

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Letter from Janet Reno to the President. Subject: Use of the Line Item Veto Act. (5 pages)	12/15/1997	P5 1111
002. memo	For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages)	12/15/1997	P5 1112
003a. memo	For the President from Phil Caplan. Subject: Memo from Charles Ruff. [See 246164SS] (1 page)	12/17/1997	P5 1113
003b. memo	For the President from Charles Ruff. Subject: Line Item Veto Litigation. (6 pages)	12/16/1997	P5 1114
003c. letter	From Janet Reno for the President. Subject: Use of Line Item Veto. (5 pages)	12/16/1997	P5 1115
003d. memo	For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages)	12/15/1997	P5 1116
004. memo	The President's Cancellation of the Dollar Amount... (26 pages)	12/16/1997	P5 1117

COLLECTION:

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

FOLDER TITLE:

Line Item Veto Litigation [binder] [1]

Van Zbinden
2007-0624-F
vz1219

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]

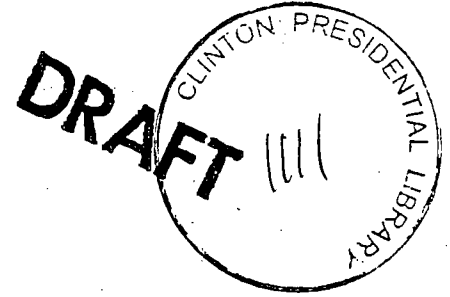
b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial 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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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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DRAFT

The President
The White House
Washington, DC 20500

Dear Mr. President:

This letter outlines the issues related to the defense of your exercise of the Line Item Veto Act to cancel the budget authority contained in Section 642 of the Treasury and General Government Appropriations Act of 1998, enacted October 10, 1997. The Department of Justice believes that defense of this cancellation would be a mistake for several reasons, including the following:

- The Solicitor General has advised me that defense of this cancellation would severely undermine our constitutional defense of the Act.
- The defense of this cancellation will require us to advance an extremely broad interpretation of the Line Item Veto Act, which finds very little support in the statutory text.
- Defense of this cancellation will undermine the inter-branch unity we have enjoyed with the Congress on issues concerning the Act because the Senate will file a brief against us.

We have had extensive consultations with the Office of Management and Budget ("OMB") concerning this cancellation. As a result of those discussions, we have formulated an argument that comports with OMB's theory. If directed, we will defend the cancellation on this basis in the district court. We believe, however, that such a defense is not legally correct, and is not in the best interests of the Executive Branch, and thus we believe that the United States should accept a consent judgment that the cancellation was invalid.

See Energy Letter

Overview of the Case

Section 642 allows individuals subject to the Civil Service Retirement System ("CSRS") to switch to the Federal Employee Retirement System ("FERS") during an open season to be conducted by the Office of Personnel Management ("OPM") in 1998. In the

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The President
Page 2

cancellation message transmitted to Congress pursuant to the Line Item Veto Act, you specified you were cancelling \$854 million of "discretionary budget authority" contained in that provision "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund" over the next five years. The message also explained that you had made the findings required by the Line Item Veto Act. The report attached to the special message explained how the \$854 million in reduced employee contributions was calculated.

The National Treasury Employees Union ("NTEU") and two of its members have challenged the cancellation. National Treasury Employees Union v. United States, Civ. Act. No. 1:97CV02399 (D.D.C.). They claim that reduced employee contributions are not "discretionary budget authority" under the Line Item Veto Act, or, in the alternative, that the Line Item Veto Act is unconstitutional.

Overview of the Line Item Veto Act

The Line Item Veto Act authorizes the President to "cancel," as prescribed by the Act, "any dollar amount of discretionary budget authority," "any item of new direct spending," or "any limited tax benefit." 2 U.S.C. § 691(a). Each of those terms has a distinct meaning. The term "dollar amount of discretionary budget authority" is defined, among other things, to include "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).

