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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss. (15 pages)	02/26/1997	P5 1098
002. draft	Franklin Raines et al. v. Robert Byrd et al. 96-1671. Reply Brief for the Appellants. (26 pages)	05/20/1997	P5 1099
003. draft	Franklin Raines et al. v. Robert Byrd et al. 96-1671. Brief for the Appellants. (58 pages)	05/05/1997	P5 1100

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 20350

FOLDER TITLE:

Line Item [5]

2007-0624-F

vz1214

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]

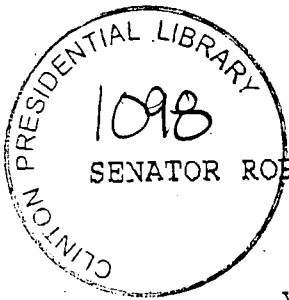
C. Closed in accordance with restrictions contained in donor's deed of gift.

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]



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DRAFT

2/26
12:45

SENATOR ROBERT C. BYRD, et al.,)

Plaintiffs,)

v.)

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

Defendants.)

Civil Action No. 97-0001 (TPJ)

REPLY TO PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

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

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Plaintiffs state that the Line Item Veto Act "affects" them now, because they must "take the item-veto power into account" when they deal with the Executive Branch. Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment ["Pl. Memo"], p. 16. They argue that this gives them standing. *Id.*, pp. 12-18. Similarly, plaintiffs contend that the perceived present impact of the Act on the formulation of appropriations legislation makes this case constitutionally ripe. *Id.*, p. 23.

Plaintiffs have failed to demonstrate a here-and-now concrete injury under the Line Item Veto Act. The fact that the Act "affects" plaintiffs reflects no more than the reality that legislators are affected by a myriad of factors from a multitude of sources. As this Court observed, however, in rejecting the standing of non-congressional plaintiffs to challenge the Line Item Veto Act, "standing requires that the plaintiff have suffered an injury, not merely that the plaintiff can identify some way in which the challenged action hypothetically affects them." *NTEU v. United States*, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423 (D.C. Cir. 1996).

Furthermore, the ripeness doctrine requires that federal courts refrain from deciding constitutional questions in the absence of a concrete controversy. In this case, until the President exercises the cancellation authority conferred on him by the Line Item Veto Act and a cancellation becomes effective, there is no concrete controversy and this case is not ripe.

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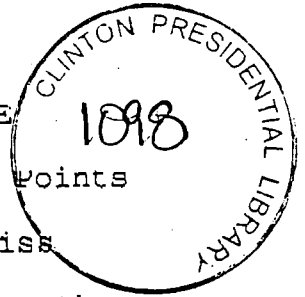
ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

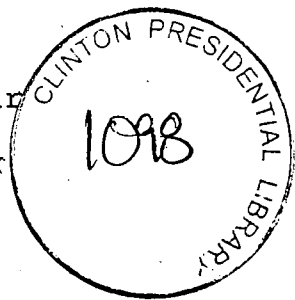
We demonstrated in our opening brief (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ["Def. Memo"], pp. 14-17) that plaintiffs failed to allege they have suffered, or certainly will suffer, concrete personal injury inflicted by the defendants or any other federal official. Although the Line Item Veto Act provides that a Member of Congress may bring an action in this Court seeking declaratory or injunctive relief on the ground that the Act is unconstitutional (2 U.S.C. 692(a)), we argued that the absence of concrete injury means that the plaintiffs do not have standing to sue, because such an injury is an "'irreducible minimum'" requirement under Article III. United Food & Commercial Workers v. Brown Group, 116 S. Ct. 1529, 1533 (1996).

In response, plaintiffs state that "the existence" of the Line Item Veto Act "injures the plaintiffs (and the public interest) now, by invading Members' rights and powers in the currently ongoing process of formulating and passing legislation, regardless of when or why the President first actually vetoes an item." Pl. Memo, p. 12. Plaintiffs have submitted declarations which they claim "detail three injuries caused by the operation of the Act." Id., p. 16.

However, plaintiffs' declarations do not demonstrate plaintiffs are suffering a here-and-now concrete injury under the Line Item Veto Act. Moreover, the District of Columbia Circuit



precedents upon which plaintiffs rely do not support their argument that they have suffered or certainly will suffer cognizable injury under Article III.



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

Contrary to plaintiffs' contention, the Line Item Veto Act does not have a "concrete present effect" by "chang[ing] the legal effect of Members' votes on appropriations bills." Pl. Memo, p. 16. There have been no such votes alleged by plaintiffs, let alone action by the President to change their legal effect. At most, plaintiffs allege that the Act will affect future votes on appropriation bills. This is clearly not a here-and-now injury.

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

Similarly, another plaintiff declares that his vote on appropriation bills will be affected by the Act "in a circumstance in which I vote for a bill on final passage that is subject to the Line Item Veto Act and that contains one or more provisions which I support and which have been the result of

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various negotiations." Declaration of Senator Carl Levin, dated January 24, 1977 ["Levin Decl."], ¶6.B.a. This declaration does not indicate that this "circumstance" has occurred. Instead, it avers that, "[w]hen that bill is presented to the President, the President will have the power to approve it while cancelling the provision or provisions which I concluded had warranted my affirmative vote for the entire bill." Levin Decl., ¶6.B.a. "If the President cancels one or more of those provisions, that cancellation would change the effect of my vote under the Constitution." Id. Thus, none of plaintiffs' declarations identifies a here-and-now injury inflicted by the President.

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

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

It may very well be true, as plaintiffs argue, that the Line Item Veto Act, "merely by being in force, affects Members' powers in the formulation of legislation, because they must take the item-veto power into account at that time, regardless of when or how it is later used." Pl. Memo, pp. 16-17. But the fact that plaintiffs must take the Act "into account" is not cognizable injury under Article III.

Members of Congress must take into account a variety of pressures and influences that affect them in their capacity as

legislators -- from the Executive Branch, from colleagues in Congress, from constituents, and from public opinion. Many laws that are passed, and actions taken by the Executive Branch to execute those laws, may "affect" the power relationship between the political branches and the formulation of legislative strategy by individual Members of Congress. But the mere existence of these laws, and the affect they have on the power relationship between the political branches, do not by themselves confer standing to sue on Members of Congress under Article III.

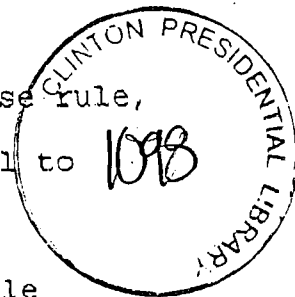
In Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), the District of Columbia Circuit considered whether a Member of Congress had standing to challenge certain domestic and foreign activities of the Central Intelligence Agency, and the manner in which they were funded. Plaintiff in that case, relying on language in Mitchell v. Laird, 488 F.2d 611 (1973), claimed he had standing because the alleged illegality "bears upon" the exercise of his constitutional duties as a legislator, including the duty to "'make appropriations.'" 553 F.2d at 198-199. But in light of its own post-Mitchell decisions and those of the Supreme Court (e.g. Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 217, 220 (1974)), the District of Columbia Circuit held that the "bears upon" test of Mitchell "does not support a claim of standing in this case." Id., at 207. It observed that "the 'bears upon' language, and the notion it imports, are inconsistent with the constitutional requirement of injury in fact and strike at the foundations of the standing

doctrine as developed by the Supreme Court (footnote omitted)."
Id., at 209. It further noted that the "bears upon" test of
Mitchell "lessens the strength of the necessary connection
between the complaining party and the controversy which he seeks
to have adjudicated," and "has the effect of transforming a
complaint for declaratory judgment into a request for an advisory
opinion in clear violation of Article III limitations (footnote
omitted)." Id.

The "affects" and "take * * * into account" language upon
which plaintiffs rely to support their standing is remarkably
similar to the "bears upon" language rejected by the District of
Columbia Circuit in Harrington as a basis for congressional
standing. And for the reasons given in Harrington, plaintiffs do
not satisfy Article III merely because the Line Item Veto Act
"affects" them and they must take it into account in the
performance of their legislative duties.

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

House. Plaintiffs alleged that, under the challenged House rule, they were being denied a vote carrying weight proportional to their states' population. 817 F. Supp. at 137.



This Court held that plaintiffs had alleged cognizable injury under Article III, because the challenged rule already had been implemented through defendants' conduct and plaintiffs' concrete loss of a proportional vote had occurred. 817 F. Supp. at 137.¹ Neither the named defendants nor the President have taken action under the Line Item Veto Act to inflict comparable injury on plaintiffs.

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

The District of Columbia Circuit held that, because defendants refused to adopt the resolution returning the House bill to the Senate without further action, and the bill became

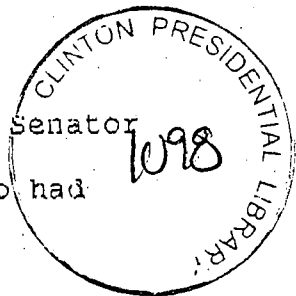
¹ On appeal, plaintiffs' standing was not challenged. 14 F.3d at 625.

law, plaintiffs actually had been deprived of the concrete opportunity to vote on a tax revenue measure in the manner prescribed by the Constitution, which was cognizable injury. F.2d at 951, 954. In this case, no similar injury has been inflicted on plaintiffs under the Line Item Veto Act.

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

In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), Senator Edward Kennedy sued the Administrator of the General Services Administration and the Chief of White House Records, who have ministerial duties related to the recording and publication of enacted legislation, to declare invalid President Richard Nixon's "pocket-veto" of a bill called the Family Practice of

Medicine Act. The District of Columbia Circuit held that Senator Kennedy alleged cognizable injury, because the pocket-veto had occurred, and Senator Kennedy's vote allegedly had been nullified. 511 F.2d at 433, 436. Here, in contrast, the President has not exercised the cancellation authority conferred on him by the Line Item Veto Act or taken any other action to injure plaintiffs' vote in Congress.

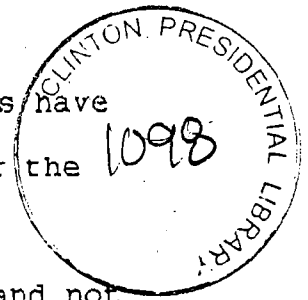


Finally, in Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986), which plaintiffs say is "indistinguishable on the standing issue from the present case" (Pl. Memo, p. 15), members of Congress and the National Treasury Employees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

This Court held that these concrete actions by the government -- and not the mere existence of the Gramm-Rudman-Hollings Act -- effectively "nullif[ied] plaintiffs' votes on th[e] earlier legislation" and gave the congressional plaintiffs

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standing. 626 F. Supp. at 1382.² Again, no such actions have been taken against plaintiffs by the named defendants or the President under the Line Item Veto Act.



These cases demonstrate that some palpable event, and not merely a legislator's subjective fear about, or taking into account the consequences of, a particular law, is necessary to constitute cognizable injury under Article III. As the District of Columbia Circuit explained in Harrington v. Bush, supra, to have standing a legislator "must perceptibly win or lose depending on the outcome." 553 F.2d at 209. A "'specific'" and "'objective'" test for congressional standing is necessary to prevent "the intrusion of the courts into the proper affairs of the co-equal branches of government." Id., at 213, 214. Unless a claim of injury is quantifiable, the courts will find themselves speculating about the interrelationships of the political branches in what is essentially a factual vacuum.

Moreover, to the extent the Line Item Veto Act has a present "effect" by depriving Members of Congress of "certainty" when they vote on future spending and tax laws, as plaintiffs claim (Pl. Memo, p. 17), uncertainty is no more an injury than anything else legislators must take into account from a multitude of

² As we pointed out in our opening brief (Def. Memo, p. 19), the Supreme Court pointedly refused to consider whether the congressional plaintiffs in Synar had standing. 478 U.S. at 721. Instead, it held that members of the National Treasury Employees Union, which had brought a companion suit, had standing to challenge the Gramm-Rudman-Hollings Act because the government's actions under the Act terminated cost-of-living allowances which otherwise they would have received. Id.

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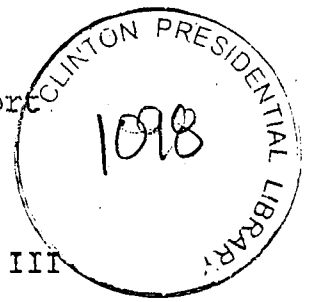
sources: do they have enough votes for the bill they want to pass; what must they trade off to gather support; will the President veto the bill; what will the hometown newspaper say. These are all present "effects" which legislators must take into account, but they do not constitute redressable injury under Article III. Uncertainty is to a large extent a fact of legislative life.

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

C. The President Has Not Nullified Plaintiffs' Votes

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

present or certainly impending concrete injury to support standing to sue.'



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

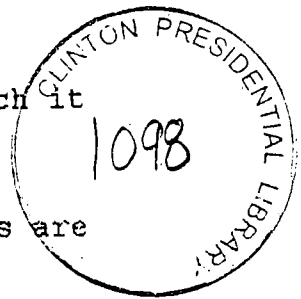
We showed in our opening brief that plaintiffs' constitutional challenge to the Line Item Veto Act is not ripe for adjudication under Article III because the President has not exercised the cancellation authority conferred on him by the Act, and no one knows whether or when he will. Def. Memo, pp. 26-29.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

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

³ Plaintiffs assert that the doctrine of equitable discretion does not apply in this case because it is a prudential rather than a constitutional doctrine. Pl. Memo, p. 24. But, as this Court has recognized, the doctrine is founded upon constitutional separation of powers concerns: "federal courts should generally refrain, as a matter of policy, from intruding in the name of the Constitution upon the internal affairs of Congress at the behest of lawmakers who have failed to prevail in the political process." Skaggs v. Carle, 898 F. Supp. 1, 2 (D.D.C.), appeal docketed, No. 95-5323 (D.C. Cir. Sept. 25, 1995). The separation of powers concerns informing the doctrine of equitable discretion are a matter of such concern that the doctrine prevents judicial intervention "even when 'such a disposition would render a constitutional question unreviewable.'" Id., at 2. Thus, regardless whether Congress authorized Members of Congress to bring an action, Congress cannot require the Court to exercise its equitable powers when the Court is concerned about its proper role vis-a-vis the legislative branch.

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and other parts of any appropriation or other bill to which it was attached -- under the cloud created by the Act." *Id.*

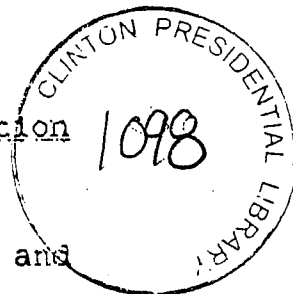


But, as we showed in part I of this reply, plaintiffs are not "suffering present injury." And it is a matter of speculation whether or when they will suffer injury in the future. First, Congress may exempt future laws from the operation of the Line Item Veto Act. Second, even if the President were to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

Moreover, simply because the issues plaintiffs seek to raise are purely legal does not mean they are ripe. It is the policy of the federal courts not to reach and decide novel and complex constitutional questions, such as those raised by plaintiffs, unless it is absolutely necessary to do so. *United States v. NTEU*, 115 S. Ct. 1003, 1019 (1995); *Ashwander v. TVA*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring). It is not absolutely necessary to reach and decide plaintiffs' constitutional claims now. Rather, the ripeness doctrine requires that plaintiffs' claims be presented in a concrete factual context so that questions may be resolved in a meaningful manner. In this case, there is simply no factual context within

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which to decide those claims. See Regional Rail Reorganization Act Cases, 419 U.S. 102, 139-140 (1974).



Therefore, this case is not constitutionally ripe. If and when the cancellation authority conferred by the Act is exercised by the President and becomes effective, this Court will be available to decide any constitutional issues presented by an appropriate plaintiff who has been injured in fact.

CONCLUSION

For these reasons, and the reasons defendants gave in our opening brief, the Court should grant defendants' motion to dismiss the complaint.

