit the following day.³ They named as defendants Franklin D. Raines, the Director of the OMB; and Robert E. Rubin, the Secretary of the Treasury. Complaint at 1; see App., infra, 2a.⁴ Appellees alleged that "the Act confers on the President powers of veto, revision, and repeal of federal law that violate Article I of the Constitution." Complaint at 2. They further alleged that

[t]he Act directly and concretely injures the [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Id. at 4-5. The complaint did not allege either that the President had exercised his cancellation authority under the Act or that he had identified any bill as to which he intended to exercise that authority.

³ A similar constitutional challenge was brought by a federal labor union immediately after the Act was signed into law in April 1996. That action was dismissed on standing and ripeness grounds. See NTEU v. United States, 101 F.3d 1423 (D.C. Cir. 1996).

⁴ Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and enforcing the tax laws of the United States." Complaint at 3-4.



3. The district court denied the government's motion to dismiss the complaint and entered summary judgment in favor of appellees. App., infra, 1a-29a.

a. The district court first held that appellees had standing to bring their suit. App., infra, 9a-12a. The court relied on prior D.C. Circuit decisions holding that Members of Congress have "standing to challenge measures that affect their constitutionally prescribed lawmaking powers." Id. at 10a. The court held that "[appellees'] claim of injury in this case, namely, that the Act dilutes their Article I voting power, is likewise of the kind that suffices to confer standing under Article III." Id. at 11a. By virtue of the Act, the court explained, "[appellees'] votes mean something different from what they meant before, for good or ill, and [appellees] who perceive it as the latter are thus 'injured' in a constitutional sense whenever an appropriations bill comes up for a vote, whatever the President ultimately does with it." Id. at 11a-12a.

The district court also held that appellees' claims were ripe for adjudication despite the fact that the President had not yet exercised his cancellation authority under the Act. App., infra, 12a-15a. The court explained that "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." Id. at 14a. The court noted as well that "the budgetary process is already underway," and that "appropriations votes are inevitable, and

'certainly impending.'" Ibid. (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)).⁵

b. On the merits, the district court concluded that the Line Item Veto Act is unconstitutional. App., infra, 16a-29a. In the court's view, the cancellation authority conferred upon the President by the Act is inconsistent with the requirement of the Presentment Clause, U.S. Const., Art. I, Sec. 7, Cl. 2, that the President must approve or disapprove a bill in toto. The court explained:

Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

App., infra, 21a.

The district court acknowledged that the President may be vested with discretionary authority to impound, or to decline to spend, funds previously appropriated by Congress. App. 22a-23a. The government contended that the President's cancellation authority under the Act is simply a form of prospective impoundment authority, one that makes individual spending items in an

⁵ Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. App., infra, 56a. Section 3(c) of the Act directs both the district court and this Court to expedite disposition of such suits "to the greatest possible extent." Id. at 57a. The district court construed those provisions as rendering inapplicable any prudential constraints on the court's exercise of jurisdiction, leaving only the requirements of Article III. See id. at 9a n.5, 14a n.8, 16a.

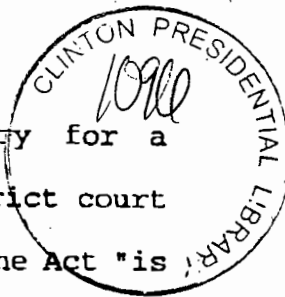
appropriation bill discretionary rather than mandatory for a limited period following the bill's enactment. The district court rejected that argument, stating that cancellation under the Act "is simply not the same thing as impoundment," but instead "is equivalent to repeal" of the underlying appropriation law. Id. at 24a-25a. The court explained that

[c]ancellation forever renders a provision of federal law without legal force or effect, so the President who cancelled an item and his successors must turn to Congress to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly.

Id. at 25a. The court also sought to distinguish the Line Item Veto Act from statutes previously upheld by this Court on the ground that the Act "hands off to the President authority over fundamental legislative choices" and "spares Congress the burden of making those vexing choices, of which programs to preserve and which to cut." Id. at 27a.

THE QUESTIONS ARE SUBSTANTIAL

The district erred both in concluding that appellees had standing to sue and in declaring the Line Item Veto Act to be unconstitutional. Members of Congress have no judicially cognizable private interest in the operation or the outcome of the legislative process. Judicial intervention is particularly unwarranted where, as here, the President has yet to take any action that is claimed to offend Article I. Contrary to the district court's holding, moreover, the Act does not purport to authorize the President to "repeal" any portion of a validly



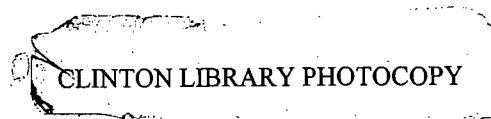
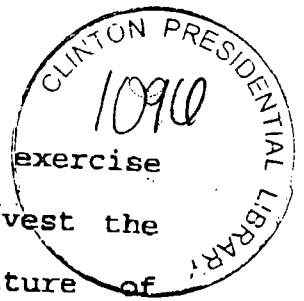
enacted federal law. Rather, the Act is simply the latest exercise of Congress's longstanding and well-settled power to vest the Executive Branch with discretion over the expenditure of appropriated funds.

1. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." Whitmore v. Arkansas, 495 U.S. 149, 155 (1990).

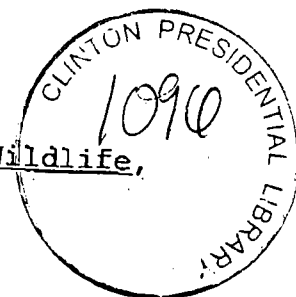
To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. Spear, No. 95-813 (Mar. 19, 1997), slip op. 6.

"[T]he 'case or controversy' requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded." Allen v. Wright, 468 U.S. 737, 750 (1984). "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Id. at 754. The "require[ment] that the party seeking review be himself among the injured," Luian v. Defenders of Wildlife, 504 U.S. 555, 563 (1992) (quoting Sierra Club v. Morton, 405 U.S. 727, 735 (1972)), ensures that the federal courts are confined to determining "the rights of individuals" and do not usurp the role of the political branches in "[v]indicating the public interest (including the public interest in Government



observance of the Constitution and laws), " Defenders of Wildlife,
504 U.S. at 576.



The complaint in this case alleges that

[t]he Act directly and concretely injures the [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the [appellees] of their constitutional role in the repeal of legislation, and (c) altering the constitutional balance of powers between the Legislative and Executive Branches, both with respect to measures containing separately vetoable items and with respect to other matters coming before Congress.

Complaint at 4-5. For two reasons, appellees' asserted injuries are insufficient to satisfy the case or controversy requirement.

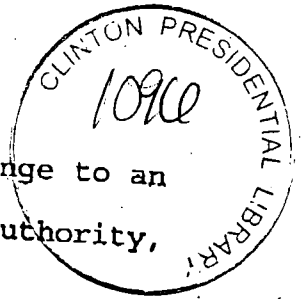
a. This Court has emphasized that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." Whitmore, 495 U.S. at 158 (internal quotation marks omitted); accord, e.g., Defenders of Wildlife, 504 U.S. at 564 & n.2.⁶ The gravamen of appellees' suit is that the President will, in the future, employ the authority conferred by the Line Item Veto Act so as to effect a partial "repeal" of appropriations bills enacted by Congress. Even if Members of Congress possessed a judicially cognizable interest in the proper administration of

⁶ The requirement that a plaintiff's injury be "actual or imminent, not 'conjectural' or 'hypothetical,'" Los Angeles v. Lyons, 461 U.S. 95, 102 (1983), is essentially equivalent to the requirement that the claim be "ripe" for adjudication. Cf. Reno v. Catholic Social Services, 509 U.S. 43, 57 n.18 (1993) (noting that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

federal law, appellees' claims would be far too speculative to provide a basis for federal jurisdiction.

At the present time it remains unclear when the President will invoke the cancellation authority contained in the Line Item Veto Act; what items of spending, or limited tax benefits, he will choose to cancel; and whether those items will be reenacted into law through a disapproval bill. It is, in particular, unclear when or whether legislative measures supported by appellees themselves will be cancelled pursuant to the Act's procedures. Thus, even if a member of Congress could be said to suffer a judicially cognizable injury through the frustration of his own legislative preferences, no such injury is either present or imminent in the instant case.⁷

⁷ In explaining its contrary conclusion, the district court stated that "[b]ecause [appellees] now find themselves in a position of unanticipated and unwelcome subservience to the President before and after they vote on appropriations bills, Article III is satisfied." App., *infra*, 14a; see also *id.* at 12a ("Under the Act the dynamic of lawmaking is fundamentally altered. Compromises and trade-offs by individual lawmakers must take into account the President's item-by-item cancellation power looming over the end product."). Appellees are free, however, to vote and to participate in legislative negotiations on the basis of their own stated conviction that the Act is unconstitutional and that any exercise of the President's cancellation authority will therefore be a legal nullity. No alteration in "the dynamic of lawmaking" is compelled by the Line Item Veto Act. Rather, any such change will result from the fact that other participants in the legislative process do not share appellees' view of the Act's constitutional deficiencies. Legislative deliberations frequently take place, however, against a backdrop of substantial disagreement or uncertainty regarding the existing state of the law. Article III's proscription on the issuance of advisory opinions by the federal courts, see, e.g., U.S. National Bank of Oregon v. Independent Insurance Agents, 113 S. Ct. 2173, 2178 (1993), may not be evaded by characterizing that uncertainty as a current injury to Members of Congress.

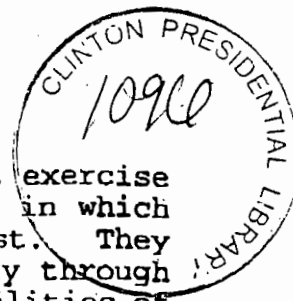


b. Even if this suit had been brought as a challenge to an actual exercise of the President's cancellation authority, appellees would lack standing. This Court has

consistently held that a plaintiff raising only a generally available grievance about government -- claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large -- does not state an Article III case or controversy.