In making a cancellation under the Act, the President must make express findings that the cancellation will reduce the federal deficit, not impair any essential government functions, and not harm the national interest. The President must, within five days of signing the law, transmit a "special message" to Congress that specifies, among other things, the "dollar amount of discretionary budget authority, . . . which has been canceled," the "account, department, or establishment of the Government for which such budget authority was to have been available for obligation and the specific project or governmental functions involved," and adjustments to be made to the federal government's discretionary spending limits. 2 U.S.C. § 691a.

Cancellation of a dollar amount of discretionary budget authority acts to "rescind" that authority. 2 U.S.C. § 691e(4)(A). Pursuant to the Act, the caps established by the Budget Enforcement Act are reduced by the canceled dollar amount

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so that the funds may not be spent on other projects. 2 U.S.C. (1) (B).



Defending the Cancellation

If so directed, we propose to defend the cancellation on two grounds. First, applying OMB's interpretation of the scoring rules that Congress has adopted for purposes of the Budget Enforcement Act, reductions in governmental receipts, such as the lost employee contributions to the retirement fund in this case, are "discretionary budget authority" within the meaning of the Line Item Veto Act if the reductions are the result of substantive provisions of law inserted into an appropriations law. We will argue that OMB's interpretation of the Act is entitled to deference, and that OMB properly followed the scoring rules.

Second, we will argue that, irrespective of what the cancellation did or what OMB did, Section 642 does contain budget authority because employees who switch retirement programs trigger a series of government outlays, including permanent appropriations to cover the fund's unfunded liability and additional agency contributions to the CSRS/FERS fund. Moreover, both NTEU and the Congressional Budget Office ("CBO") have admitted that there is budget authority triggered by Section 642. Although OMB's estimate of the financial impact of the cancellation is different from the figure given in your cancellation message to Congress, we will argue that this discrepancy does not invalidate the cancellation.

Reasons Why This Cancellation Is Unlikely to Stand

Although we believe that this argument is not altogether unreasonable -- and that it is the best that can be made under the statute -- we believe that it is legally incorrect and has little chance of success. To defend this cancellation, we must argue either that reductions in income are "budget authority" or that the cancellation should be upheld even if the special message identified the wrong "budget authority" and the wrong "dollar amount." Neither approach is promising.

With respect to the first argument, that a reduction in income may be "canceled" under a statute plainly designed to apply to legislated spending (and "limited tax benefits"), gives every appearance of unjustifiably expanding the President's powers under the Act. The plain language of the Act appears to preclude treating reductions in governmental income as "budget authority," and Scoring Rule 3 does not, by its plain terms,

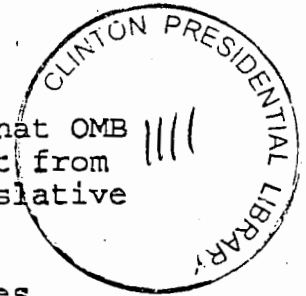
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The President
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support the broader construction of "budget authority" that OMB favors. Moreover, Section 642 is significantly different from the sorts of cancelable provisions discussed in the legislative history of the Act.



It would also be problematic to rely on scoring rules developed under the Budget Enforcement Act to control interpretation of the Line Item Veto Act. The scoring rules are subject to frequent change and are interpreted differently by OMB and CBO; in this situation, one would not expect the Line Item Veto to be subject to such variations. In addition, any argument relying on OMB's interpretation of the scoring rules will provoke a sharp response from Congress; the Senate Legal Counsel has informed us that he will file a brief against us if we pursue this argument.

The second possible argument -- that Section 642 contains budget authority because it triggers additional government payments -- is flawed because such payments are not mentioned in your special message to Congress concerning the cancellation. There is no evidence to indicate that the findings required by the Line Item Veto Act were made with respect to those payments, and it is clear that the \$854 million identified in the message does not correlate with those payments.