Respectfully submitted,

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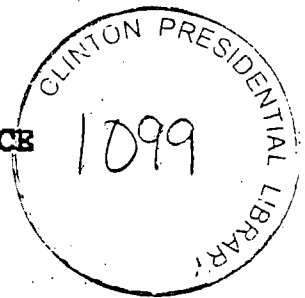
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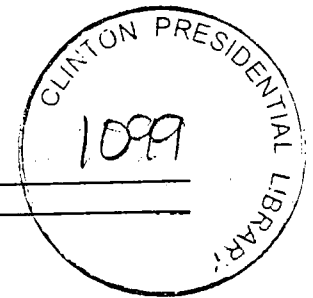
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No. 96-1671



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

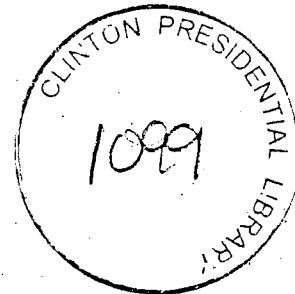
REPLY BRIEF FOR THE APPELLANTS

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

REPLY BRIEF FOR THE APPELLANTS

A. Appellees Lack Standing To Bring Their Suit.

1. Contrary to appellees' suggestion (Br. 31), we do not contend that an individual's status as a Member of Congress imposes special limitations on his entitlement to judicial relief. A Member who establishes a cognizable personal (e.g., pecuniary) interest in the resolution of a legal issue has standing to sue, even if the opposing party is another governmental official or entity. See Gov't Br. 22 n.11; Moore v. U.S. House of Representatives, 733 F.2d 946, 960 n.2 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("There is no problem in entertaining a suit by a congressman against the Executive Branch for a tax refund, or by a congressman against the Speaker of the House for breach of a commercial contract."), cert. denied, 469 U.S. 1106 (1985). Cf. United States v. Will, 449 U.S. 200 (1980) (suit by

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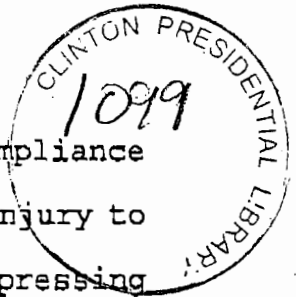
Article III judges challenging statutes affecting their compensation).¹

This Court's cases make clear, however, that separation-of-powers principles are directly relevant to the question whether the harms alleged by appellees may be regarded as legally cognizable injuries. In Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992), the Court rejected the proposition that "the public interest in proper administration of the laws * * * can be converted into an individual right by a statute that denominates it as such." The Court explained:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3.

¹ Nor is there any basis for appellees' assertions (Br. 18, 31-32) that persons other than Members of Congress would have standing to sue in analogous circumstances. In Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543-545 & n.6 (1986), this Court held that an individual school board member lacked standing to appeal from a district court judgment entered against the board. Despite the fact that the district court had declared a decision of the board to be unconstitutional, see id. at 537-539, the Court concluded that the member "ha[d] no personal stake in the outcome of the litigation," id. at 543-544. Bender cannot be reconciled with appellees' contention (Br. 18) that "members of any other occupation" would have standing to challenge "a statute [that] unconstitutionally altered the legal consequences of a core occupational activity." To the contrary, Bender makes clear that an individual whose "core occupational activity" is participation in a collective decision-making process typically lacks a judicially cognizable interest in vindicating the decision of the body as a whole. In any event, appellees' asserted interests do not stem from just "any other occupation." They sue as Members of one Branch of a Government established by a Constitution that rests on a system of separated powers in order to secure personal liberty (see Gov't Br. 24) and prescribes a limited role for Article III courts in their relation to the political Branches.

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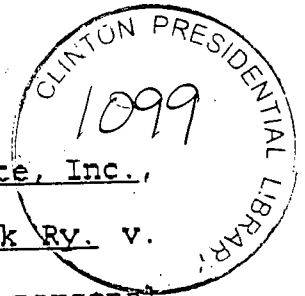


Id. at 577. A statute that defined Executive Branch noncompliance with the Constitution and laws as a judicially cognizable injury to Congress or its Members would be subject to even more pressing constitutional objections.² Such a statute would not only expand the role of the courts beyond their proper sphere; it would vest Congress with a substantial institutional role in the execution of the laws, in violation of fundamental separation-of-powers principles. See, e.g., Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("once Congress makes its choice in enacting legislation, its participation ends"); Gov't Br. 25-26.

Indeed, this suit is far removed from an exercise of the "judicial power" and the resolution of "Cases" and "Controversies" as the Framers understood those terms. See, e.g., Muskrat v. United States, 219 U.S. 346, 356-357 (1911); Speech of the Honorable John Marshall to the House of Representatives, 18 U.S. (5 Wheat.) App. 3, 16-17. Appellees seek a ruling by an Article III court, not as a forum of "last resort," Valley Forge Christian

² 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)). Contrary to appellees' contention (Br. 32), Section 3(a)(1) does not reflect an affirmative congressional determination that individual Members have Article III standing to challenge the Act. Rather, it is properly understood as eliminating prudential barriers to Members' suits. In Bennett v. Spear, 117 S. Ct. 1154 (1997), this Court considered a statutory provision authorizing "any person" to bring suit to enforce the Endangered Species Act. In considering whether the plaintiffs in that case had standing under Article III, the Court did not give weight to any supposed congressional determination that all persons would have standing to sue. The Court instead construed the citizen-suit provision to expand standing to the full extent permitted by Article III. See id. at 1162-1163.

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College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471 (1982) (quoting Chicago & Grand Trunk Ry. v. Wellman, 143 U.S. 339, 345 (1892)), for redress of personal injuries, but rather as a sort of council of revision within the Government to nullify an Act of Congress before it has any operative effect -- a mechanism specifically rejected by the Framers. See United States v. Richardson, 418 U.S. 166, 189-191 n.9 (1974) (Powell, J., concurring); Gov't Br. 32-33. And the dispute at issue -- between dissenting Members of one political Branch and the other political Branch arising out of the performance of their official duties -- is not one whose "adjudication is consistent with the system of separated powers" or "traditionally thought to be capable of resolution through the judicial process." Allen v. Wright, 468 U.S. 737, 752 (1984) (quoting Flast v. Cohen, 392 U.S. 83, 97 (1968)). Compare Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) ("we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum").³

³ Significantly, the Framers made available an alternative procedure by which Congress may bring about an adjudication of the legality of conduct by Executive Branch officials, but carefully limited the circumstances and manner in which it may be invoked. That procedure is impeachment by the House of Representatives (Art. I, § 2, Cl. 5) and trial by the Senate (Art. I, § 3, Cl. 6). The impeachment process was regarded as "political" in nature, in the sense that it provides for an inquiry into the "conduct of public men," The Federalist No. 65, at 396-397 (Rossiter ed. 1966) (Hamilton). Proposals to involve the Judiciary in the impeachment (continued...)

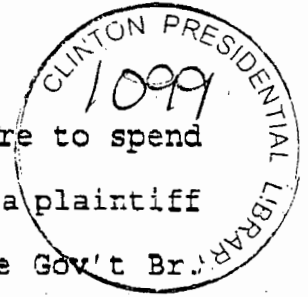
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2. Appellees do not challenge the foregoing principles directly. They deny that they are "merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest)," claiming instead to have "alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of legislation." Appellee Br. 31, 24. The Line Item Veto Act, however, places no constraints on the right of appellees to vote on proposed legislation. Nor does the Act affect the manner in which votes are counted. Despite their efforts to gainsay the fact, appellees' suit is in every meaningful respect an attack on the manner in which future appropriations laws will be implemented after they are enacted.

That would be true, we emphasize, even if (as appellees contend) a cancellation under the Act constituted an impermissible partial "repeal" of an appropriations law. If a cancellation under the Act were properly so characterized, the President's refusal to spend the appropriated funds would violate his obligation to execute the particular appropriations law in accordance with its terms. The same would be true, however, if the President refused to spend a particular sum based on the mistaken belief that the underlying appropriations law was permissive rather than mandatory. See Train v. City of New York, 420 U.S. 35 (1975); Gov't Br. 6-7.

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process were rejected by the Framers. See Nixon v. United States, 506 U.S. 224, 233-235 (1993).

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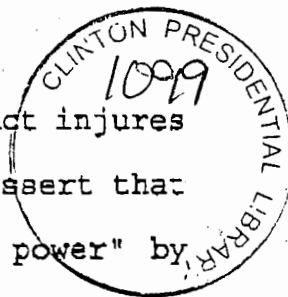


In either circumstance, the President's unlawful failure to spend the appropriated funds would be subject to challenge by a plaintiff whose pecuniary interests were adversely affected (see Gov't Br. 19-20); but neither form of Executive Branch illegality would threaten appellees' right to vote or otherwise impair their ability to discharge their legislative duties.

Appellees assert (Br. 24) that the Line Item Veto Act "changes the legal effect of Members' votes on spending and tax bills" and "deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it becomes operative as law" (emphasis added). The precise meaning of the italicized language is left unclear. Appellees plainly do not contend, however, that cancellation under the Act causes appropriations laws to be enacted in any form other than that in which they were voted on by Congress. To the contrary, they acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." In stating that the appropriations bill may "become[] operative as law" in some form other than that in which it was voted on, appellees can only mean that the President's cancellation would deprive the bill, after enactment, of its operative effect. That contention (whatever its merits) has nothing to do with the lawmaking process; it is simply a challenge to the (anticipated) execution of (hypothetical) enacted laws.⁴

⁴ If appellees' arguments were accepted, any contention that the President's conduct violates statutory requirements or (continued...)

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3. Appellees also contend that the Line Item Veto Act injures them even in advance of any actual cancellation. They assert that the Act "unconstitutionally increases the President's power" by enabling him to utilize the threat of cancellation "to influence Members' votes on all matters before Congress." Appellee Br. 24. The Act, however, places no legal constraints on Congress's ability to require the President to spend appropriated funds on specified projects, since Congress retains the power to provide that the Act shall not apply to a particular appropriations law, or to any individual item contained therein. See Gov't Br. 30-31. Appellees (and other individual Members) may attempt to persuade their colleagues to vote to exempt particular appropriations laws, or individual budgetary items, from the cancellation authority vested in the President by the Line Item Veto Act.⁵

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(...continued)

prohibitions could be recast as a claim that a Member's vote had been nullified or its legal effect altered, or that the statute in question had "become operative as law" in some manner other than that in which it was voted on. If separation-of-powers principles bar Congress from defining noncompliance with federal law as an injury to itself or its Members, that bar cannot be circumvented by recharacterizing such noncompliance as an impairment of the Members' right to vote.

⁵ The district court stated that "just because Congress as a whole can suspend or repeal the Act, or pass a disapproval bill, does not mean that an individual Member's injury is illusory. A Member cannot procure any such relief on his own." J.S. App. 15a. An individual Member's achievement of any legislative goal, however -- including the appropriation of public funds for purposes that the Member regards as desirable -- requires the support of a majority of his colleagues. Appellees' inability to effectuate legislative policy unilaterally is neither the result of the Line Item Veto Act nor a judicially cognizable injury.

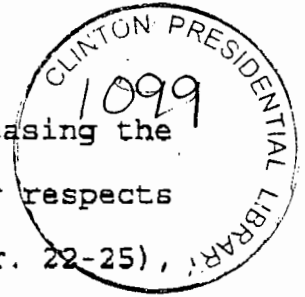
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Standing alone, the Line Item Veto Act is akin to a non-binding resolution or statement of congressional policy that future appropriations laws should be permissive rather than mandatory.⁶ Any change in the negotiating process between Congress and the President will result not from the legal force of the Act, but from the (actual or anticipated) unwillingness of other Members of Congress to exempt particular appropriations laws from the Act's coverage. That prospect is insufficient to establish judicially cognizable injury. Cf. Skaggs v. Carle, No. 95-5323 (D.C. Cir. Apr. 22, 1997) (Members of Congress lacked standing to challenge House Rule requiring three-fifths vote for passage of any federal tax rate increase, since a simple majority of the House of Representatives could amend or repeal the Rule, or suspend its operation with respect to a particular tax increase).⁷

⁶ Taken in isolation, the Line Item Veto Act has no operative legal effect. The Act is similar, in this respect, to various federal statutory provisions -- including other provisions of the Impoundment Control Act, on which appellees extensively rely -- whose sole function is to regulate the construction or implementation of other federal laws. See, e.g., 1 U.S.C. 1-6 (Dictionary Act); 1 U.S.C. 108, 109 (effect of statutory repeals); 5 U.S.C. 302(b) (powers vested by law in agency head may be delegated to subordinate officials); 5 U.S.C. 701 et seq. (judicial review of agency action); 31 U.S.C. 1301(c) and (d) (rules governing construction of appropriations laws).

⁷ In pointing out that the Line Item Veto Act's provisions may be rendered inapplicable to any appropriations law or item contained therein, we do not intend to trivialize the Act's significance. Having chosen (after extensive deliberation and debate) to enact the Line Item Veto Act, Congress may be unlikely to adopt a routine practice of exempting individual appropriations laws from the Act's coverage. The fact remains, however, that the Act can have no effect unless Congress passes another law that is not exempted from the Act's terms. The practical effect of the Act thus depends entirely on Congress's continued adherence to the view
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Appellees' claim that the Act injures them by increasing the President's power during negotiations is flawed in other respects as well. As we explain in our opening brief (see Gov't Br. 22-25), Members of Congress exercise their powers on behalf of their constituents and of the public generally, and they have no personal interest in the allocation of power between the Legislative and Executive Branches.⁸ Appellees are in an especially poor position to represent the interests of the Legislative Branch, since they challenge the constitutionality of an Act of Congress that has been defended in the district court and this Court by the Senate and House of Representatives as *amici curiae*. And it is implausible to suppose that the threat of cancellation could inflict a judicially

⁷(...continued)
that the discretion it confers on the President over budgetary matters represents wise national policy. And even then, the Act will have no concrete legal effect unless and until the President exercises his cancellation authority under the Act with respect to a particular item.

⁸ Appellees' contrary argument is premised almost exclusively (see Appellee Br. 27-28) on Coleman v. Miller, 307 U.S. 433 (1939). As we explain in our opening brief (see Gov't Br. 28-29 n.15), Coleman is distinguishable from the instant case in three significant respects. First, Coleman involved state legislators whose asserted interest had been "treated by the state court as a basis for entertaining and deciding the federal questions." 307 U.S. at 446. The majority did not dispute the conclusion of four Justices that the plaintiffs "[c]learly * * * would have no standing had [they] brought suit in a federal court." Id. at 465 (opinion of Frankfurter, J.). Second, Coleman involved an asserted impropriety in the process by which votes were counted within the state legislature, rather than a defect in the administration of a duly enacted law. Finally, the Court did not hold that any individual member of the Kansas legislature would have had standing, but stated only that at least the twenty senators who voted to defeat the resolution ratifying the proposed constitutional amendment had an interest in the controversy. Id. at 446.

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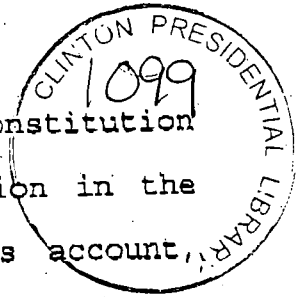
cognizable injury upon appellees if (as we demonstrate above, see pages **-**, supra) an actual cancellation would not.

Finally, the diminution of influence that appellees claim to suffer is not traceable to the defendants in this case. As we explain above, it is within Congress's power to exempt any appropriation from the Act's provisions, and thus to prevent the Act from having any operative legal effect. Whatever the practical likelihood of that occurrence, appellees have made no effort to explain how the named defendants -- the Director of the Office of Management and Budget, and the Secretary of the Treasury -- could be held responsible for Congress's decision not to do so. Because Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976) (emphasis added), appellees' allegation of diminished influence within the legislative process would be insufficient to establish the existence of a case or controversy even if such a loss of influence could be said to constitute judicially cognizable injury.