Defenders of Wildlife, 504 U.S. at 573-574. A private plaintiff could, of course, establish the existence of a case or controversy by demonstrating that the cancellation of a particular budget item (or limited tax benefit) would adversely affect his own economic interests. A member of the public could not, however, obtain judicial review of an exercise of the President's cancellation authority by alleging that the cancellation had improperly negated the vote of his own Senator or Representative; that it had subverted the will of Congress as a body; or that it had improperly shifted the balance of power between the Legislative and Executive Branches. Any such allegation would present a "generalized grievance" plainly insusceptible of judicial resolution. United States v. Richardson, 418 U.S. 166, 171 (1974).

Appellees' claim to standing thus rests on the premise that they have a concrete and personal interest in the proper performance of their legislative duties, or in the maintenance of the constitutionally prescribed balance of power between the President and Congress, even though their constituents possess no such interest. That premise is contrary to first principles of representative democracy. As then-Judge Scalia has explained,

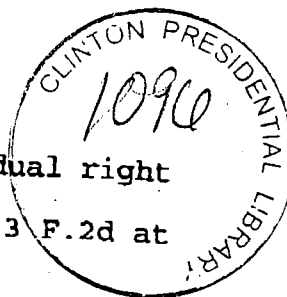


no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of private ambition and vainglory may be, in contemplation of law their personal interest in full and unfettered exercise of their authority is no greater than that of all the citizens for whose benefit (and not for the personal benefit of the officeholder) the authority has been conferred.

Moore v. U.S. House of Representatives, 733 F.2d 946, 959 (D.C. Cir. 1984). Because Members of Congress exercise their powers as representatives and servants of the people, any impairment of their legislative functions causes them no injury that is not shared by the public generally. Cf. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343 (1977) (association's standing to sue on behalf of its members requires, inter alia, that "its members would otherwise have standing to sue in their own right").

Recognition of an individual Member's personal interest in the operation or outcome of the legislative process would also subvert the separation of powers principles that the case or controversy requirement is intended to serve. That requirement ensures that the Judicial Branch does not exercise a general superintendence over the workings of the federal government. See Allen, 468 U.S. at 760 (explaining that abandonment of standing requirements "would have the federal courts as virtually continuing monitors of the wisdom and soundness of executive action") (quoting Laird v. Tatum, 408 U.S. 1, 15 (1972)). Rather, the federal courts are to resolve constitutional and other legal issues only in the course of determining "the rights of individuals." Defenders of Wildlife, 504 U.S. at 576. To hold that a Member's interest in the proper

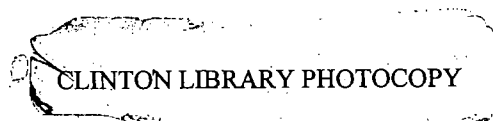
operation of the legislative process is itself an individual right would effectively negate that limitation. See Moore, 733 F.2d at 959 (Scalia, J., concurring).



Any contention that the President's conduct violates statutory requirements or prohibitions can be recast as a claim that the votes of Members of Congress have been nullified. Presidential action that is alleged to transgress the Constitution can frequently be characterized as shifting the balance between the Executive and Legislative Branches. And any challenged delegation of power to the President can be said to affect future interactions between the political branches, since the President will have no incentive to negotiate for authority that he already possesses. There is, in short, no principled limitation on the theory that Members of Congress have a judicially cognizable interest in the operation or outcome of the legislative process.

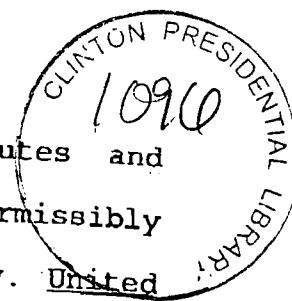
2. The district court also erred in concluding that the Line Item Veto Act violates the Presentment Clause.

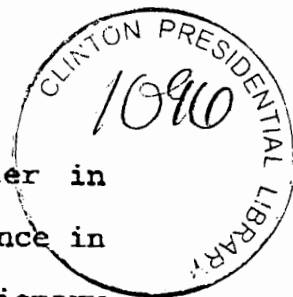
a. Although Article I of the Constitution vests "[a]ll legislative Powers" in Congress, it "do[es] not prevent Congress from obtaining the assistance of its coordinate Branches" in furtherance of its responsibilities. Mistretta v. United States, 488 U.S. 361, 372 (1989). Congress is therefore free to "leav[e] a certain degree of discretion to executive or judicial actors" in the execution of federal laws. Touby v. United States, 500 U.S. 160, 165 (1991). This Court has repeatedly sustained the constitutionality of laws that vest the Executive Branch with



discretion over the implementation of federal statutes and programs, notwithstanding claims that Congress had impermissibly delegated its legislative powers. See, e.g., Loving v. United States, 116 S. Ct. 1737 (1996); Touby, supra; Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989); Mistretta, supra; FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); Lichter v. United States, 334 U.S. 742, 785 (1948); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Yakus v. United States, 321 U.S. 414 (1944); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); NBC v. United States, 319 U.S. 190 (1943); New York Central Securities Corp. v. United States, 287 U.S. 24 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928); Field, supra; Synar v. United States, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam) (three-judge court) (citing cases), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986).