Cancellation of Section 642 raises other, very thorny problems. For example, under the Act, cancellation of discretionary budget authority operates to "rescind" the funds allocated; it does not repeal the provision of law. Here we would not be purporting to rescind any funds allocated; we would instead be effectively repealing the provision of law. Moreover, there is a strong argument that, even though the lost employee contributions were "canceled," OPM would have to run the open season because some employees may still want to switch programs.

Defense of This Lawsuit Will Jeopardize Our Defense of the Constitutionality of the Line Item Veto Act

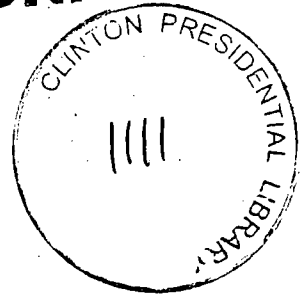
The single most important reason not to defend this cancellation is the impact that it is likely to have on a defense of the constitutionality of the Line Item Veto Act. As the Solicitor General explains in the enclosed memorandum to me, defense of this cancellation will jeopardize our constitutional arguments in several ways:

- Our best chance to defend the constitutionality of the Act is by arguing that the President's cancellation authority is narrow and closely analogous to his historic discretion to decline to spend

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appropriated funds. This cancellation cannot be defended on that narrow basis, because it involves reductions in receipts.

- Our best chance to defend the constitutionality of the Act depends on the support of the Congress, who can argue to the Court that their power is not infringed by the Act. They will oppose the lawfulness of this cancellation.
- Defense of this cancellation will leave us susceptible to the argument that the President's cancellation authority is being exercised without consideration of all of the effects of the canceled provisions. This will undermine our central argument that the Act's requirements of formal presidential findings and a special message place meaningful constraints on the President's discretion.

Conclusion

In sum, we believe that the chances of winning this lawsuit are slim because the Line Item Veto Act does not extend to cancellation of provisions such as Section 642. Moreover, the expansive reading that we will be forced to give the Act in defense of this cancellation will make the Solicitor General's efforts to defend the constitutionality of the Act dramatically more difficult, and could cost us critical votes in the Supreme Court. For these reasons, we strongly urge that the United States not defend the cancellation of Section 642, and instead submit to a consent judgment in the district court.

Sincerely,

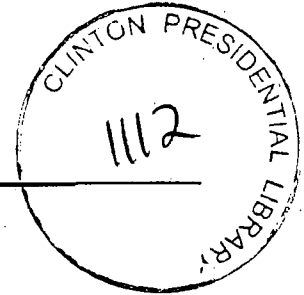
Janet Reno

Enclosure

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



The Solicitor General

Washington, D.C. 20530

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL *SGW*

Re: NTEU Line Item Veto Case

I understand that the Civil Division and OMB have concluded that a statutory defense in the NTEU line item veto case is at least theoretically possible. For the reasons that follow, however, I urge you and the President not to defend this cancellation — even in the district court — but, instead, to accept a consent judgment. I firmly believe that attempting to justify the NTEU cancellation as a proper exercise of the President's authority would seriously undermine our ability to defend the Line Item Veto Act against constitutional challenge.

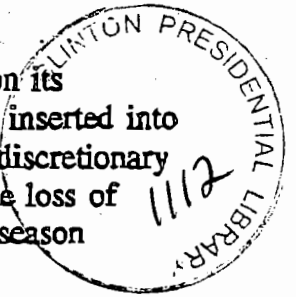
The Theory of Defense

This case involves the President's effort, pursuant to his authority under the Line Item Veto Act, to cancel a provision of law that would have established an "open season" during which certain federal employees could have switched their retirement coverage from CSRS to FERS. The President's special message stated that he was cancelling a "dollar amount of discretionary budget authority" totalling \$854 million. That amount represented the reduction in employee contributions to the retirement fund that was expected to occur during the five-year period following the cancellation if the option to switch from CSRS to FERS became available. The cancellation message itself did not make clear whether the President intended to cancel the entire open season provision or only the reduction in employee contributions. We know from OMB, however, that the intent was to prevent the open season from going forward.