B. The Line Item Veto Act Is Constitutional.

1. In our opening brief, we survey the history of federal appropriations laws from 1789 to the present. For appellees, however, the history of Executive Branch spending discretion begins not in 1789 but in 1974, with the enactment of the Impoundment Control Act (ICA). Appellees' apparent view is that the provisions

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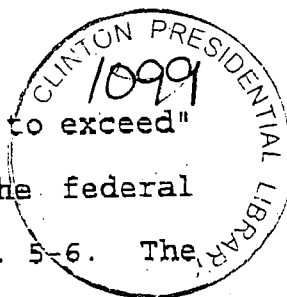
of the ICA reflect and embody the limits that the Constitution places on Congress's power to vest spending discretion in the Executive Branch. The Line Item Veto Act, in this account, represents a fall from constitutional grace because (and to the extent that) it departs from the ICA's limitations. See Appellee Br. 4-6, 41.

Appellees' focus on the ICA as a constitutional baseline is profoundly ahistorical. The legislative practice of giving the President substantial discretion over the expenditure of appropriated funds has a 200-year pedigree. See Gov't Br. 2-6; see also Senate/House Amicus Br. 5-12. On those occasions when Congress has acted to tighten controls on Executive Branch discretion, the controls have typically been aimed at preventing overspending, not underspending. See, e.g., Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).⁹

When seen in its proper historical context, the Line Item Veto Act is noteworthy less for the discretion it grants the President than for the limits it imposes on that discretion. The Act gives the President less control over federal spending than, for example,

⁹ The Constitution itself reflects a concern with restraining, rather than compelling, expenditures by the Executive Branch. The Appropriations Clause (Art. I, § 9, Cl. 7) prohibits the drawing of money from the Treasury except "in Consequence of Appropriations made by Law." See generally OPM v. Richmond, 496 U.S. 414 (1990). The Appropriations Clause was designed in part to ensure that the Executive Branch spends no more than Congress appropriates. See id. at 427; Reeside v. Walker, 52 U.S. (11 How.) 271, 291 (1851). The Constitution contains no comparable provision aimed at compelling the expenditure of appropriated funds.

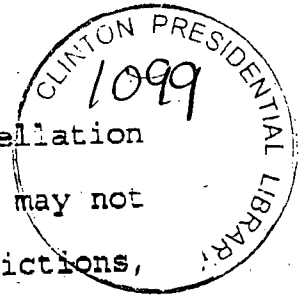
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the First Congress conferred when it used lump-sum "not to exceed" appropriations to fund the general operations of the federal government. See Gov't Br. 2-3; Senate/House Amicus Br. 5-6. The Act gives the President no authority to revise current levels of entitlement spending, which account for the lion's share of all federal outlays. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see Gov't Br. 9 n.4, 45. With respect to spending items covered by the Act, the President is limited to two choices: to spend the full appropriated amount on the specified item or to use the whole amount to reduce the federal deficit. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a; see Gov't Br. 44. The President must consider a number of statutory criteria in making that choice, ICA §§ 1021(a)(A), 1021(b), 1022(b) (2 U.S.C. 691(a)(A), 691(b), 691a(b)); J.S. App. 33a-34a; he must act within a limited time, ICA § 1021(a)(B) (2 U.S.C. 691(a)(B)); J.S. App. 33a; and he may not reverse course once he has made his decision. And because the President must determine that any cancellation will "reduce the Federal budget deficit," ICA § 1021(a)(A)(i) (2 U.S.C. 691(a)(A)(i)); J.S. App. 33a, he may not cancel spending items or limited tax benefits beyond the point at which the deficit has been or would be eliminated. Because the Act leaves the President with significantly less discretion than Congress has chosen to confer in prior spending laws, the historical record weighs heavily in favor of its constitutionality.

Ironically, appellees treat some of the Act's restrictions as a source of constitutional concern. For example, appellees regard

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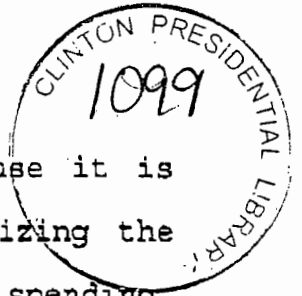


it as problematic that the President must exercise his cancellation authority within five days (see Br. 38 n.22) and that he may not unilaterally undo a cancellation (see Br. 40). Those restrictions, however, serve to facilitate planning and prevent disruption of ongoing programs; and if the President were free to cancel spending items at any time, or to restore cancelled spending, he would enjoy far greater "leverage over the lawmaking process" (*id.* at 30) than he enjoys under the Act in its existing form.

2. In our opening brief (at 34-35), we explain that the Act does not conflict with the lawmaking procedures of the Presentment Clause because the Act does not come into play until after those procedures have been satisfied. When the President is presented with a spending bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) it in its entirety. When he signs the bill, it becomes a law, and the "finely wrought" lawmaking procedures of the Presentment Clause (*INS v. Chadha*, 462 U.S. 919, 951 (1983)) are complete. Appellees acknowledge (Br. 39) that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." Their repeated assertions (Br. 6, 20, 37, 43, 45) that cancellation occurs "in conjunction with" signing cannot obscure the fact, critical to analysis under the Presentment Clause, that the President's cancellation authority arises only after the President has complied with the requirements of the Clause by signing the bill into law.

Appellees nevertheless contend that the Line Item Veto Act "deliberately contravenes the spirit and purposes of the in toto

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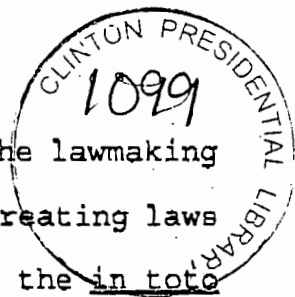
requirement of the Presentment Clause" (Br. 38) because it is functionally indistinguishable from "a statute authorizing the President to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder" (Br. 37-38).¹⁰ That argument is flawed in two respects. First, the Presentment Clause prescribes the "procedure[s]," Chadha, 462 U.S. at 951, by which bills are enacted into law. The difference between the Act and appellees' hypothetical statute is the difference between a law that honors those procedures and a law that does not. It is no objection to a law that conforms to the Constitution that the same results could be achieved by a law that did not do so.

Second, the purpose of the in toto requirement is not to restrict Congress's ability to vest the President with discretion in administering the laws. To the contrary, some lawmaking practices that vest extremely broad discretion in the President are unquestionably consistent with the requirement that the President sign or return a bill in toto.¹¹ Rather, the in toto requirement

¹⁰ As we explain in our opening brief (at 10 n.6), when the President exercises his cancellation authority, the Act's "lockbox" provision permanently reduces the amounts of budgetary resources that Congress may thereafter appropriate in any one fiscal year without triggering a sequester under the Budget Enforcement Act of 1990 (BEA). Under a statute that permitted the President to remove spending items from bills before signing them into law, in contrast, those items would never become law, and the BEA's caps and "paygo" limits would remain unchanged. Appellees are thus incorrect in stating (Br. 38) that "postponement of cancellation until after signing has no real-world consequence whatsoever."

¹¹ Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might adopt the practice of enacting each line item as a separate bill, which
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protects Congress against presidential usurpation of the lawmaking function by preventing the President from (in effect) creating laws through emendation of bills presented to him. Because the in toto requirement serves to ensure that the President remains within the bounds established by Congress -- rather than to restrict Congress in its determination of what those bounds should be -- a decision by Congress itself to confer discretion upon the President cannot possibly be contrary to the "spirit" or "purpose" of that requirement.¹²

3. As we explain above, the requirement that the President must sign or return a bill in toto places no limitations on Congress's power to vest the Executive Branch with discretion in the execution of federal laws. Rather, Congress's authority to confer discretion upon the Executive Branch is limited only by the

¹¹(...continued)
the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

¹² If the President were vested with partial veto power by the Constitution, he would indeed have the power to "reshape legislation to produce results that would never have passed Congress." Appellee Br. 12. The exercise of that power would result in laws whose terms had not been approved, and might well have been rejected, by the legislature. See Bengzon v. Secretary of Justice, 299 U.S. 410, 414 (1937). Because Congress retains the power to render the Line Item Veto Act inapplicable to any particular appropriations bill, however, the Act creates no risk of a law whose contents are against the will of Congress. Rather, Congress's passage of an appropriations bill that does not alter the "default rule" (see Gov't Br. 30-31) established by the Act manifests an intent that the President be permitted either to spend, or to impound for deficit reduction purposes, each qualifying item contained therein. See pages **-**, infra; Gov't Br. 50.

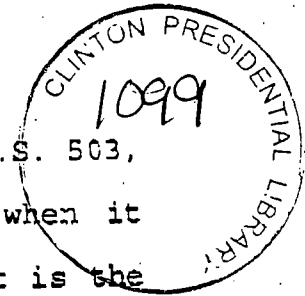
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principle that Congress may not delegate legislative power to other officials. See Gov't Br. 40-42. In our opening brief, we show that the restrictions that the Act places on the President's cancellation authority easily satisfy this Court's nondelegation precedents. See id. at 44-46; pages **-**, supra.

Appellees make virtually no effort to demonstrate that the Act fails to provide "intelligible principle[s]," Mistretta v. United States, 488 U.S. 361, 372 (1989), to guide and cabin the President's discretion. Instead, they assert (Br. 46-49) that Congress may give the Executive Branch discretion over the operation of federal laws in only two situations: "to 'fill up the details' of a legislative scheme" or "to adapt a statutory program to [changing] circumstances." Id. at 49. Because they believe that the Act does not fit into either of those categories, appellees assert that it represents an unconstitutional "abdication" (id. at 45) of lawmaking power by Congress.¹³ Appellees' characterizations of Congress's powers under the Constitution and the President's powers under the Act are both mistaken.

¹³ In a related vein, appellees argue (Br. 45) that the limited duration of the President's cancellation authority militates against treating the Act as a valid grant of authority to execute the laws, since the President cannot adjust spending in response to changed circumstances. As we explain in our opening brief (Gov't Br. 35-36 n.22), prompt action is needed to avoid unwarranted disruption of spending programs. See also Senate/House Amicus Br. 21. In any event, the fact that the President's cancellation decision must be made within five days after enactment of an appropriations law, and is irrevocable thereafter, is a substantial constraint on the President's authority. See pages **-**, supra.

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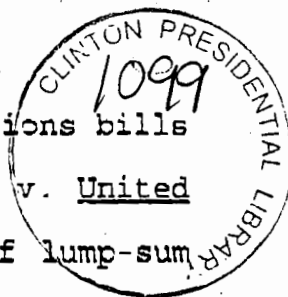


As the Court explained in Bowles v. Willingham, 321 U.S. 503, 515 (1944), "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority." The reasons why it chose the particular course it did are irrelevant. This Court has recognized, for example, that Executive Branch officials may permissibly be vested with "policymaking responsibilities" when Congress itself is "unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the scheme devised by the agency." Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984). So long as 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, it has discharged its lawmaking responsibilities under Article I.¹⁴

As we explain above, see note **, supra, the President's cancellation authority under the Act is functionally comparable to the power that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting each line item as a separate bill. The Act places far greater constraints on the

¹⁴ In attacking the Act on delegation grounds, appellees apparently contend that Congress may confer discretionary authority only when, and to the extent that, such discretion is somehow "necessary" to achieve Congress's goals. This Court has squarely held, however, that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." Yakus v. United States, 321 U.S. 414, 425-426 (1944). And the Court has sustained grants of authority that cannot be justified by any notion of legislative necessity. See, e.g., Loving v. United States, 116 S. Ct. 1737 (1996).

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President's discretion than did the lump-sum appropriations bills favored by early Congresses. See Cincinnati Scap Co. v. United States, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of the availability of alternative mechanisms by which the President could be vested with equal or greater authority over the expenditure of federal funds, the Line Item Veto Act cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.¹⁵

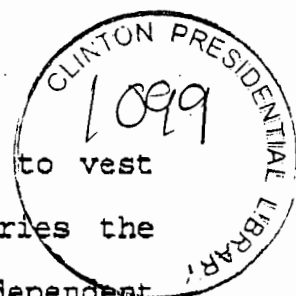
Moreover, the Act confers authority on the President with respect to matters -- the budget, expenditures, and the administration of federal programs -- in which he has preexisting authority and accumulated expertise based on historical practice, his responsibility for execution of the laws, superintendence of the Executive Branch, and the assistance of the heads of Departments (see U.S. Const. Art. II, § 2, Cl. 1) and the Director of the Office of Management and Budget.¹⁶ This Court has

¹⁵ Appellees suggest (Br. 42) that the Line Item Veto Act is constitutionally indistinguishable from a statute giving the President plenary power to strike "unnecessary" provisions from civil rights laws or other federal laws. The relevant question in any such case would be whether the law provided "intelligible principles" to guide and cabin the President's discretion. In addition, the Line Item Veto Act does not regulate primary conduct, and it operates in an area where the President has historically been accorded particularly broad authority. See page **, infra.

¹⁶ The Framers anticipated this role for the Executive:

The administration of government in its largest sense comprehends all operations of the body politic, whether legislative, executive, or judiciary; but in its
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recognized that Congress has especially broad latitude to vest discretionary authority when it is "set within boundaries the President may not exceed" and the President has independent authority over the subject matter. See, e.g., Loving v. United States, 116 S. Ct. 1737, 1750-1751 (1996).

4. Appellees' principal contention is that the President's exercise of cancellation authority under the Act constitutes a statutory "repeal" that must itself conform to the lawmaking requirements of Article I. As we explain in our opening brief (at 46-49), however, Congress has frequently vested the President with the authority to suspend, limit, or otherwise modify the operation of federal laws. As long as Congress provides intelligible standards for the exercise of that authority, the President is exercising not the Article I power to repeal a law, but rather his Article II power to "faithfully execute" the laws. See, e.g.,

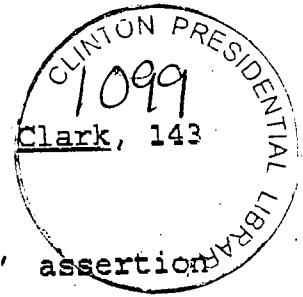
¹⁶(...continued)

most usual and perhaps in its most precise signification, it is limited to executive details, and falls peculiarly within the province of the executive department. The actual conduct of foreign negotiations, the preparatory plans of finance, the application and disbursement of the public moneys in conformity to the general appropriations of the legislature, the arrangement of the army and navy, the direction of the operations of war, -- these, and other matters of a like nature, constitute what seems to be most properly understood by the administration of government.

The Federalist No. 72, at [209-210] (Hamilton) (emphasis added). Congress reinforced the President's central role when it enacted the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, which assigned to the President the responsibility for formulation of a national budget and created a Bureau of the Budget to assist him.

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Intermountain Rate Cases, 234 U.S. 476 (1914); Field v. Clark, 143 U.S. 649 (1892).

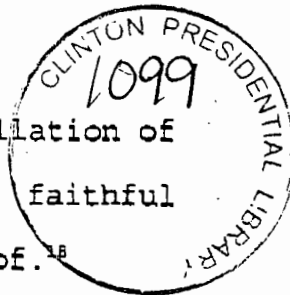


There is, in particular, no basis for appellees' assertion (Br. 50) that the Line Item Veto Act permits the President to "undo part of what Congress has just done," or to "decid[e] that a part of a law that he has just signed shall not be executed." As we explain above and in our opening brief (at 30-31), Congress retains the power to determine, with respect to each appropriations bill, whether and to what extent the provisions of the Act will apply. Read against the backdrop of the Line Item Veto Act, an appropriations law 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 that is subject to the Act. See Gov't Br. 50.¹⁷

Thus, an "A-B-C bill" (Appellee Br. 25) will be construed, absent express contrary language, to mean that "the President may either spend, or cancel, each of the items A, B, and C." The President's cancellation of an item therefore does not "undo" any portion of the appropriations law, nor does it reflect a decision that part of the law "shall not be executed." Rather, the possibility of cancellation is an integral feature of the

¹⁷ Appellees' contention that cancellation of budgetary items prevents the faithful execution of the laws is particularly untenable in light of the manner in which appropriations laws have been construed and administered since the ICA was enacted in 1974. Prior to the Line Item Veto Act, the question whether a particular appropriation was permissive or mandatory was governed not only by the language of the appropriations law itself, but by the background rules established by the ICA. The Line Item Veto Act, which is part of the ICA, simply changed the background rules.