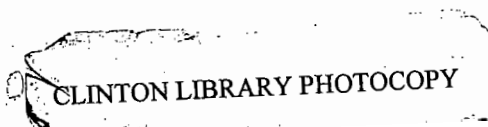
As we explain above, Executive Branch discretion has long been an integral part of Congress's exercise of its spending powers under Article I. See pages **--**, supra. Although the withholding of appropriated funds has frequently engendered litigation, the point of dispute invariably has been one of statutory construction -- i.e., whether Congress had in fact given the Executive Branch authority to withhold the contested funds. See, e.g., Train, 420 U.S. at 44-46. The political branches and the courts have shared the assumption that Congress is free to confer that authority if it wishes to do so.





The Line Item Veto Act is simply the latest chapter in Congress's efforts to enlist the Executive Branch's assistance in controlling spending by giving the President discretionary authority over federal expenditures. By virtue of the Act, the President may decline to give effect to specified spending and revenue items in any federal statute, during a brief period following the law's enactment, if the President determines that cancelling a particular item will "reduce the Federal budget deficit," will not "impair any essential Government functions," and will not "harm the national interest." § 1021(a)(A); App., infra, 33a. The Act operates to make the specified spending and revenue items discretionary, rather than mandatory, where the President finds that the Act's criteria have been met. For purposes of Article I, the Line Item Veto Act is no different from any other federal statute that gives the President discretion to decide whether or not to expend funds that have been appropriated by Congress.

b. When Congress vests the Executive Branch with discretion over the implementation of federal laws, the nondelegation doctrine generally provides the constitutional standards that govern the permissible scope of the Executive Branch's role. The touchstone of the nondelegation doctrine is whether Congress has provided an "intelligible principle" by which the executive discretion may be exercised. Mistretta, 488 U.S. at 372; J.W. Hampton, 276 U.S. at 406. This Court "has deemed it constitutionally sufficient if Congress clearly delineates the general policy, the public agency



which is to apply it, and the boundaries of th[e] delegated authority." Mistretta, 488 U.S. at 372-373 (internal quotation marks omitted). Under that approach, the Court has frequently "upheld * * * delegations under standards phrased in sweeping terms." Loving, 116 S. Ct. at 1750.⁸

The Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.⁹ To begin with, the Act permits the President to cancel

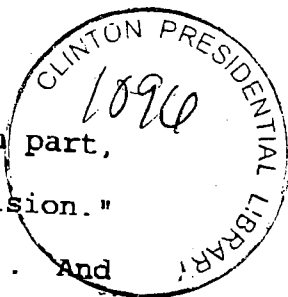
⁸ For example, the Court has sustained the constitutionality of statutes giving the Executive Branch the authority to regulate broadcast licensing as required by "public interest, convenience, or necessity" (NBC, 319 U.S. at 194, 225-26); to approve consolidation of carriers "in the public interest" (New York Central Securities Corp., 287 U.S. at 24); to recover "excessive profits" on military contracts (Lichter, 334 at 778-86); to fix prices that "will be generally fair and equitable and will effectuate the purposes" of the law (Yakus, 321 U.S. at 420, 426-27); and to determine "just and reasonable" natural gas rates (Hope Natural Gas Co., 320 U.S. at 600-601).

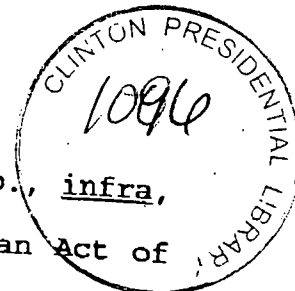
⁹ It is far from clear that congressional appropriations of money are subject to the nondelegation principles that generally apply to regulation of private conduct. This Court has observed that "certain categories of administrative decisions * * * traditionally have [been] regarded as 'committed to agency discretion.'" Lincoln v. Vigil, 508 U.S. 182, 191 (1993). "The allocation of funds from a lump-sum appropriation is" one such decision, since "a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions." Id. at 192 (internal quotation marks omitted). So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Article I, Sec. 9, Cl. 2; see OPM v. Richmond, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if an appropriation statute placed no further constraints on Executive Branch discretion. Even if the nondelegation standard articulated in Mistretta is assumed to apply in this context, however, it is easily satisfied here.

items only "in whole" (§ 1021(a); App., infra, 32a), not in part, thereby requiring him to make "an all or nothing decision." H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 33 (1996). And because the Act's "lockbox" feature (see page *, supra) requires the President to devote any cancelled funds to deficit reduction, the President has no authority to spend money on any project beyond the specific amount appropriated by Congress. The Act's requirement that each budgetary item must be devoted (in its entirety) either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

In addition, however, the Act provides meaningful guidance to the President in his choice between those two alternatives. The Act permits the President to cancel particular spending and revenue items only if he determines that cancellation of such items will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." § 1021(a)(A); App., infra, 33a. The Act also requires the President to support any cancellation by providing Congress with, inter alia, the reasons for the cancellation; the estimated fiscal, economic, and budgetary effects of the cancellation; the estimated effect of the cancellation upon the objects, purposes, and programs for which the canceled authority was provided. § 1022(b); App., infra, 34a.