To understand the theory of defense, it is necessary to understand something about "scoring rules" OMB uses to carry out its responsibilities under a different statute, the Budget Enforcement Act (BEA). Under that Act, OMB is required to provide an "estimate of the amount of discretionary new budget authority and outlays" contained in an

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appropriations law. 2 U.S.C. 901(a)(7).¹ OMB's established practice (based on its interpretation of "Scoring Rule 3") is that a substantive provision of law that is inserted into an appropriations law to reduce the government's income will be "scored" as "discretionary new budget authority."² Consistent with its general practice, OMB "scored" the loss of employee contributions that was expected to result from the CSRS/FERS open season provision as "discretionary new budget authority."



The Civil Division has prepared a draft brief that attempts to defend the cancellation at issue on two alternative theories. The draft argues, first, that because Congress was aware of OMB's scoring practices when it enacted the Line Item Veto Act, therefore since OMB "scored" the reduced employee contributions as "discretionary new budget authority" for BEA purposes, the reduced contributions should likewise be regarded as "discretionary budget authority" subject to cancellation under the Line Item Veto Act. Significantly, the draft brief does not argue that the reduced contributions satisfy the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i) -- a provision that expressly applies to the Line Item Veto Act. The draft brief does contend, however, as an alternative theory, that because certain outlays that would result from the open season provision do fall within the Section 622 definition, the cancellation may be upheld on that basis if the court concludes that the Section 622 definition of "budget authority" is controlling.

Reasons Not To Defend the CSRS/FERS Cancellation

The theory of defense reflected in the draft brief is extremely weak, even as a statutory matter. What is more, the defense rests upon an expansive interpretation of presidential power under the Line Item Veto Act that is inconsistent with the arguments we have made in favor of the Act's constitutionality. At this critical stage, establishing the constitutionality of the President's cancellation authority under the Line Item Veto Act is simply too important a goal to jeopardize with a dubious and immoderate assertion of statutory authority.

1. Cancellation of the CSRS/FERS provision cannot credibly be analogized to any power the President has historically exercised.

Opponents of the Line Item Veto Act have contended, inter alia, that it results in an unconstitutional delegation by Congress to the President of legislative power because the President's cancellation authority is broad and standardless. Our brief in Raines v. Byrd responded to that constitutional attack by arguing that the President's authority under the Act (at least as applied to spending items) is closely analogous to the discretion Executive Branch officials have historically possessed with respect to the decision whether or not to spend appropriated sums. Indeed, our brief essentially equated the cancellation of "discretionary

¹ Such estimates might ultimately trigger a "sequestration" under the BEA if discretionary spending caps for the fiscal year are exceeded.

² The Congressional Budget Office does not agree with that interpretation of Scoring Rule 3.

budget authority" -- the category invoked by the President's cancellation message in this case -- with decisions historically made by Presidents (in the nature of impoundments) not to spend money appropriated to an agency.

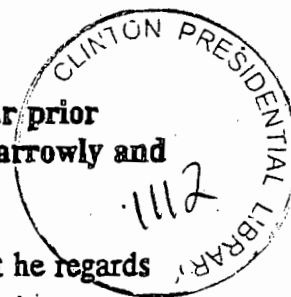
That analogy will be wholly undercut if we construe the Act (and particularly its provision for cancelling "discretionary budget authority") as permitting the President to invalidate an entire substantive provision of law simply by identifying some form of "budget authority" contained in or affected by the provision. The reduction in employee contributions to the retirement fund is only one of a number of substantive provisions of law that are triggered by the special open season Congress enacted, and it is only one of many financial consequences that follow from an employee's decision to switch from CSRS to FERS. The authority to cancel the open season provision therefore cannot plausibly be compared to any power the President has traditionally exercised to decline to spend the full amount of funds that Congress has appropriated to a particular agency, or for a particular purpose, for a fiscal year. Rather, our defense of the cancellation will (necessarily) blur the line between the refusal to spend appropriated funds and the invalidation of substantive provisions of law.³

2. - Defending the CSRS/FERS cancellation will jeopardize our alliance with Congress in the constitutional defense.