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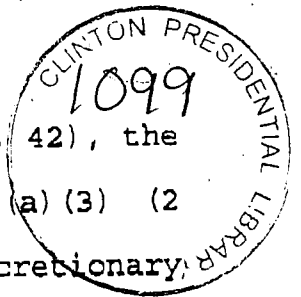


appropriations law from the moment it is enacted. Cancellation of budgetary items pursuant to the Act is therefore a faithful execution of the laws, not a repeal or abrogation thereof.¹⁸

The fact that the President's cancellation of spending items is irrevocable does not transform cancellation authority into a power of statutory repeal. There is nothing novel about federal laws whose provisions may be rendered permanently inoperative by presidential action. For example, the Defense Production Act of 1950, 50 U.S.C. App. 2061 et seq., provides that the President "by proclamation may terminate this Act." 50 U.S.C. App. 2166(b)(1). Similarly, the Agricultural Adjustment Act, 7 U.S.C. 601 et seq., provides that it "shall cease to be in effect" if the President "finds and proclaims" that a national agricultural emergency "has been ended." 7 U.S.C. 613. See also, e.g., 22 U.S.C. 1955 (joint resolution authorizing economic and military aid to Middle Eastern nations "shall expire" when President determines that peace and security in Middle East is adequately assured); Act of June 10, 1933, ch. 55, § 1, 48 Stat. 119 (law authorizing Reconstruction Finance Corporation to engage in specified loan and stock transactions may be "declared no longer operative" by President).

¹⁸ The Controlled Substances Act, for example, permits the Attorney General to add and remove substances from the list of controlled substances specified in the statute. See 21 U.S.C. 811(a)(1)-(2), 812; Touby v. United States, 500 U.S. 160, 162 (1991). As a result, the Executive Branch can engage in the kind of post-enactment "A-B-C" adjustments to which appellees object. This Court nevertheless has held that the existence of the Executive Branch's discretion over the contents of the controlled substances list does not render the Controlled Substances Act unconstitutional. See Touby, 500 U.S. at 164-169.

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5. Contrary to appellees' contention (Br. 41 n.26, 42), the cancellation of limited tax benefits (see ICA § 1021(a)(3) (2 U.S.C. 691(a)(3)); J.S. App. 33a) is also a form of discretionary administrative authority, not a form of statutory repeal. This Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges," Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223 (1989), and Congress has frequently vested the President with discretionary authority over the imposition of taxes. See, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 405-410 (1928) (rejecting nondelegation challenge to "flexible tariff" provisions of Tariff Act of 1922); Field v. Clark, 143 U.S. at 682-693 (rejecting nondelegation challenge to similar provision of Tariff Act of 1890 and citing many similar statutes). The President's authority to cancel limited tax benefits is governed by "intelligible principles." Because the provisions subject to cancellation will affect very small numbers of taxpayers, see ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a, the President has no wide-ranging authority to reshape the basic corpus of federal tax law. Cancellation of a limited tax benefit, moreover, does not subject the affected taxpayers to a special disability; it simply ensures that their tax liability is

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governed by the generally applicable requirements and prohibitions imposed by the remainder of the Internal Revenue Code.¹⁹

Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Buckley v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken. Contrary to appellees' suggestion (Br. 41 n.26), the absence of a severability provision hardly makes it "evident" (Buckley, 424 U.S. at 108) that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

* * * * *

For the reasons stated above and in our opening brief, the judgment of the district court should be vacated and the case

¹⁹ To the extent there may be differences between expenditures and taxation for purposes of nondelegation analysis, however, they simply reinforce the conclusion that the constitutionality of each of the Act's provisions should ultimately be resolved in litigation involving a party whose interests are concretely affected by a particular cancellation.

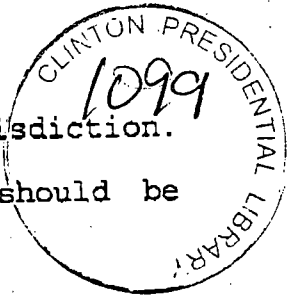
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remanded with instructions to dismiss for lack of jurisdiction.
Alternatively, the judgment of the district court should be
reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997



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No. 96-1671

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

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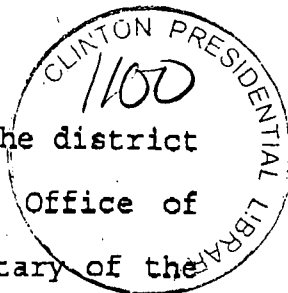
QUESTIONS PRESENTED

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.

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.



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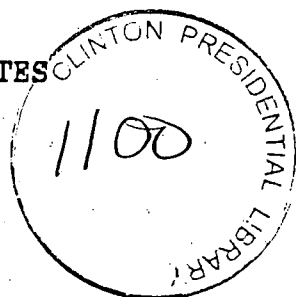
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OPINION BELOW

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

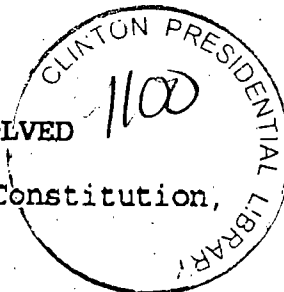
JURISDICTION

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)).



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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 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

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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).

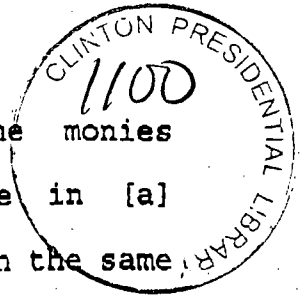
Within a few years, appropriations bills began to make increased use of itemized, rather than lump-sum, appropriations. See Abascal & Kramer, 62 Geo. L.J. at 1579-1580. However, Congress soon recognized the continued need to provide the Executive Branch with discretion to transfer itemized appropriations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

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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

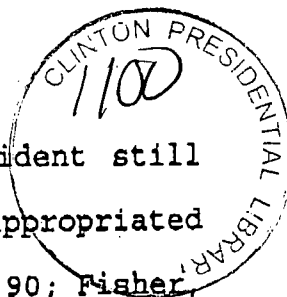


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abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1518 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415). All appropriations "unexpended by reason 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.

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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).

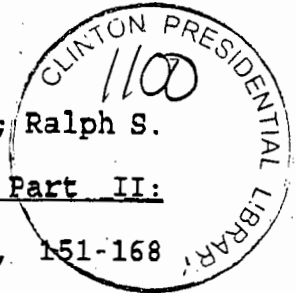
b. In each of the foregoing instances, the Executive Branch withheld appropriated sums pursuant to authority conferred by Congress. During the early 1970s, however, President Nixon asserted a general authority to impound appropriated funds whether or not Congress intended for the impounded appropriations 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).

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(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.



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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.

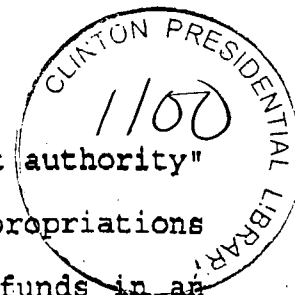
2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (1996) (J.S. App. 32a-59a) (to be codified at 2 U.S.C. 691 et seq.). The Act expires on January 1, 2005. Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a). It authorizes the 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.

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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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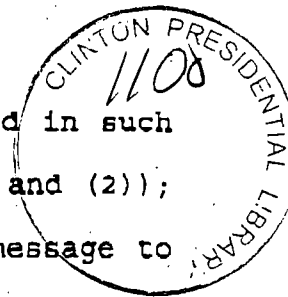
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Cancellation of a dollar amount of discretionary budget authority operates to rescind that authority. ICA § 1026(4)(A) (2 U.S.C. 691e(4)(A)); J.S. App. 48a. Cancellation of an item of new direct spending or a limited tax benefit renders the cancelled 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

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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).

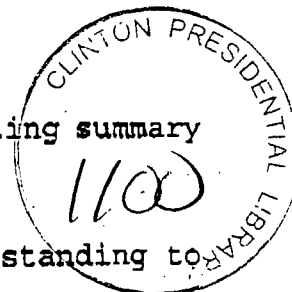
⁶ Appellees alleged that "defendant Raines is responsible for executing the President's cancellations of budgetary and spending authority under the Act," and that "defendant Rubin is responsible for executing the President's cancellations of 'limited tax benefits' under the Act and for executing and 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.

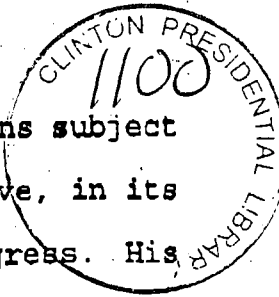
2. The Line Item Veto Act does not violate Article I. Its title notwithstanding, the Act does not authorize the President to approve some provisions of an appropriations bill while preventing

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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



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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, 30 (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

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(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.

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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.

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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...)

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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

⁹ (...continued) 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

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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").

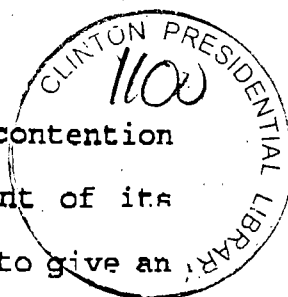
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Separation of powers principles thus foreclose any contention that Congress suffers a judicially cognizable impairment of its lawmaking function if an Executive Branch official fails to give an enacted law its proper legal effect. Indeed, if Congress 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

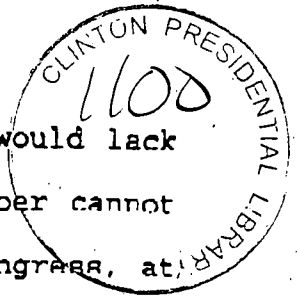
¹² Congress (or one House thereof) may seek judicial redress where the unlawful actions of Executive Branch officials or private parties impede Congress's ability to perform its legislative functions. See, e.g., 2 U.S.C. 288b(b) (Senate Legal Counsel "shall bring a civil action to enforce a subpoena 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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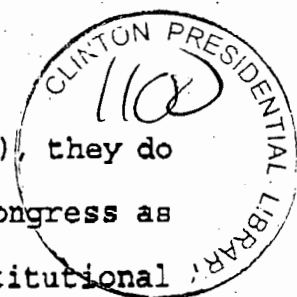


compliance with the Constitution and laws, appellees would lack standing to sue. A suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. The 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

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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.,
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(continued...)

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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

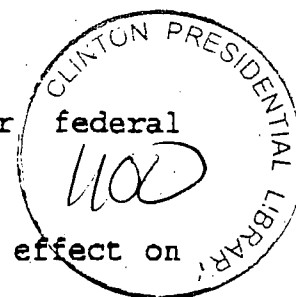
¹³ (...continued)
concurring in result). Second, the votes of the Coleman plaintiffs had legal significance as a bloc, since those votes "would have been sufficient to defeat the resolution" under the plaintiffs' view of the Constitution. Id. at 446. The Coleman plaintiffs therefore could plausibly be 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 the 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

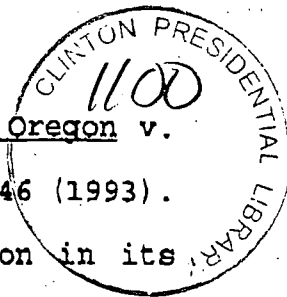
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result from the fact that other participants in the legislative process do not share appellees' view that the Act is constitutionally deficient. See Eastern Kentucky Welfare Rights Org., 426 U.S. at 42 ("case or controversy" requirement is not satisfied 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.

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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 As though the President's power to return a bill is not exclusive, 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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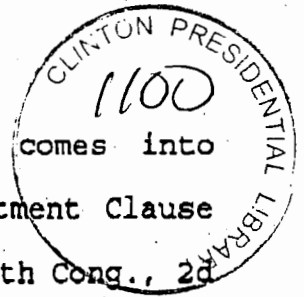
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signs the bill, it becomes a law. If the President instead returns the bill, it does not become law unless two-thirds of each House vote to override the President's veto. As the district court, correctly recognized, see J.S. App. 5a-6a & n.3, 18a-19a, 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.

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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. L. 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.

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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. 551; see Benzon 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 issue. Rather, the Act must be ^{discretionary} ~~scrutinized~~ ^{"mandated"} under the standards governing statutory grants of discretion to the Executive Branch in its administration of enacted laws. The Act

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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).

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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.

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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.

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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

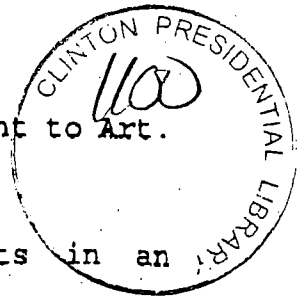
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statute that created it -- a statute duly enacted pursuant to Art.

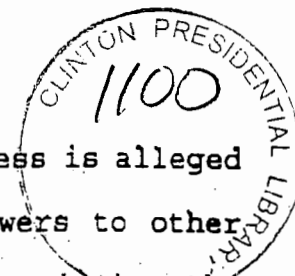
I, §§ 1, 7." Ibid.

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



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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...)

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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

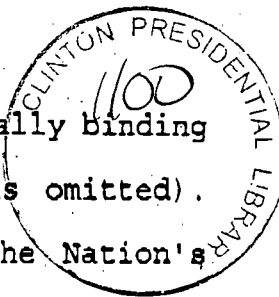
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319 U.S. 190 (1943); New York Central Securities Corp. v. United States, 287 U.S. 24 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928); Field, supra; Synar v. United States, 626 F. Supp. 1374, 1383-1384 & n.9 (D.D.C.) (per curiam)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

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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

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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

(continued...)

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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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24 (continued)

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.

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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...))

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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. 2781c (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).

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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).

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particularly "expansive * * * delegation[] of power."

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.

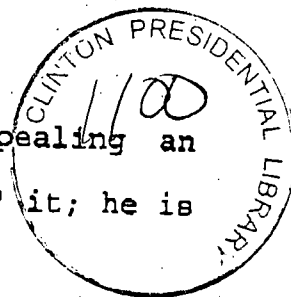
d. Finally, the fact that the President's cancellation authority is conferred by the Line Item Veto Act rather than by individual appropriations laws is of no constitutional significance. As we explain above, the Line Item Veto Act creates a "default rule" that budgetary items within its purview will 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

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

MAY 1997

increased ...
accident in
Court ...

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To Charles Ruff from Gary Grindler. Subject: NTEU v. U.S. (2 pages)	12/23/1997	P5 1101
002. draft	National Treasury Employees Union et al. v. United States et al. 97-2399. Order. (2 pages)	12/23/1997	P5 1102

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 12017

FOLDER TITLE:

Line Item Veto

Van Zbinden
2007-0624-F
vz1215

RESTRICTION CODES

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

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

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

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

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

RR. Document will be reviewed upon request.

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

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U.S. Department of Justice
Civil Division



Deputy Assistant Attorney General

Washington, D.C. 20530

December 23, 1997

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3.3 (c)

Initials: VZ Date: 3/21/2012
2007-0624-F

~~CONFIDENTIAL~~ ATTORNEY CLIENT COMMUNICATION/
ATTORNEY WORK PRODUCT

The Honorable Charles F. C. Ruff
White House Counsel
Assistant to the President
and Counsel to the President
1600 Pennsylvania Avenue, N.W.
2nd Floor, West Wing
Washington, D.C. 20500

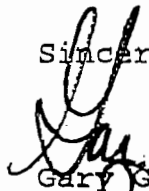
RE: NTEU v. U.S.

Dear Mr. Ruff:

I have enclosed NTEU's proposed order resolving its challenge to the President's cancellation of Section 642 of the Treasury and General Government Appropriations Act, 1998 for your review and comment. My initial reaction is that the proposed requirement in paragraph three that the defendants implement the provisions of Section 642 goes beyond the relief which plaintiff could obtain even if we litigated the case to judgment. I think that we should go no further than agreeing that Section 642 has not been canceled.

I understand that Bill Marshall is out of town until Monday. I will be out tomorrow, Monday and Tuesday. Joseph Onek, however, will be available on these days to discuss the language of this draft order as well as how quickly you would like this matter resolved. I will be available on December 31st to discuss this matter.