c. Thus, contrary to the district court's conclusion, the Line Item Veto Act does not authorize the President to exercise





"legislative authority" or to "repeal" federal law. App., infra, 24a, 25a. An Executive Branch official administering an Act of Congress "does not exercise 'legislative' power." INS v. Chadha, 462 U.S. 919, 953 n.16 (1983). "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it -- a statute duly enacted pursuant to Art. I, §§1, 7." Ibid. When an Executive Branch official declines to exercise discretionary spending authority conferred by statute, he does not thereby "repeal" that statute -- he implements it according to its terms.¹⁰

Finally, no constitutional infirmity results from the fact that the President must exercise, or decline to exercise, his cancellation authority within the five-day period after enactment of an appropriation law. There is, in particular, no basis whatever for the district court's suggestion that this feature of the Line Item Veto Act effects a particularly "expansive * * * delegation of power." App., infra, 25a. To the contrary, the discretion thus conferred is quite plainly narrower than would be

¹⁰ The Presentment Clause and related provisions of Article I establish "a single, finely wrought and exhaustively considered, procedure" for the enactment of federal legislation. Chadha, 462 U.S. at 951. It is, of course, undisputed that the Line Item Veto Act itself was enacted into law in conformity with that "finely wrought" procedure. It is equally clear that the Act does not exempt any other federal law from the requirements of the Presentment Clause. The President's cancellation authority comes into play only after the requirements of the Presentment Clause, including the President's approval of the presented bill, have been satisfied.

the case if the President were authorized to revisit the question whether particular expenditures should be made.

* * * * *

This Court recently observed that "[s]eparation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes." Loving, 116 S. Ct. at 1751. The Act at issue here represents such an exercise in "measured cooperation." The district court's conclusion that the Act is at odds with Article I should be rejected.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

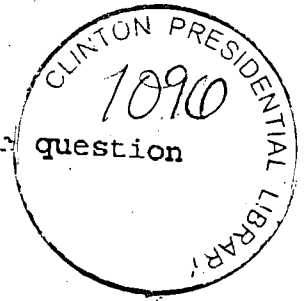
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APRIL 1997



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR ROBERT C. BYRD, et al.,

Plaintiffs,

v.

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

Defendants.

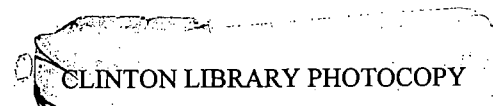
Civil Action No. 97-0001 (TPJ)

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

INTRODUCTION

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

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



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

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

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

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

example of an interest which is not judicially cognizable injury.

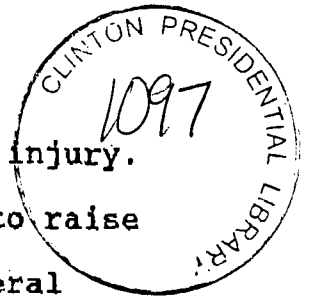
Moreover, the constitutional issues plaintiffs seek to raise in this lawsuit are not "ripe" for consideration by a federal court at the present time. They are remote and speculative. The Line Item Veto Act itself provides that Congress, in the exercise of its legislative discretion, may neutralize the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

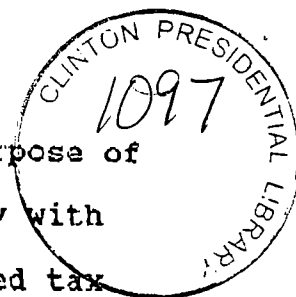
Finally, under the doctrine of equitable or remedial discretion, plaintiffs' lawsuit should be dismissed because they have an effective "in-house" remedy in Congress. They may persuade their colleagues to exempt particular appropriations from the operation of the Line Item Veto Act. They may persuade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

STATEMENT

A. The Line Item Veto Act

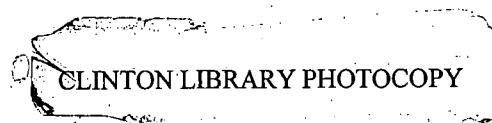
On April 9, 1996, the President approved the Line Item Veto Act, as passed by Congress. Pub. L. No. 104-130, 110 Stat. 1200,



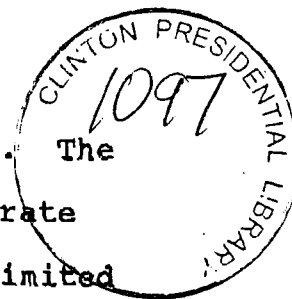


to be codified at 2 U.S.C. 681 note, 691, et seq. The purpose of the Act is "to give the President line item veto authority with respect to appropriations, new direct spending, and limited tax benefits." Id., Preamble. The Line Item Veto Act became effective on January 1, 1997, and it expires on January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

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

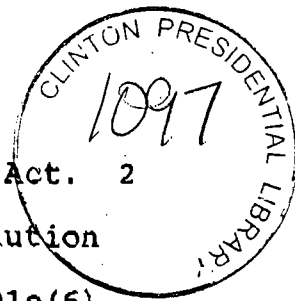


Committee as limited tax benefits. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).