In defending the Line Item Veto Act against the claim that the Act violates separation of powers principles by authorizing the President to "repeal" Acts of Congress, it will be very important to have the full support of the Senate and House as amici curiae, arguing that Congress does not regard the Act as an infringement on its constitutional prerogatives. If we defend the cancellation on the theory described above, the Senate Legal Counsel is expected to file an amicus brief arguing that the cancellation was improper. (Such an argument would be consistent with the Congressional Budget Office's longstanding view that reductions in governmental income resulting from provisions contained in appropriations laws should not be scored as "discretionary new budget authority.") Such a filing would impair the image of interbranch unity we need to project, and might lead the Supreme Court to conclude that if the Act is sustained, the judiciary will be required (in the course of ruling on challenges to individual cancellations) to resolve disputes between the political branches concerning arcane budgetary matters.

³ Cancellation of limited tax benefits is also concededly different from the authority that the President has historically possessed to decline to spend appropriated funds. The President's authority to cancel tax provisions, however, is subject to limitations of its own -- most obviously, the requirement that no more than 100 taxpayers be affected. The President's power to cancel limited tax benefits, moreover, is clear on the face of the Line Item Veto Act, while the contention that the President may cancel entire provisions of law based on relatively modest budget impacts has no apparent textual basis (and no apparent stopping point). Finally, invalidation of the President's authority to cancel limited tax benefits would (assuming that authority to be severable) leave the core of the Line Item Veto Act intact. The provisions governing discretionary budget authority, by contrast, have always been regarded as the most important and most defensible feature of the Act.

3. **Defending the CSRS/FERS cancellation is inconsistent with our prior representations that the President will exercise his authority narrowly and with care and circumspection.**



The President has tried, in a variety of ways, to convey the message that he regards the cancellation authority under the Line Item Veto Act as an especially important presidential prerogative, to be exercised with particular care and circumspection. It is quite important that we do all we can to persuade the Court that the Act is in fact being administered on that basis. The Supreme Court's decisions during the last Term suggest a particular aversion to anything that smacks of "symbolic legislation," and we should make every effort to prevent the Court from regarding the Line Item Veto Act in that light.

To defend the CSRS/FERS cancellation -- even in the district court -- would significantly undermine that effort. The draft brief does not contend that the reduction in employee contributions that the President's special message identified as the cancelled item falls within the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i). Instead, the draft brief argues (in essence) that established OMB scoring practices can be used to replace rather than to elucidate the statutory definition. OMB sincerely regards the various scoring rules (and its own construction of them) as substantial constraints on its own discretion. The contention that the President's cancellation authority extends beyond items covered by the statutory definition, however, is likely to strike the Supreme Court as an extraordinary assertion of executive power.

Similarly, to defend the cancellation on the alternative theory that the "open season" provision of the Treasury Appropriations Act triggers certain provisions of other laws that might fit the definition of "budget authority" in 2 U.S.C. 622(2) would require us to offer a rationale that is not set forth in the President's cancellation message -- suggesting that the President may rely on statutory provisions and financial consequences that are far afield from the appropriations provision that he purported to cancel. That alternative would undermine another important point we made in Raines v. Byrd in defense of the Act: that the President is subject to important procedural limitations on the exercise of his cancellation authority by the requirements that he (a) make specific determinations and (b) include particular information about the cancellation in his cancellation message, both of which are lacking here with respect to the suggested alternative rationale.

At worst, a defense of the cancellation along the lines set forth in the draft brief may suggest to the Court that the President's authority is being exercised cavalierly or carelessly. Even if the Court does not regard our position as wholly unreasonable, however, it will surely conclude that the President is intent on construing his own cancellation authority under the Line Item Veto Act in the broadest possible manner. That perception cannot help but lessen the Court's willingness to sustain the Act against constitutional challenge.