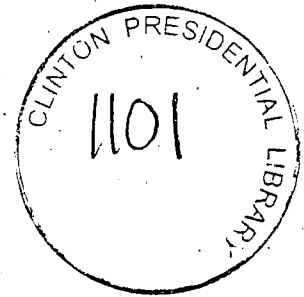
Sincerely,


Gary G. Grindler
Deputy Assistant Attorney General

Enclosure

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-2-



cc: Frank W. Hunger
Assistant Attorney General

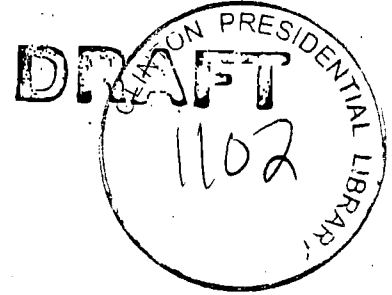
Joseph Onek
Deputy Associate Attorney General

David J. Anderson
Director, Federal Programs Branch

Neil H. Koslowe
Special Litigation Counsel

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



NATIONAL TREASURY EMPLOYEES
UNION, et al.,
Plaintiffs,

v.

UNITED STATES, et al.,
Defendants.

Civil No. 97-2399 (TFH)

ORDER

It is hereby ORDERED, that plaintiffs' motion for summary judgment is granted in part, insofar as it seeks summary judgment on the first cause of action in the amended complaint (paragraphs 23 and 24), and defendants' cross-motion for summary judgment is denied in part; and it is

FURTHER ORDERED, that Cancellation No. 97-56, in which the President stated that he canceled "the dollar amount of discretionary budget authority, as specified in the attached report, contained in the 'Treasury and General Government Appropriations Act, 1998' (Public Law 105-61; H.R. 2378)" is declared invalid; and it is

FURTHER ORDERED, that defendants shall implement the provisions of section 642 of that Act (known as the "Federal Employees' Retirement System Open Enrollment Act of 1997") according to its terms; and it is

FURTHER ORDERED, that defendants shall pay plaintiffs' attorney fees and expenses in the amount of \$59,600.19, under the

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Erskine Bowles from Charles Ruff, William Marshall, and Lisa Hertzner. Subject: Line Item Veto Litigation. (3 pages)	11/03/1997	P5 1103

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 12017

FOLDER TITLE:

Line Item Veto: Congressional Budget Office Reports

Van Zbinden
2007-0624-F
vz1216

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

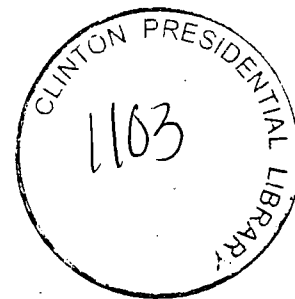
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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November 3, 1997

MEMORANDUM FOR ERSKINE BOWLES

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

SUBJECT: LINE ITEM VETO LITIGATION

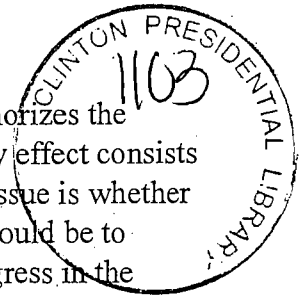
On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory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

A. BACKGROUND

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

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



B. THE STATUTORY ISSUE

1. The Concerns Raised by DOJ

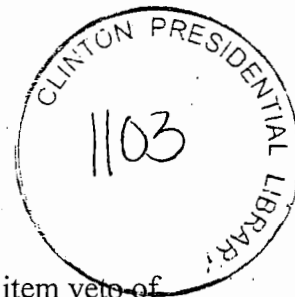
DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact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

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

2. The Position of OMB

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

budget authority subject to cancellation.



C. RE-CHARACTERIZING THE CANCELLATION

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

D. RECOMMENDATION

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

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

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	NTEU v. U.S. (15 pages)	12/03/1997	P5 1104

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 12017

FOLDER TITLE:

Line Item Veto: Department of Justice Report

Van Zbinden
2007-0624-F
vz1217

RESTRICTION CODES

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

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

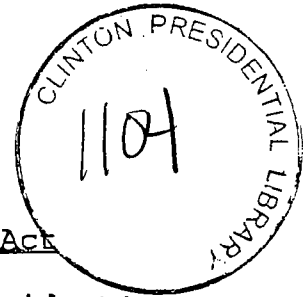
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- C. Closed in accordance with restrictions contained in donor's deed of gift.
- PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
- RR. Document will be reviewed upon request.

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NTEU HAS NO CLAIM FOR RELIEF
UNDER THE LINE ITEM VETO ACT



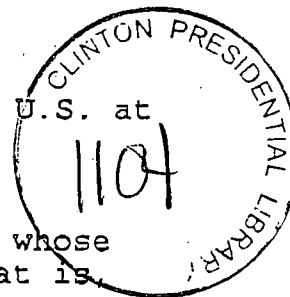
A. There is No Private Cause of Action to
Enforce Compliance with the Terms of the Act

Although NTEU alleges and argues that the President's cancellation with respect to the CSRS/FERS provision was not authorized by the Line Item Veto Act, nothing in the Act vests in NTEU the right to bring suit to enforce compliance by the President with its terms. The only cause of action created by the Act is a right to seek declaratory or injunctive relief on the ground that the Act is unconstitutional. 2 U.S.C. 692(a)(1). Therefore, unless a private right of action to enforce compliance by the President with the Act's terms may be implied, NTEU may not seek, and the Court may not grant, such enforcement.

California v. Sierra Club, 451 U.S. 287, 298 (1981); Washington Legal Foundation v. Alexander, 778 F. Supp. 67, 68 (D.D.C. 1991). Moreover, a strong presumption exists against the creation of implied rights of action, and it is NTEU's burden to overcome that presumption. Suter v. Artist M., 503 U.S. 347, 363-364 (1992); West Allis Memorial Hospital, Inc. v. Bowen, 852 F.2d 251, 254 (7th Cir. 1988).

In Cort v. Ash, 422 U.S. 66, 95 (1975), the Supreme Court established a four-part test for resolving the question of implied causes of action. Although the "ultimate issue" is "whether Congress intended to create a private right of action," the four factors specified in Cort are the criteria through which congressional intent may be

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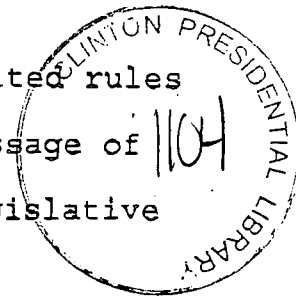
discerned. California v. Sierra Club, supra, 451 U.S. at 293. These four factors are:

First, is the plaintiff one of the class for whose especial benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, supra. [Internal quotations omitted.] The first two factors are dispositive; if they give no indication of congressional intent to create a private right of action, the third and fourth factors are of no relevance. California v. Sierra Club, supra, 451 U.S. at 298.

First, it is clear that the Line Item Veto Act was not enacted for the "especial" benefit of NTEU or any particular individuals or organizations. Rather, its purpose is to reduce the federal budget deficit, for the benefit of all citizens generally. Furthermore, the Act does not confer authority upon, or create a federal right in favor of, NTEU or any private individuals or organizations. The Act confers cancellation authority exclusively upon the President, who has unfettered discretion to exercise it when he, alone, makes the required determinations. 2 U.S.C. 691. Under the Act, only Congress may check the exercise of the President's cancellation authority through passage of a

disapproval bill, 2 U.S.C. 691b(a), and the expedited rules governing the introduction, consideration, and passage of such disapproval bills are purely of internal, legislative concern. 2 U.S.C. 691d. Private individuals and organizations are accorded no role in the cancellation process. Therefore, the first Cort inquiry leads to the conclusion that no private right of action to enforce compliance by the President with the Act's terms may be implied in favor of NTEU.



Second, there is no indication in the Act or its legislative history that Congress intended to create a private right of action to enforce compliance by the President with its terms. The Act, and its legislative history, are silent on the subject. This silence serves to confirm that the Line Item Veto Act is concerned not with private rights but with the federal government's ability to control spending and reduce the deficit.

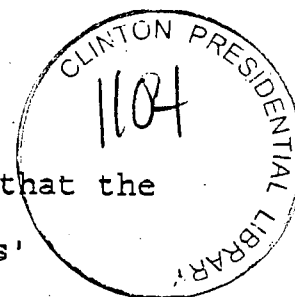
Moreover, there is some indication that Congress intended to deny a private right of action to enforce compliance with its terms. In 2 U.S.C. 692, the Act expressly confers a right of action on "any individual adversely affected" by it to seek declaratory and injunctive relief on the ground that the Act is unconstitutional. This suggests that a right of action to challenge the constitutionality of the Act is the only private right of action Congress intended to create. As the Supreme Court

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said in Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453, 459 (1974): "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." See Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) ("[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"). See also Cf. Russell v. District of Columbia, 747 F. Supp. 72, 78 (D.D.C. 1990), aff'd, 984 F.2d 1255 (D.C. Cir. 1993). Accordingly, the second Cort inquiry also leads to the conclusion that there is no implied private right of action under the Line Item Veto Act to enforce compliance by the President with its terms.

The conclusion from the first two dispositive Cort inquiries, that no private right of action to enforce compliance with the terms of the Line Item Veto Act may be implied, is consistent with this Court's holdings that no private right of action was implied under the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 681 et seq., to which the Line Item Veto Act is an addition. Pub. L. No. 104-130, 110 Stat. 1200, §2. In Rocky Ford Housing Authority v. U.S. Dep't of Agriculture, 427 F. Supp. 118 (D.D.C. 1977), this Court held that no private right of action was created or could be implied under the Impoundment Control Act in favor of individuals and organizations who

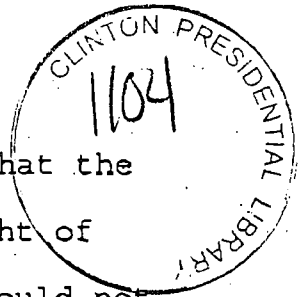
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sought to enforce that Act's reporting requirements concerning impoundments. Although the Court found that the Impoundment Control Act "clearly enunciates Congress' disapproval of unauthorized impoundments by the Executive Branch," it concluded from the text and legislative history of the Act that "Congress did not intend the Act to create a claim upon which relief can be granted to individuals in cases where the executive has failed to report to Congress the withholding of funds or contract authority." 427 F. Supp. at 134.¹



Subsequently, in Public Citizen v. Stockman, 528 F. Supp. 824, 827 (D.D.C. 1981), this Court again held that "Congress did not intend to create a private right of action to police against transgressions of the [Impoundment Control] Act by the executive." Plaintiffs in that case challenged 128 "deferrals" of fiscal year 1982 funds, totaling over \$577 million, which were announced by the President in special messages delivered to Congress under the Impoundment Control Act. Plaintiffs alleged that these deferrals were not authorized by the Impoundment Control Act, and they sought to enjoin the Director of the OMB from

¹ This conclusion was reinforced by the fact that the Impoundment Control Act provides that "[n]othing contained in this Act * * * shall be construed as * * * affecting in any way the claims or defenses of any party to litigation concerning any impoundment," 2 U.S.C. 681(3), and that the Comptroller General is authorized to bring suit to required budget authority to be made available for obligation. 2 U.S.C. 687.

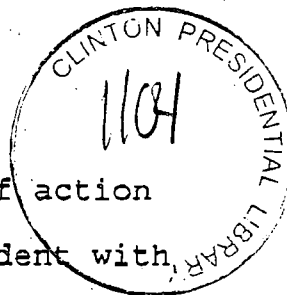
refusing to make available the funds covered by the deferrals. Applying the Cort test, the Court held that the Impoundment Control Act did not create a private right of action to enforce its provisions, and such a right could not be implied.



Finally, although the conclusions reached under the first two dispositive Cort inquiries make it unnecessary to inquire whether the purpose of the Line Item Veto Act would be advanced by the judicial implication of a private right of action to enforce its terms, California v. Sierra Club, supra, 451 U.S. at 298, we submit that the purpose of the Act would not be advanced by the implication of such a private right of action. The Act's emphasis on expeditious action by the executive and legislative branches would be thwarted if private litigants were permitted to seek injunctive relief against such action. Furthermore, the courts would become embroiled in controversies over compliance with intricate budgetary issues that traditionally have been left to the two political branches. Nothing in the text or legislative history of the Line Item Veto Act remotely suggests that Congress had in mind such judicial involvement in the inner workings of the Act when Congress enacted it.

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B. The President's Cancellation With
Respect to the CSRS/FERS Provision
was Authorized by the Line Item Veto Act

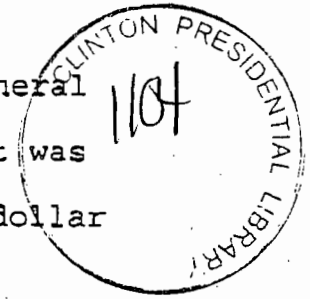


Even if the Court recognizes a private right of action in favor of NTEU to enforce compliance by the President with the terms of the Line Item Veto Act, there is no merit to NTEU's claim that the President's cancellation with respect to the CSRS/FERS provision was not authorized by the Act. The CSRS/FERS provision contained a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act, and the President canceled that dollar amount "in whole" after determining that this cancellation would reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest, and by notifying Congress of the cancellation in a special message. Therefore, the cancellation was authorized by, and complies fully with, the Line Item Veto Act.

1. Under the Line Item Veto Act, the President is authorized to "cancel in whole" three budgetary items, one of which is "any dollar amount of discretionary budget authority." 2 U.S.C., 691(a)(1). The Act defines the term "dollar amount of discretionary budget authority" to mean, among other things, "the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. 691e(7)(A)(i). Thus, if a "dollar amount of budget authority" was "required to be allocated"

yes

by the CSRS/FERS provision in the Treasury and General Government Appropriations Act, 1998, the President was authorized to cancel it, even though a "specific dollar figure was not included" in that provision.



To determine whether the CSRS/FERS provision required a "dollar amount of budget authority" to be allocated, one must define the term "budget authority." The Line Item Veto Act itself does not define "budget authority." However, it was added as an amendment to the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 104-130, 110 Stat. 1200, §2, and that act defines "budget authority" to mean, among other things, "provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections." 2 U.S.C. 622(2)(A)(i). The question, then, is whether the CSRS/FERS provision required the allocation of a dollar amount of funds to be made available for obligation and expenditure, including the obligation and expenditure of offsetting receipts and collections.

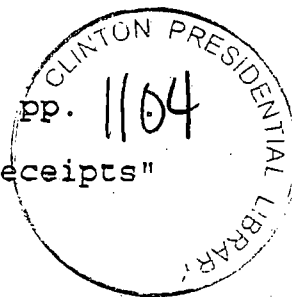
The CSRS/FERS provision did require the allocation of a dollar amount of funds to be made available for obligation and expenditure, including the obligation and expenditure of offsetting receipts and collections. For most FERS employees, agencies must contribute 10.7% of basic pay to the Civil Service Retirement and Disability Fund, and 6.2%

of basic pay to the Social Security trust fund, while for most CSRS employees agencies contribute only 7% of basic pay to the Civil Service Retirement and Disability Fund and nothing to the Social Security trust fund.² As shown in the estimate submitted by the Director of the Congressional Budget Office to Congress in accordance with the Line Item Veto Act, 2 U.S.C. 691c(d), annexed as Attachment A, the CSRS/FERS provision therefore would have required agencies to allocate \$428 million over the next ten years, of which \$141 million would have been transferred to the Civil Service Retirement and Disability Fund and \$287 million would have been transferred to the Social Security trust fund, assuming 11,500 people (1% of all CSRS employees)

² Employing agency contributions to the Civil Service Retirement and Disability Fund for FERS employees are established by 5 U.S.C. 8423(a), and equal a "normal-cost percentage" minus the amount contributed by the employee. The employee contribution for most FERS employees under 5 U.S.C. 8422(a) is 7% minus the percentage the employee must pay in Social Security taxes (26 U.S.C. 3121(b)(5)(H)(i)), which is currently 6.2% (26 U.S.C. 3101(a)), for a net employee contribution of 0.8%. Effective October 1, 1997, the "normal-cost percentage" for most FERS employees is 11.5% (62 Fed. Reg. 19,153 (1997)). Thus, for most FERS employees, the agency contribution to the Civil Service Retirement and Disability Fund currently is 10.7% (11.5% minus 0.8%). The agencies also must match the 6.2% Social Security tax paid by FERS employees (26 U.S.C. 3111(a), 3121(b)(5)(H)(i)).