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

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



bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6).

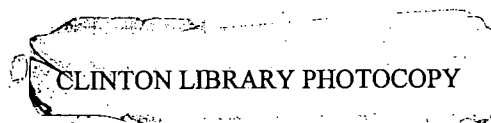
If a disapproval bill is enacted into law, then all cancellations disapproved in that law are null and void. 2 U.S.C. 691b(a).

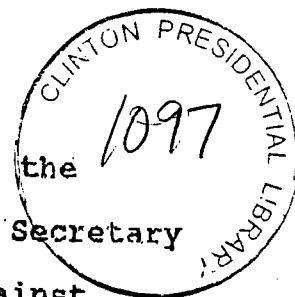
The Act does not confer authority on the President to cancel any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in an enacted disapproval bill. 2 U.S.C. 691(c).

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

B. This Lawsuit

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





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

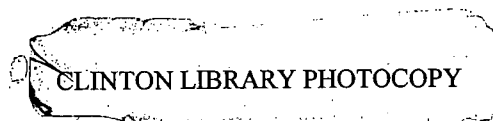
ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

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

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

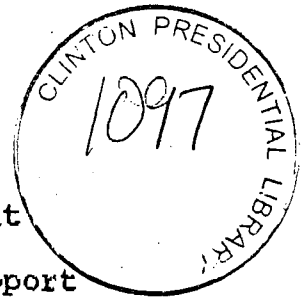
¹ One of the plaintiffs, Senator Mark O. Hatfield, is no longer a Member of Congress.



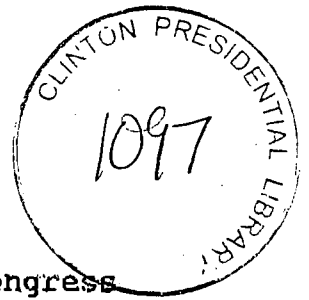
116 S. Ct. 1529, 1533 (1996).

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

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

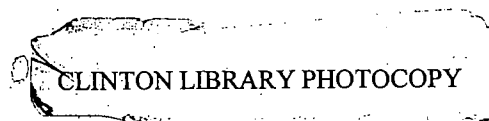


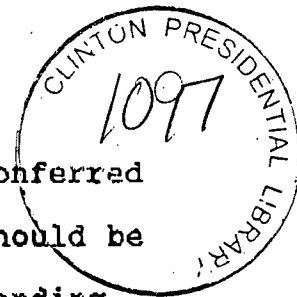
UNITED STATES, 219 U.S. 346, 361-362 (1911).



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

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

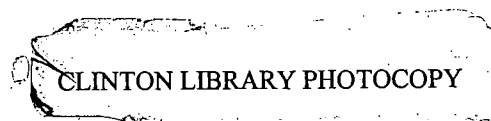


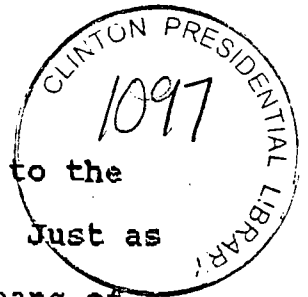


personal or private interest in the governmental powers conferred upon them by the Constitution or by statute, the courts should be precluded by the separation of powers component of the standing doctrine from interfering in their intragovernmental disputes, absent a companion claim by some private entity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

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

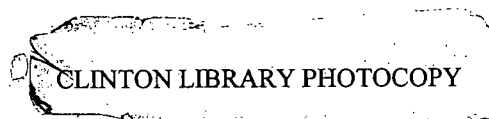
² A member of Congress may have standing to challenge legislative or executive action which does not affect the voting power or the legislative process but which, nevertheless, inflicts concrete, personal injury. For example, in Boehner v. Anderson, 30 F.3d 156, 160 (D.C. Cir. 1994), the District of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





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

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

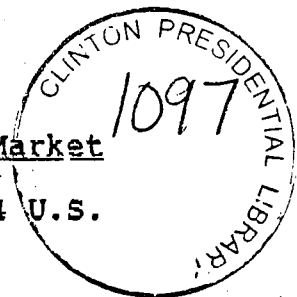


proposed agency reorganizations); Riegle v. Federal Open Market Committee, 656 F.2d 873, 879 (D.C. Cir.) cert. denied, 454 U.S. 1082 (1981) (alleging designation of members to executive committee denied Senator's constitutional right to confirm Presidential appointments).