Employing agency contributions to the Civil Service Retirement and Disability Fund for CSRS employees are established by 5 U.S.C. 8334(a), and equal 7% for most CSRS employees. CSRS employees do not pay Social Security taxes (26 U.S.C. 3121(b)(5)), so their employing agencies make no matching Social Security payment on their behalf.

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elected to switch from CSRS to FERS. Attachment A, pp. 1104
Those intragovernmental transfers are "offsetting receipts"
and constitute "budget authority" under 2 U.S.C.
622(2)(A)(iv).³



Furthermore, FERS employees who make contributions to the Thrift Savings Fund are entitled, under 5 U.S.C. 8432(c)(2)(A), to a matching contribution from their employing agency up to a maximum of 5% of basic pay. No such matching contributions are made by agencies on behalf of CSRS employees. Because all sums contributed by employees and employing agencies to the Thrift Savings Fund, and all net earnings held in the Fund attributable to their investment, must be held in trust for the employees and are not the property of the United States (5 U.S.C. 8438(g)), the agency contributions to the Thrift Savings Fund mandated by 5 U.S.C. 8432(c)(2)(A) are obligated expenditures, and constitute "budget authority" under 2 U.S.C. 622(2)(A)(i). The CBO Director's estimate was that the CSRS/FERS provision

³ "Offsetting receipts" under the Impoundment Control Act are amounts deposited in receipt accounts, including trust fund accounts such as the Civil Service Retirement and Disability Fund and the Social Security trust fund, which "offset" agency spending for budgetary purposes. H. Conf. Rep. No. 99-433, 99th Cong., 1st Sess. 102 (1985); Principles of Federal Appropriations Law, p. 2-8 (2d ed. 1991); Budget of the United States Government, Fiscal Year 1998, pp. 342-343. Intragovernmental transfers are a form of offsetting receipts, and the intragovernmental transfers to the federal retirement funds are so large that they are treated as "offsets" to spending by the government as a whole. Budget of the United States Government, Fiscal Year 1998, p. 343.

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would require agencies to obligate and expend an additional \$232 million over the next ten years. Attachment A, p. 1104

OMB has confirmed that the CSRS/FERS provision contains "offsetting receipts" and obligated expenditures which constitute "budget authority" under 2 U.S.C. 622(2). However, its estimates are based on the assumption that 5% of employees eligible to switch would elect to do so. See Declaration of _____, dated _____, ¶ . The respective amounts of "offsetting receipts" to the retirement funds, and obligated expenditures to the Thrift Savings Fund estimated by OMB are _____. Id., ¶ .

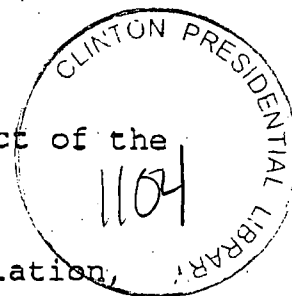
Consequently, it is clear that the CSRS/FERS provision did require the allocation of dollar amounts of budget authority, although it did not specify the amount of that budget authority. Under the Line Item Veto Act, that means the CSRS/FERS provision is a "special proviso in an appropriation law" which "required" that a "dollar amount of budget authority * * * be allocated" but "for which a specific dollar figure was not included." 2 U.S.C. 691e(7)(A)(i). Therefore, the President was authorized by 2 U.S.C. 691(a) to cancel in whole the entire dollar amount of this budget authority.

2. Although NTEU acknowledges that the additional agency contributions to the retirement funds required by the CSRS/FERS provision are "budget authority" (NTEU Br., pp. 15-16, 17-18 & n. 18), and, therefore, are subject to

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cancellation under the Line Item Veto Act, NTEU contends that the President's cancellation with respect to the CSRS/FERS provision was not authorized by the Line Item Veto Act. Its contention is based solely on the fact that, in the special message the President transmitted to Congress in connection with this cancellation, the President said that the dollar amount of discretionary budget authority he canceled (\$854 million over the next five fiscal years) was "due to" reductions in employee contributions to the Civil Service Retirement and Disability Fund. NTEU Br., p. 14. According to NTEU, reductions in employee contributions are not "budget authority," so the President was not authorized by the Line Item Veto Act to cancel them. Id., pp. 15-21.

While it is true that the special message focused on the reduction in employee contributions to the Civil Service Retirement and Disability Fund that would result from the CSRS/FERS provision, and did not discuss the "budget authority" contained in that provision, the Line Item Veto Act nowhere instructs the President, when cancelling a dollar amount of discretionary budget authority, to specify in the special message or elsewhere the nature of that budget authority. See 2 U.S.C. 691a(b). It merely instructs the President to "specify" in the special message the "dollar amount of discretionary budget authority * * * which has been canceled," and to specify as well the required determinations, the reasons for the cancellation,

W. Ross



the estimated fiscal, economic, and budgetary effect of the cancellation, the relevant facts, circumstances, considerations, and estimated effect of the cancellation, and the adjustments that will be made under the "lockbox" provisions. The special message accompanying the President's cancellation with respect to the CSRS/FERS does specify the dollar amount of discretionary budget authority that was canceled -- \$854 million over the next five fiscal years -- and it also contains the rest of the information required by 2 U.S.C. 691a(b).

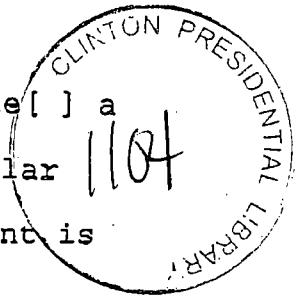
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The absence of a specification of the precise nature of budget authority that was canceled, which is not required by the Line Item Veto Act, cannot render the cancellation unauthorized.⁴ The cancellation was authorized because the CSRS/FERS provision indisputably contains a dollar amount of discretionary budget authority within the meaning of the Act, and the President (specified the dollar amount of discretionary budget authority being canceled.

3. NTEU also argues that the President's cancellation with respect to the CSRS/FERS provision "bears no resemblance" to other cancellations of specific dollar amounts of discretionary budget authority, and that what the

⁴ This cancellation was one of the earliest made by the President under the Line Item Veto Act. It may very well be appropriate that future special messages make clear the precise nature of the discretionary budget authority or item that is being canceled.

President did in this cancellation was to "terminate[] a congressional policy other than by rescinding a dollar amount." NTEU Br., pp. 19-20, 21. But this argument is without foundation.



The principal reason the cancellation with respect to the CSRS/FERS provision differs from many other cancellations of dollar amounts of discretionary budget authority is that, in the CSRS/FERS provision, Congress did not include a specific dollar figure. Thus, it was necessary for the President to estimate the amount of budget authority contained in that provision. Congress contemplated that, in exercising the cancellation authority conferred by the Line Item Veto Act, the President would have to make such estimates, because it expressly provided that the President was authorized to cancel "the entire dollar amount of budget authority required by a specific proviso in an appropriation law for which a specific dollar figure was not included (emphasis added)." 2 U.S.C. 691e(7)(A)(i).

After studying the CBO Director's estimate, OMB and the Office of Personnel Management have re-examined the costs associated with the CSRS/FERS provision, and they have determined that, assuming 5% of eligible employees elected to switch from CSRS to FERS, there would be additional offsetting receipts to the retirement funds of \$ and additional obligated expenditures to the Thrift Savings Fund

of \$. Because, as the CBO Director's estimate notes, the increases in agency contributions -- other than to the Thrift Savings Fund -- would be reflected in the budget both as additional agency expenditures and as additional receipts to the trust funds, Attachment A, p. , the cancellation of those contributions as offsetting receipts would have been a budgetary "wash" and would not have reduced the federal deficit. The President must determine that a cancellation will, among other things, "reduce the Federal budget deficit" (2 U.S.C. 691(a)(A)(i)). Therefore, the President could not cancel the agency contributions to the retirement funds required by the CSRS/FERS provision.

But the cancellation of \$ in mandated agency contributions to the Thrift Savings Fund will reduce the federal budget deficit. Therefore, by cancelling the entire dollar amount of the discretionary budget authority represented by these obligated expenditures, the President has been faithful to the purpose of the Line Item Veto Act and has not "terminated a congressional policy."⁵

⁵ The word "cancel" with respect to a dollar amount of discretionary budget authority means "to rescind." 2 U.S.C. 691e(4)(A). Therefore, the President's cancellation with respect to the CSRS/FERS provision rescinds the entire dollar amount that would have funded this provision. As a practical matter, this means there will not be an "open season" because there is no money to pay for its financial benefits. However, this does not mean that the President has rescinded the congressional policy underlying the CSRS/FERS provision.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Walter Dellinger from Malcolm Stewart. Subject: Line Item Veto Act. (2 pages)	08/06/1997	P5 1105
002. memo	New York Tax Provider Provision. [8/5/97 liva0805.doc] (4 pages)	08/05/1997	P5 1106
003. memo	Discussion of CSRS/FERS provision. (4 pages)	12/08/1997	P5 1107
004. memo	Duplicate of 003. (4 pages)	12/08/1997	P5 1108 - Dup 1107
005. memo	Memorandum RE NTEU v. U.S. (D.D.C., Civ. No. 1:97CV02399) (10 pages)	11/10/1997	P5 1109
006. memo	Duplicate of 003. (4 pages)	12/08/1997	P5 1110 - Dup 1107

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
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FOLDER TITLE:

Line Item Veto: talking Points Line Item Veto

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RESTRICTION CODES

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

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

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

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

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

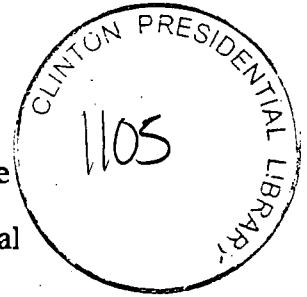
RR. Document will be reviewed upon request.

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

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



Washington, D.C. 20530

August 6, 1997

To: Walter Dellinger
Solicitor General

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

Re: Line Item Veto Act

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

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

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

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

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

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New York Provider Tax Provision

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

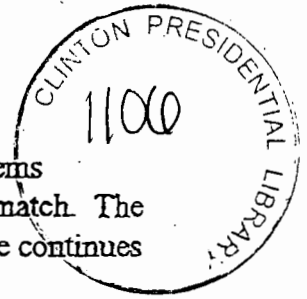
Background. Congress enacted the 1991 Medicaid provider tax law to address State "gaming" of the Medicaid program, through provider tax and donation schemes. The law was enacted to curb the unprecedented growth in Medicaid costs in the late 1980's and early 1990's. The law requires that all provider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

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

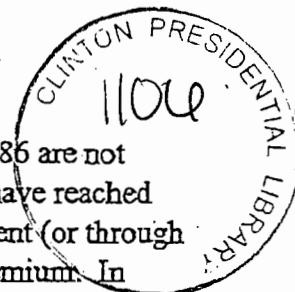
NY has three kinds of provider taxes that HCFA determined to be illegal: 1) a tax that varies by region that was given special consideration in the 1991 law; 2) other taxes that fail to meet the broad-based and uniformity requirements; and, 3) taxes on impermissible classes of providers. The bill deems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

Arguments Against the Provision.

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



State and Local Employees Medicare Buy-In



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

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

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

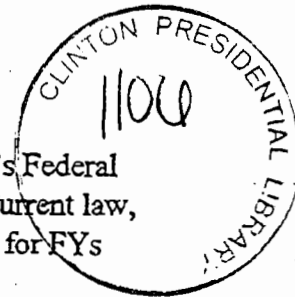
While we do not have CBO's revised participation estimate (i.e., reflecting the seven year requirement), we believe that the provision included in the BBA may affect even fewer beneficiaries. CBO scored the House provision as a net cost of \$800 million over five years but estimates that the BBA provision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

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

Arguments Against the Provision.

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

Alaska FMAP



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

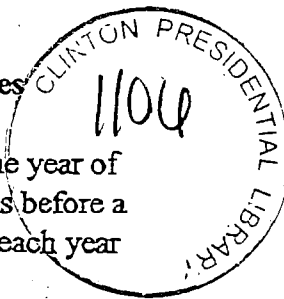
Background. Under current law, the Medicaid Federal Medical Assistance Percentage (FMAP) is based on the average per capita income in a State relative to the national average per capita income. Over many years, States have argued that the FMAP is inequitable and does not accurately reflect each States'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

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

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

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

Waiver of Delayed Enrollment Penalties for Certain Disabled Retirees



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

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

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

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

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

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

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

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

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I. What -- if anything -- can reasonably be argued to constitute a "dollar amount of discretionary budget authority" in the CSRS/FERS provision?

(A) The President's report to Congress specified "reductions in employee contributions to the Civil Service Retirement and Disability Fund (CSRDF)" in the amount of \$854 million over 5 years as a cancelable "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act (the Act). That position was premised on OMB's theory that any budget item that constitutes "discretionary spending" within the meaning of the Congressional Budget Enforcement and Impoundment Control Act (the CBEICA), 2 U.S.C. § 900 et seq., is a "dollar amount of discretionary budget authority" within the meaning of the Act. Because OMB, based on its application of Scoring Rule 3, considered the reduction in employee contributions "discretionary spending," it concluded that it was cancelable.

The Act does not refer to "discretionary spending." Instead, it incorporates the definition of "budget authority" set forth in the CBEICA, 2 U.S.C. § 622(2)(A). That definition includes four categories: (1) provisions of law that make funds available for obligation and expenditure, including the authority to obligate and expend the proceeds of offsetting receipts and collections, (2) borrowing authority, (3) contract authority, and (4) offsetting receipts and collections. The lost employee contributions could only be cancelled if they fit within one of those four categories. They do not fall within any of the categories; instead, they are, as the President's FY 1998 Budget states, "governmental receipts," or revenues.

(B) We have identified only one other amount that is arguably a "dollar amount of discretionary budget authority" that has deficit reduction impact. (Any other amounts we have identified that might count as budget authority would apparently have no deficit impact.) That amount consists of the agency contributions to the Thrift Savings Fund that would have to be obligated if the open season were held and employees were permitted to switch from CSRS to FERS. Switching employees would be able to contribute to the TSP and, should they do so, would be entitled, under 5 U.S.C. § 8432(c)(2)(A), to matching agency contributions up to a maximum of 5% of their pay. The CBO estimated the these matching agency contributions (which arguably would have been obligated expenditures comprising "budget authority") would cost \$232 million over 10 years.

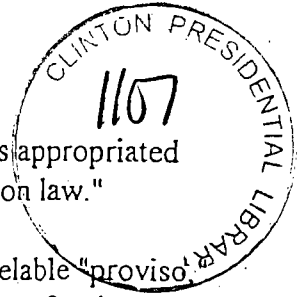
The argument that even that cancellation would have been valid is extremely vulnerable:

(1) The CSRS/FERS provision seems to be a substantive provision of law that enables certain employees to take advantage of, among other things, the TSP, an existing program not contained in the FY 1998 Treasury appropriation. It therefore may not constitute a "proviso" in an appropriation law that requires funds to be allocated."

Congress arguably intended the term "proviso" (which the Act uses as distinct from the term "provision of law") to apply only to a limitation on the specific appropriation in which the "proviso" appears. The CSRS/FERS provision, however, operates in conjunction with 5 U.S.C. § 8342(c)(2)(A) to require an "allocation of funds" government-wide. It does not simply allocate funds within the appropriations law in which it appears. Because the CSRS/FERS provision

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applies to appropriations government-wide, and does not simply allocate the funds appropriated by the FY 1998 Treasury appropriation, it may not be a "proviso" in an appropriation law."



(2) Even if the CSRS/FERS provision could be defended as a cancelable "proviso," a cancellation of matching agency contributions might cancel only such contributions for the agencies funded by the FY 1998 Treasury appropriation. Agencies not so funded might still be required, despite the cancellation, to hold an open season and to match switching employees' TSP contributions. As Senator Stevens argued with respect to the CSRS/FERS provision, "the President could not reach dollar amounts of discretionary budget authority government-wide unless the dollar amount of budget authority needed government-wide was provided in the specific appropriations law before him."

(3) Particularly in light of the examples of cancellations given in the Conference Report, the matching agency contributions are far from the core of "the entire dollar amount of discretionary budget authority" that Congress intended the President to be authorized to rescind.

II. Can the President's actual cancellation be defended as the valid cancellation of the "entire dollar amount of discretionary budget authority" on the ground that he cancelled the CSRS/FERS provision as a whole?

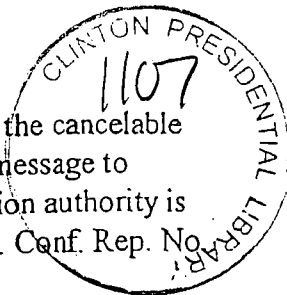
No. The Act authorizes the President only to cancel a "dollar amount of discretionary budget authority" contained in a provision of law, not the provision of law itself. Congress specifically defined "cancel" with respect to "dollar amount of discretionary budget authority" to mean "rescind," a budgetary term of art that has an established meaning akin to "impound." By contrast, it defined "cancel" in the context of direct spending and tax benefits to mean preventing the cancelled provision of law "from having legal force or effect." As we have argued to the Supreme Court, the power to "rescind" provides the President only with a limited authorization to impound dollar amounts, not to strike provisions of law.

III. Can the President's actual cancellation be defended on the ground that, in effect, he cancelled the matching agency contributions?

We considered the argument that the President cancelled all the discretionary budget authority in the CSRS/FERS provision that has deficit impact. The argument relies on the provision of the Act that requires the President to cancel "in whole" the "entire dollar amount of discretionary budget authority required to be allocated by a specific proviso in appropriation law for which a specific dollar figure was not include." Therefore, if there is other discretionary budget authority than that identified in the cancellation, it must also have been cancelled. (Conversely, anything identified that could not be cancelled was not cancelled.) One would then argue that the matching contributions are such authority and that the President necessarily cancelled them.

Even if an argument to this effect could be made to this point, problems would still arise because the Act makes it clear that for a cancellation to be effective the President must within five

days: (1) make certain determinations as to the consequences that will flow from the cancelable amount, 2 U.S.C. § 691a, and (2) "specify" the cancelable amount in his special message to Congress. As the Conference Report explains, "[t]he delegation of this cancellation authority is not separable from the President's duties to comply with these restrictions." H.R. Conf. Rep. No. 104-491 at 19 (1996).



(A) As to the **determinations** requirement, it is extremely difficult to argue that the President's determinations in fact related to the agency contributions.

(1) The President stated that he was cancelling the reductions in employee contributions and did not identify the matching agency contributions. That statement makes it difficult to argue that he made any determinations regarding the cancellation of the matching agency contributions.

(2) Given the President's statement, the President's determinations apparently assumed that, as a result of the "cancellation," employee contributions to the CSRDF would continue to be made. In fact, however, the employee contributions to the CSRDF would not necessarily have continued to be made if the President had cancelled the only truly cancelable amount -- the matching agency contributions to the TSP. The open season could still have been held despite a cancellation of agency contributions, and the employees could still have switched to FERS -- as some of them would have had an incentive to do. (As noted above, it may still be a legal requirement to hold an open season.)

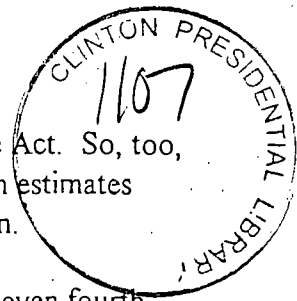
(B) As to the **special message to Congress** requirement, the President did not "specify" the matching agency contributions as the "entire dollar amount of discretionary budget authority" being cancelled. His report referred only to a dollar amount of governmental receipts. The special message provides reasons for the cancellation that are in most respects inconsistent with the theory of cancellation that would now be proposed.

IV. What are the potential adverse consequences of attempting to defend the actual cancellation as the cancellation of the matching agency contributions?

(A) As discussed above, there is a significant risk that the courts may find not merely that the President's actual cancellation was ineffective, but that, even if the President had specifically identified the matching agency contributions as the cancelable item, he would not have had the statutory authority to cancel that item.

It seems extremely unwise to assert broad, highly questionable claims to OMB's authority before the Act has been held to be constitutional. (This is particularly true on the facts of this case, where we would have to defend a rationale and a figure that differ substantially from those used at the time of the cancellation.) To press a broad interpretation now only invites a court to construe OMB's powers narrowly in order to avoid the constitutional concerns that a broader delegation of power would raise. For example, a judicial holding that the CSRS/FERS provision

included no cancelable item could seriously compromise OMB's authority under the Act. So, too, would a holding that the President cannot make (or correct) good faith but mistaken estimates even when his special message has identified the proper rationale for the cancellation.



At best, the question presented here should be litigated only in the third or even fourth generation of challenges to the administration of the Act. Until the constitutionality of the Act has been established, it would be wise to focus our litigation efforts on exercises of the core cancellation authority.

(B) A good faith defense of the actual cancellation would require the Department to admit that the President's cancellation message was gravely defective in at least two key respects -- it identified governmental receipts (employee contributions to the CSRDF) as a dollar amount of discretionary budget authority; and it gave as the cancelable dollar amount a figure (\$854 million over 5 years) that bore no actual relationship to the amount of the only truly cancelable item.

It would be unwise for the Department to ask the courts to depart from their customary practice of deferring to the official statements of the President in order to "look behind" them and attempt to reconstruct what he "must" have intended. More broadly, to offer what would be, at best, a very strained defense of the President's cancellation on grounds other than those offered by the President himself could do grave damage to the President's credibility before the courts. Such a defense would diminish the respect that we generally ask courts to accord Presidential determinations.

(C) One of the two chief constitutional objections to the Act is that it results in an unconstitutional delegation by Congress because the exercise of the President's power is standardless. Cancellation of the open season provision falls so far outside the core of the President's authority under the Act as to cast doubt on the premise that the delegated power is sufficiently cabined to satisfy nondelegation concerns. In addition, any attempt to defend the cancellation on grounds other than articulated in the special message undermines our argument that the requirements set forth in the Act place meaningful constraints on the President's discretion.

The other chief constitutional objection to the Act is that a "cancellation" is the functional equivalent of a repeal that does not conform to the requirements of the Presentment Clause. A defense of this cancellation may commit the Department to arguing that the open-season would be, if not strictly "cancelled," then at least precluded. We would then be open to the argument that our cancellation operated as a "repeal" of that substantive provision of law. As a result, such a defense would render what is now the most defensible aspect of the statute -- the one that effectively grants the President only a limited form of the historic impoundment power -- as constitutionally questionable as the targeted tax benefit provision.

ATTORNEY-CLIENT PRIVILEGED INFORMATION

MEMORANDUM RE NTEU V. U.S. (D.D.C., Civ. No. 1:97CV02399)

1. Under the Line Item Veto Act, the President may cancel three budgetary items: (1) "any dollar amount of discretionary budget authority;" (2) "any item of new direct spending;" and (3) "any limited tax benefit (2 U.S.C. 691(a))." The term "dollar amount of discretionary budget authority" is defined to mean, among other things, "the entire dollar amount of budget authority * * * specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included (2 U.S.C. 691e(7)(A)(i))."

The Line Item Veto Act does not define the term "budget authority" incorporated within the "dollar amount of discretionary budget authority" that is subject to cancellation under the Act. However, the Line Item Veto Act is as an amendment to the Congressional Budget and Impoundment Control Act of 1974, as amended, and that Act expressly defines "budget authority" to mean:

(i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;

(ii) borrowing authority * * *;

(iii) contract authority * * *; and

(iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

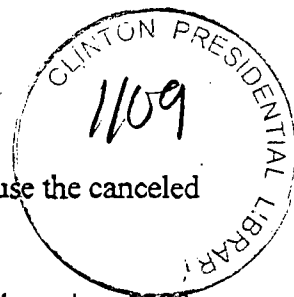
2 U.S.C. 622(2)(A). The Budget Enforcement Act, 2 U.S.C. 900(c)(1), also adopts this definition of "budget authority."

Cancellation of a dollar amount of discretionary budget authority operates to "rescind" that authority (2 U.S.C. 691e (4)(A)). Under a "lockbox" procedure operating in conjunction with the Budget Enforcement Act, 2 U.S.C. 900 *et seq.*, the canceled dollar amount may not be spent on other projects but may be used only for deficit reduction. This is accomplished by lowering the total amount the government may spend in the affected fiscal year (called the "discretionary spending cap") by the amount of the cancellation, even those the canceled amount was not actually spent. 2 U.S.C. 691c(a)(1)(B).

For example, if the discretionary spending cap for fiscal year 1998 were \$500 billion, and during that year Congress appropriated -- that is, made "available for obligation and expenditure" within the meaning of 2 U.S.C. 622(2)(A) -- \$20 billion for a weapons system, the President's cancellation of that \$20 billion would lower the cap from \$500 billion to \$480 billion, even though the \$20 billion were not spent on the weapons system.^{*} At the end of the year, assuming no other budgetary changes, the government will have spent \$20 billion less than it was originally authorized

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to spend, which will reduce the federal deficit by \$20 billion. The President cannot use the canceled \$20 billion to fund educational programs instead of the weapons system.

2. On October 10, 1997, the Treasury and General Government Appropriations Act, 1998, was enacted into law. Section 642 of this act required the Office of Personnel Management to conduct an "open season" to permit federal employees covered by the Civil Service Retirement System ["CSRS"] to switch to the Federal Employee Retirement System ["FERS"] between July 1, 1998, and December 31, 1998.

On October 16, 1997, the President sent a message to Congress canceling the "dollar amount of discretionary budget authority" contained in the Treasury and General Government Appropriations Act, 1998. The President's cancellation message stated: "I hereby cancel the dollar amount of discretionary budget authority, as specified in the attached report, contained in the 'Treasury and General Government Appropriations Act, 1998' (Public Law 105-61; H.R. 2378)." The report specified that the "dollar amount of discretionary budget authority" being canceled was \$8 million in fiscal year 1998, \$183 million in fiscal year 1999, \$209 million in fiscal year 2000, \$221 million in fiscal year 2001, and \$233 million in fiscal year 2002, for a total of \$854 million, "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund (CSRDF)." The report noted that, "[a]s a result of the cancellation, Federal receipts will not decrease, as specified below." These "Federal receipts" were the same amounts of reductions in employee contributions to the CSRDF that were specified as being canceled.

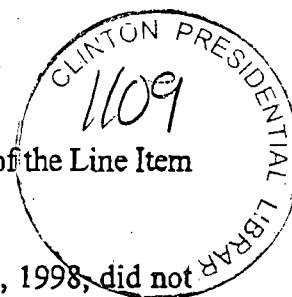
In the report, the President explained how the \$854 million in reduced employee contributions was computed. The report said that "[t]hese reduced contributions would result from employee elections to switch retirement coverage to the Federal Employee Retirement System (FERS) from enrollment in the Civil Service Retirement System (CSRS) that is authorized by Section 642 [of the Treasury and General Government Appropriations Act, 1998]." The report estimated that 5 percent of CSRS-covered employees would switch, and that "[t]he estimated impact is the net reduction in employee contributions to the CSRDF trust fund from 7 percent of pay under CSRS to 0.8 percent under FERS. The report did not discuss other fiscal impacts of section 642, such as required agency contributions to retirement funds, matching agency contributions to the Thrift Savings Plan, and increases or decreases in retirement benefits.

Plaintiffs in this lawsuit, the National Treasury Employees Union and two of its members, allege that the President purported to cancel as "dollar amounts of discretionary budget authority" employee contributions to the Civil Service Retirement and Disability Fund, but that such contributions are not "dollar amounts of discretionary budget authority" and, therefore, are not subject to cancellation under the Line Item Veto Act (Amended Complaint, Pars. 18, 20-21, 23-24). Alternatively, plaintiffs allege the Act is unconstitutional (*Id.*, Pars. 25-31).

3. We have concluded that a reduction in "governmental receipts," such as the \$854 million reduction in employee contributions to the Civil Service Retirement and Disability Fund resulting from the enactment of section 642 of the Treasury and General Government Appropriations Act,

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1998, is not a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act. If so, such a reduction is not subject to cancellation under that Act.

Section 642 of the Treasury and General Government Appropriations Act, 1998, did not include any dollar amounts. It simply directed the Office of Personnel Management to conduct and "open season" during which federal employees covered by the CSRS may switch to FERS. Therefore, the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund resulting from the enactment of section 642 could constitute a "dollar amount of discretionary budget authority" under the Line Item Veto Act only if it were a "dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. 691e(7)(A)(i). That means the \$854 million must, in turn, satisfy the definition of "budget authority" in 2 U.S.C. 622(2)(A), and constitute one of four things: (1) "funds available for obligation and expenditure;" (2) "borrowing authority;" (3) "contract authority;" or (4) "offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority."

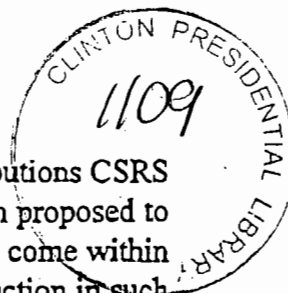
The \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund is not any of the four things defined as "budget authority" under 2 U.S.C. 622(2)(A). It is not funds made available for obligation and expenditure. It is not borrowing or contract authority. And it is not a "reduction" in "offsetting receipts and collections." Although the term "offsetting receipts and collections" is not defined in the Congressional Budget and Impoundment Control Act of 1974, it is defined in the President's annual budget and in various Office of Management and Budget ["OMB"] circulars and congressional documents as "amounts received from the public as a result of business-like or market-oriented activities (for example, proceeds from the sale of postage stamps or electricity, fees for admittance to recreation areas, or the proceeds from the sale of Government-owned land) and amounts collected by one Government account from another ['intragovernmental transfers'].¹ These receipts are called "offsetting" receipts because, for budget purposes, they are subtracted ("offset") from gross outlays rather than treated as revenue (like taxes). Employee contributions to the Civil Service Retirement and Disability Fund are not amounts received from the public as a result of business-like activities, and, therefore, a reduction in such contributions is not a reduction in offsetting receipts which would constitute "positive budget authority" under 2 U.S.C. 622(2)(A).

Employee contributions to the Civil Service Retirement and Disability Fund are considered "governmental receipts," or revenue, just like taxes. Indeed, the challenged cancellation message itself identifies them as "Federal receipts." The President's annual budget and various OMB circulars and congressional documents define "government receipts" as "collections from the public that result from the exercise of the Government's sovereign or governmental powers," such as "individual and corporation income taxes and social insurance taxes, * * * excise taxes, compulsory user charges, customs duties, court fines, certain license fees, and deposits of earnings by the Federal Reserve

¹ Analytical Perspectives, Budget of the United States Government, 1997, p. 331. This definition is also contained in OMB circulars and congressional budget committee documents.

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System."² Thus, in the President's fiscal year 1997 budget, federal employee contributions CSRS and FERS were included in a table of governmental receipts, and the President even proposed to increase them.³ Governmental receipts, unlike "offsetting" receipts, simply do not come within the definition of "budget authority" under 2 U.S.C. 622(2)(A), and, therefore, a reduction in such receipts does not constitute "positive budget authority" under 2 U.S.C. 622(2)(A).

It appears to be no accident that governmental receipts were excluded from the reach of the Line Item Veto Act. Initially, the sponsors of the legislation that became the Act intended it to apply solely to appropriations. During subsequent negotiations, the scope of the legislation was extended to new entitlements ("new direct spending") and one small class of receipts, namely, tax reductions for 100 or fewer beneficiaries or tax measures which provide temporary or transitional relief for 10 or fewer beneficiaries ("limited tax benefits"). It is evident that Congress did not want to grant the President power to "cancel" across-the-board tax cuts.