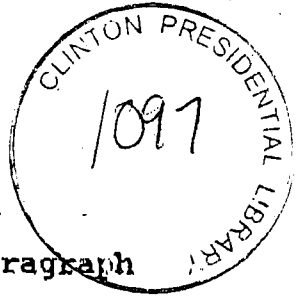
In this vein, too, the District of Columbia Circuit has held that legislators have standing to challenge actions that allegedly violate the constitutional provisions governing the enactment of legislation. E.g., Moore v. U.S. House of Representatives, supra (challenging enactment of tax measure which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

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

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



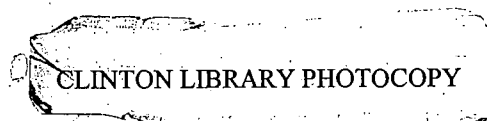
B. Plaintiffs Have Failed to Allege Actual or Impending Personal Injury Inflicted by Defendants Under the Line Item Veto Act

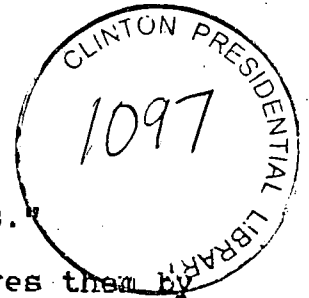


1. The complaint in this case contains only one paragraph addressing the subject of plaintiffs' "injuries." That paragraph -- paragraph 14 -- is devoid of allegations of actual injury or "certainly impending" injury (Whitmore v. Arkansas, supra, 495 U.S. at 158) inflicted upon plaintiffs, personally,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

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

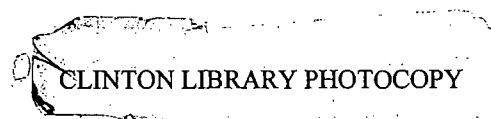
direct and adequate interest in maintaining the effectiveness of their votes," 307 U.S. at 438, its holding that this qualified as a cognizable interest in the controversy was grounded on the fact that it was "treated by the state court as a basis for entertaining and deciding the federal questions."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





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

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



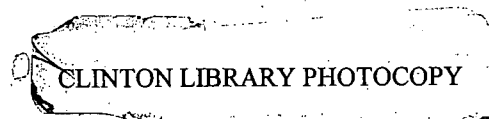


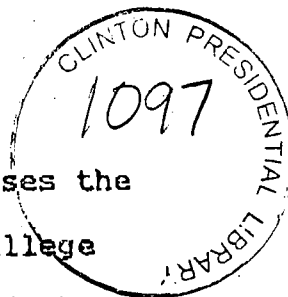
that such injury is "certainly impending."

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

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

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

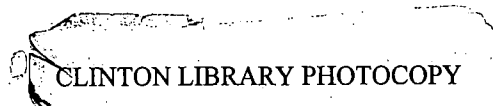


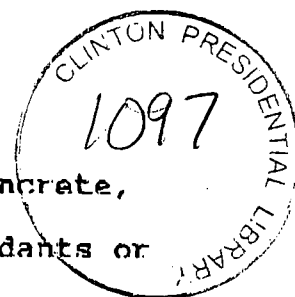


make certain estimates and reports if the President exercises the cancellation authority provided by the Act, they nowhere allege that the Director's fulfillment of these duties has injured them or can injure them. And notwithstanding plaintiffs' recitation in paragraph -- of the complaint, defendant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

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

In sum, plaintiffs have failed to satisfy the "irreducible

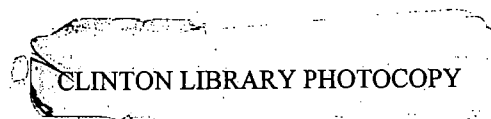


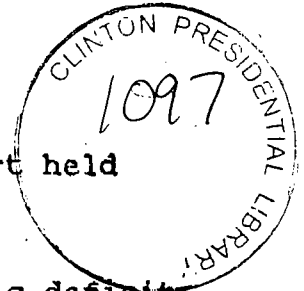


minimum" requirement of standing by failing to allege concrete, personal injury that has been inflicted on them by defendants or that is "certainly impending." Their lawsuit must be dismissed for lack of subject matter jurisdiction under Article III

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

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

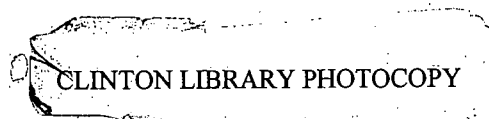




President had issued a "sequestration" order. The Court held that members of Congress had standing to challenge the constitutionality of Gramm-Rudman because "the automatic deficit reduction process" already had operated "to nullify plaintiffs' votes on [] earlier legislation." 626 F. Supp. at 1382.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

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

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



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

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

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

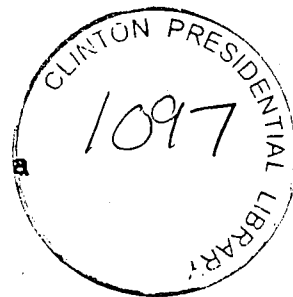
namely, the nullification of his right to vote to override a presidential veto.

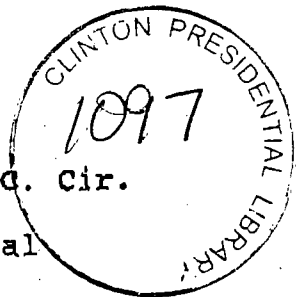
511 F.2d at 433, 436.