4. Notwithstanding the definition of "dollar amount of discretionary budget authority" in the Line Item Veto Act, and the definition of "budget authority" in the Congressional Budget and Impoundment Control Act of 1974 and the Budget Enforcement Act, OMB takes the position that the challenged cancellation was authorized by the Act. As we understand it, OMB's position is based on the theory that any budget item which constitutes "discretionary spending" within the meaning of the Budget Enforcement Act, 2 U.S.C. 900 *et seq.*, constitutes a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act.⁴ Because OMB consistently has treated and reported reductions in governmental receipts which appear in appropriation laws, such as the reduction in employee contributions to the Civil Service Retirement and Disability Fund caused by section 642 of the Treasury and General Government Appropriations Act, 1998, as "discretionary spending" within the meaning of the Budget Enforcement Act, it maintains that such reductions are a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act and subject to cancellation.

We disagree with this position, as we understand it. Even if, as we assume, OMB properly has treated and reported reductions in governmental receipts as "discretionary spending" within the meaning of the Budget Enforcement Act, it does not follow that such reductions are a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act.

Under the Budget Enforcement Act, legislation affecting spending and receipts are subject to constraints intended to prevent any increase in the federal deficit. One category of spending

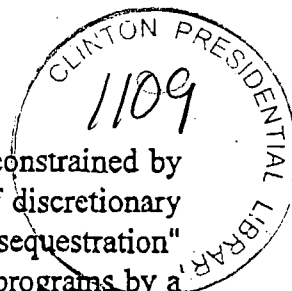
² Supra.

³ Analytical Perspectives, Budget of the United States Government, 1997, pp. 46, 49, 52.

⁴ We base this understanding on conversations with OMB's Office of General Counsel and a two-page written summary of OMB's position which we received.

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legislation, called "discretionary appropriations"⁵ or "discretionary spending," is constrained by dollar limits, called "caps," for each fiscal year. 2 U.S.C. 901. If the amount of discretionary spending under appropriation laws for the year exceeds the caps, a procedure called "sequestration" is triggered, which automatically reduces spending for most discretionary federal programs by a uniform percentage. A second category of spending legislation, called "direct spending"⁶ or "mandatory spending," is constrained through "pay-as-you-go" ["PAYGO"] rules. 2 U.S.C. 902. Under these rules, the cumulative effect of legislation affecting mandatory spending must not increase the deficit. A third category of legislation, "receipts legislation," is constrained by the same PAYGO rules as mandatory spending. 2 U.S.C. 902. The Budget Enforcement Act does not distinguish between "offsetting" and "governmental" receipts. Thus, legislated increases in benefit payments must be offset by legislated reductions in other mandatory spending or increases in receipts (e.g., offsetting receipts, such as national park entrance fees, or governmental receipts, such as taxes). If, at the end of the year, there is an estimated net increase in the deficit because of legislation affecting mandatory spending and receipts, a sequestration is triggered, which automatically reduces most non-exempt mandatory spending programs.

Both OMB and the Congressional Budget Office ["CBO"] keep track of the amount of discretionary and mandatory spending and receipts by "scoring" all legislation affecting such spending and receipts under conventions ("scoring rules") adopted in consultation with Congress. The scoring is reflected in reports that CBO and OMB are required to prepare and submit shortly after the legislation is enacted.

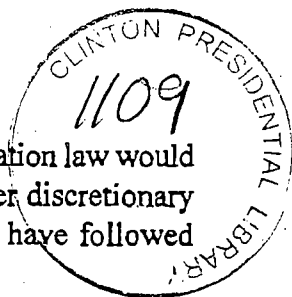
Two scoring questions have arisen under the Budget Enforcement Act which are relevant to the present case. The first was: how should one score the effects of an appropriation law which makes a change in mandatory spending? Under "Scoring Rule 3," appropriation laws which affect mandatory spending and offsetting receipts are scored as discretionary, rather than mandatory,

⁵ "Discretionary appropriations" is defined to mean "budgetary resources (except to fund direct-spending programs) provided in appropriation Act." 2 U.S.C. 900(c)(7).

⁶ "Direct spending" is defined to mean "(A) budget authority provided by law other than appropriation Acts; (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 900(c)(8). The term "budget authority" in the Budget Enforcement Act "ha[s] the meaning[] given to such term[] in section 3 of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. sec. 622]."

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spending.⁷ Accordingly, an increase in mandatory spending contained in an appropriation law would be attributed to discretionary spending and, depending on the sum total of all other discretionary spending, could trigger a sequestration if not otherwise offset. OMB and CBO have followed Scoring Rule 3 in this manner.

The second scoring question was: how should one score an appropriation law which provides for a reduction in governmental (as opposed to offsetting) receipts? Scoring Rule 3 does not address this problem.

For seven years, OMB consistently has scored reductions in governmental receipts which are contained in appropriation laws as discretionary spending. Evidently, OMB believes that, because the Budget Enforcement Act treats all receipts the same way it does mandatory spending, Scoring Rule 3 should be construed to apply to all receipts. Thus, in its report to Congress on the Treasury and General Government Appropriations Act, 1998, OMB scored section 642 as imposing a "discretionary spending" cost of \$8 million for fiscal year 1998, which is the same \$8 million in reduced employee contributions to the Civil Service Retirement and Disability Fund identified as a "dollar amount of discretionary budget authority" in the President's cancellation message under the Line Item Veto Act.

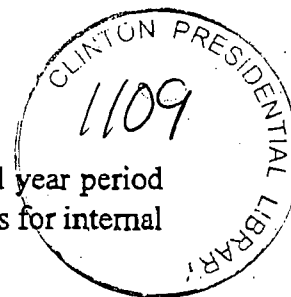
CBO, on the other hand, has scored reductions in governmental receipts which are contained in appropriation laws to PAYGO. Evidently, CBO believes that, because Scoring Rule 3 refers only to offsetting receipts and not governmental receipts, it does not apply to governmental receipts. Thus, in its report on the Treasury and General Government Appropriations Act, 1998, CBO reported the reduced employee contributions on the PAYGO scorecard, and estimated that, together with a reduction in income tax receipts from an increase in employee contributions to the Thrift

⁷ Scoring Rule 3 states:

Entitlements and other mandatory programs (including offsetting receipts) will be scored at current law levels as defined in section 257 of [the Budget Enforcement Act], unless Congressional action modifies the authorizing legislation. Substantive changes to or restrictions on entitlement law or other mandatory spending law in appropriations laws will be scored against the Appropriations Committee's section 302(b) allocations in the House and the Senate. For the purpose of CBA scoring, direct spending savings that are included in both an appropriations bill and a reconciliation bill will be scored to the reconciliation bill and not to the appropriations bill. For scoring under sections 251 or 252 of [the Budget Enforcement Act], such provisions will be scored to the first bill enacted.

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Savings Plan, the total reduction in governmental receipts over the 1998-2007 fiscal year period would be \$312 million. As OMB has written in a confidential memo it furnished to us for internal use only:

[Scoring] Rule 3 distinguishes between changes and receipts and direct spending that are to be scored as PAYGO and those that are to be scored against the discretionary caps. Changes enacted in appropriations acts are to be scored against the discretionary caps. Changes enacted in authorizing legislation are scored as PAYGO. OMB applies this rule to all changes in receipts, including governmental receipts (taxes). CBO does not apply it to governmental receipts. [Emphasis added.]

Until now, the difference between OMB and CBO in the scoring of reductions in governmental receipts that are contained in appropriation laws has not had any practical significance, because there have been no sequestrations. As a result, there has been no litigation raising this issue in court.

But even if, as we assume, OMB is right and CBO is wrong about this scoring issue, the fact that reductions in governmental receipts contained in an appropriation law should be deemed "discretionary spending" for purposes of the Budget Enforcement Act does not mean they should be deemed a "dollar amount of discretionary budget authority" for purposes of the Line Item Veto Act. Indeed, the Budget Enforcement Act provides that the term "budget authority" in that act "ha[s] the meaning[] given to such term[] in section 3 of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. Sec. 622]." Moreover, the Budget Enforcement Act and the Line Item Veto Act attack the problem of the federal deficit in very different ways. The Budget Enforcement Act is global legislation intended to prevent an increase in the federal deficit by constraining all spending and all reductions in receipts. In contrast, the Line Item Veto Act, as intended and written by Congress and as interpreted by us in our submissions to the Supreme Court, is a limited grant of authority to the President to cancel only three defined budgetary items. A reduction in governmental receipts simply is not one of them.

The logical extension of OMB's position is that all reductions in governmental receipts contained in appropriation laws -- including across-the-board tax cuts -- are subject to cancellation under the Line Item Veto Act. Such a construction of the Act eviscerates the "limited tax benefit" provision in the Act, which authorizes the President to cancel only those revenue-losing provisions which give a tax benefit to 100 or fewer beneficiaries or which give temporary or permanent transitional relief for ten or fewer beneficiaries (2 U.S.C. 691e(9)), and is, therefore, contrary to Congress' fundamental understanding of the scope of the President's power to cancel under the Act. It is also at odds with our representation to the Supreme Court in Raines v. Byrd (Appellant's Reply Brief, p. 19) that "[t]he President's authority to cancel limited tax benefits is governed by 'intelligible principles.' Because the provisions subject to cancellation will affect very small numbers of

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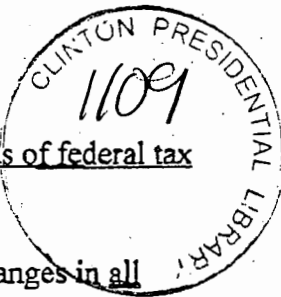
taxpayers, * * * the President has no widespread authority to reshape the basic corpus of federal tax law (emphasis added)."⁸

This is no mere hypothetical concern, because OMB has, in fact, scored changes in all government receipts that are contained in appropriation laws to discretionary spending for purposes of the Budget Enforcement Act. For example, the Treasury/Postal appropriation bill for fiscal year 1993 included general provisions that increased penalties for violations of the Trading with the Enemy Act. This increased governmental receipts by \$2.1 million a year. OMB scored this increase in governmental receipts as 'negative' discretionary spending, and increased the discretionary spending caps by that amount. It did the same thing in response to the enactment of chapter 10 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, which required federal agencies to adjust civil monetary penalties at least once every four years, and mandated that most federal payments be made by electronic funds transfer after January 1, 1999, thereby increasing governmental receipts.

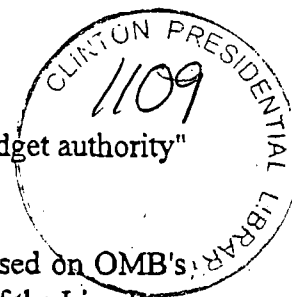
There is one other conceptual problem with OMB's position, as we understand it. If Congress had enacted the "open season" provision in an authorization bill rather than an appropriation bill, we understand that OMB would have treated and reported the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund as reduced "receipts" for purposes of the Budget Enforcement Act (2 U.S.C. 902, and would have scored the \$854 million to PAYGO rather than to discretionary spending. As a result, it would appear that, under OMB's theory, the \$854 million would not have been subject to cancellation under the Line Item Veto Act. But the Line Item Veto Act applies to "budget authority," and "budget authority" is defined exactly the same way in the Congressional Budget and Impoundment Control Act of 1974, the Line Item Veto Act, and the Budget Enforcement Act. If an item is "budget authority," it is subject to cancellation under the Line Item Veto Act. If it is not "budget authority," it is not subject to cancellation under the Line Item Veto Act. For purposes of cancellation under the Line Item Veto Act (as opposed to scoring under the Budget Enforcement Act), it can make no difference whether an item is contained in an appropriation law or an authorization law. The only difference that matters is whether it is or is not "budget authority."

In sum, the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund resulting from the enactment of section 642 of the Treasury and General

⁸ This past summer, the initial deal discussed by Congress and the White House called for the inclusion of the across-the-board capital gains tax cut and various appropriations and reconciliation measures in a single law. Ultimately, two separate laws -- the Balanced Budget Act and the Taxpayer Relief Act -- were enacted. However, if the initial deal had stood, and the single law had been enacted as an appropriation law, the across-the-board capital gains tax would have been subject to cancellation under the logical extension of OMB's position. We believe that would be contrary to the intention of Congress, as expressed in the enactment of the "limited tax benefit" provision.


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Government Appropriations Act, 1998, is not a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act.

5. A defense of the statutory authority for the challenged cancellation based on OMB's position, as we understand it, would seriously jeopardize our constitutional defense of the Line Item Veto Act. It has been a central tenet of our construction of the Act that it is a narrow and carefully circumscribed grant of limited authority to the President. The reason we have construed it this way is to rebut the argument that the Act is an unconstitutional delegation of legislative power to the President. We estimate we have no better than a 50-50 chance of prevailing on our constitutional defense. But that estimate would drop dramatically if we were to adopt OMB's position in this case and argue that, notwithstanding the Act's definitions, a reduction in "government receipts" (potentially including an across-the-board tax cut) which is contained in an appropriations law is a "dollar amount of discretionary budget authority" and subject to cancellation because OMB scores such reductions to discretionary spending for purposes of the Budget Enforcement Act. By adopting this theory we necessarily would be expanding the scope of the President's authority beyond the text of the Line Item Veto Act, in the teeth of our contention that the Act was carefully circumscribed by Congress. Although the Supreme Court could reject such a broad construction yet sustain the constitutionality of the Act on narrower grounds, the very fact that we would urge a broader construction of the Act than its terms provide could lead wavering Justices to conclude that the Executive Branch would use the Act to encroach upon the prerogatives of Congress, and that, therefore, the Act must be stricken.

Moreover, the Senate adopted a resolution authorizing the Senate Legal Counsel to participate as amicus in this case in support of the constitutionality of the Act, but also to make clear that the President's power under the Act is narrow and confined to the strict terms of the Act. The Senate Legal Counsel advised us that he interprets this to direct him to support plaintiffs' statutory claim. Particularly in light of the implications of OMB's position for the President's authority to cancel across-the-board tax cuts that might be included in appropriation laws, Congress can be expected vigorously to oppose that position and contend that the government's effort to expand the scope of the Line Item Veto Act beyond its literal terms is indefensible. That would make it very difficult for Congress to turn around and support us as vigorously as it did in Raines v. Byrd on the constitutional issues. Strong amicus support from Congress on the core issue of whether the Line Item Veto Act impermissibly takes legislative power away from Congress is important to our chances of prevailing in the litigation.

6. At our meeting with the Counsel to the President on October 31, it was suggested that we defend the challenged cancellation on the ground that section 642 of the Treasury and General Government Appropriations Act, 1998, would cause increased payments by employing agencies to the retirement funds and, therefore, is subject to cancellation under the Line Item Veto Act. While we agree that, in theory, the President might have been able to cancel dollar amounts other than the dollar amount he did cancel, it is clear that what he did cancel was the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund. We cannot defend that cancellation on the ground that he might have been able to make a different one.

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The specification of the \$854 million in the President's cancellation message has controlling significance under the Line Item Veto Act. First, that is the amount that gets put into the "lockbox," and by which discretionary spending caps for the affected fiscal years are lowered. 2 U.S.C. 691c(a), (b). Second, that is the amount that was before Congress when it was considering whether to introduce a "disapproval" bill to override the cancellation. Third, there are no amounts other than the \$854 million mentioned in the President's message. Therefore, we would be unable to identify what "dollar amount of discretionary budget authority" other than the \$854 million was canceled.

In short, we cannot substitute a fictitious cancellation for the one that is being challenged in this lawsuit. The cancellation stands or falls on whether the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund constitutes a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act.

Nor is it possible for us to argue that the operation of the federal retirement system is a business-like activity, and that, as a result, employee contributions to the Civil Service Retirement and Disability Fund should be deemed "offsetting receipts," a reduction in which is "budget authority" and subject to cancellation under the Line Item Veto Act. As we pointed out earlier, the challenged cancellation message itself identifies the employee contributions as "Federal [i.e., "governmental"] receipts," and the President's annual budget not only identifies them as governmental receipts but specifically distinguishes them from "offsetting receipts." Therefore, we cannot in good faith claim that they are "offsetting receipts" under the Line Item Veto Act.

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