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

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

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

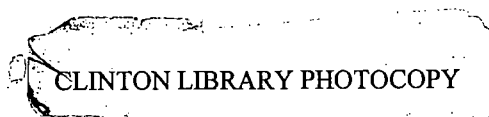


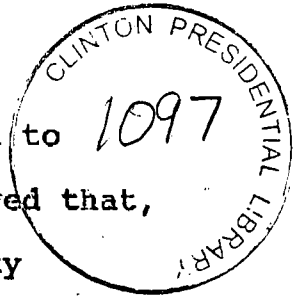


States, 929 F. Supp. 484 (D.D.C.), aff'd, No. 96-5217 (D.C. Cir. Dec. 13, 1996), rejected the standing of a union of federal employees to challenge the constitutionality of the Line Item Veto Act on the basis of abstract injuries.

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

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



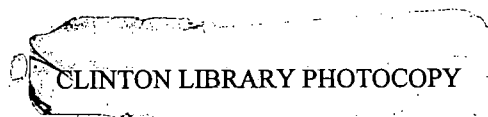


citizenry at large and is not sufficiently particularized to satisfy Article III." Id. Furthermore, the Court observed that, even if the President exercised the cancellation authority provided by the Line Item Veto Act to the detriment of the union's members, Congress could pass a disapproval bill which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

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

Plaintiffs' allegations about the impact of the unexercised

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



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

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

Plaintiffs in this case are alleging injury on the basis of

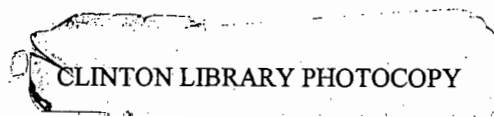
the "mere existence" of the Line Item Veto Act and the unexercised authority it confers on the President. Plaintiffs do not allege they have suffered any "discrete injury" flowing from that Act. Consequently, plaintiffs in this case, unlike the plaintiffs in Metropolitan, lack standing to sue.



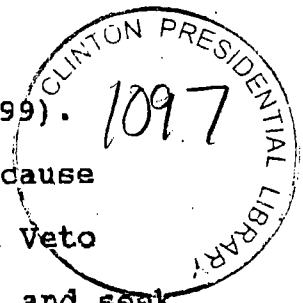
II. THE CONSTITUTIONAL ISSUES PLAINTIFFS SEEK TO RAISE ARE NOT "RIPE" FOR JUDICIAL RESOLUTION

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

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



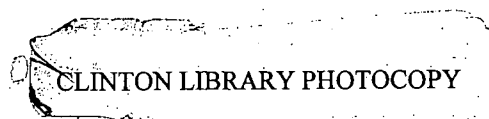
statute calling for adjustments scheduled to occur in 1999).



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

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

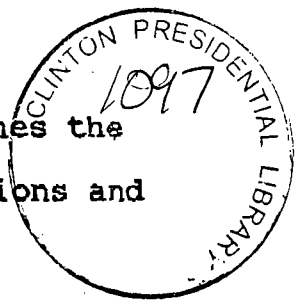
The absence of an application of the Line Item Veto Act is not simply a technical deficiency in the pleadings. It robs the Court of an indispensable factual context within which to evaluate plaintiffs' constitutional claims.



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

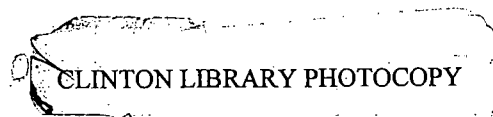
Similarly, the Court cannot effectively evaluate plaintiffs' claim, in paragraph 14 of the complaint, that the Line Item Veto Act alters their constitutional role in the repeal of legislation until the President exercises the cancellation authority provided by the Act and Congress attempts to override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

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

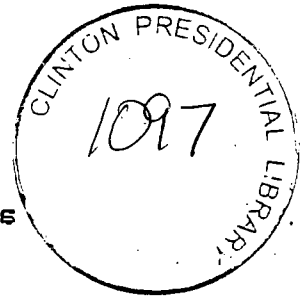


Finally, the Line Item Veto Act is simply a statute. If Congress wants to make it inapplicable, by legislation, to any particular appropriation, and the President acquiesces, it may do so whenever it wishes. Consequently, until the Court has before it the language of an enacted bill or joint resolution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

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



known:



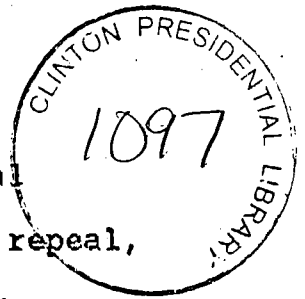
The Constitution allots the nation's judicial power to the federal courts. Unless these courts respect the limits of that unique authority, they intrude upon powers vested in the legislative or executive branches. Judicial adherence to the doctrine of the separation of powers preserves the courts for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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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

legislators of the wisdom of [their] views" in a variety of ways.

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

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

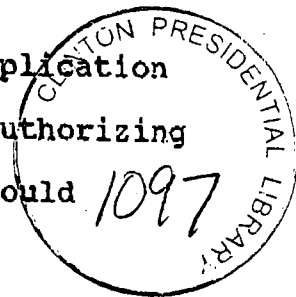
The legislator-plaintiffs should be required to exercise their powers in these ways, rather than involve the judiciary in a dispute with their colleagues. As this Court has recognized, the remedial discretion doctrine applies regardless of whether its exercise would mean that a constitutional question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

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

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

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

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



CONCLUSION

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

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