THE PRESIDENT HAS SEEN
12-18-97

THE WHITE HOUSE
WASHINGTON

December 17, 1997

MR. PRESIDENT:

Attached is an well written memo from Chuck Ruff on pending litigation in federal district court relating to your authority under the Line Item Veto Act (Act). The Justice Department must file its brief in the case by Thursday.

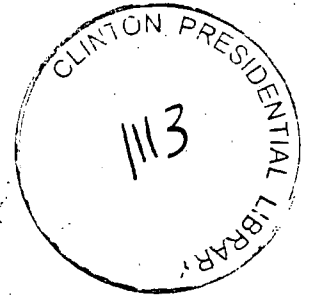
In short, Chuck believes we should defer to Justice and permit them to enter into a consent judgement stipulating that your cancellation of a pension provision in the Treasury/Postal Appropriations Bill exceeded your *statutory* authority under the Act. Justice has serious reservations about the statutory issue and believes defense of this cancellation would harm its broader, constitutional defense of the Act.

Chuck has also attached a memo from the Attorney General and a memo from the Solicitor General, but I think you only need to read Chuck's memo. It is of a length that I would normally summarize for you, but the memo is well reasoned and a fairly quick read.

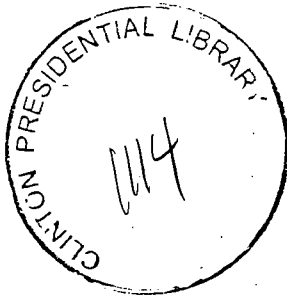
Views. Erskine asked *John Podesta* to read the memo; John concurs with Chuck's recommendation, but he thinks it's a very close call. *Frank Raines* disagrees with Chuck and feels Justice should defend the cancellation.

Caplan
Ruff
Bowles

Phil Caplan
Phil



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THE WHITE HOUSE
WASHINGTON

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December 16, 1997

THE PRESIDENT WAS SEEN
12-18-97

MEMORANDUM FOR THE PRESIDENT

THROUGH: ERSKINE BOWLES

FROM: CHARLES F.C. RUFF CR

SUBJECT: LINE ITEM VETO LITIGATION

Litigation is pending in the federal district court relating to three instances in which you exercised your authority under the Line Item Veto Act (Act). The three cases have been consolidated before Judge Hogan. One of these cases involves a challenge by the National Treasury Employees Union (NTEU) to your use of the line item veto to cancel Section 642 of the "Treasury and General Appropriation Act, 1998." 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).

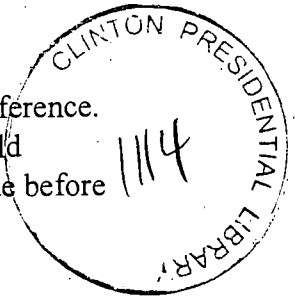
In all three cases, the plaintiffs are challenging the constitutionality of the Act. The NTEU also contends, however, that the cancellation of Section 642 exceeded your statutory authority under the Act because it canceled lost receipts (in the form of reduced employee contributions to federal trust funds caused by the provision) rather than appropriated funds. Senate Counsel, who supports our position on the constitutionality of the Act, has signaled that it is likely to file on the side of the NTEU on the statutory claim. The parties do not dispute that Section 642, if implemented, would have had negative budget consequences.

The Office of Management and Budget (OMB) strongly asserts that the cancellation is valid and wants to defend it. The Department of Justice (DOJ) has very serious reservations about the statutory issue and believes that the defense of this cancellation would harm its broader, constitutional defense of the Act. DOJ, therefore, proposes to enter into a consent judgment that the 642 cancellation falls outside the scope of the Act.

We have had extensive discussions with OMB and DOJ in an effort to develop an approach that would enable DOJ to defend your use of the line item veto in this case without endangering the defense of the Act's constitutionality. Justice must file its brief in response to plaintiff's motion for summary judgment by December 18. Memoranda of the Attorney General

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and of the Solicitor General, setting out their recommendations, are attached for your reference. We believe that we should defer to DOJ's conclusion that defending this provision would undermine the constitutional defense of the Act, but want to make you aware of the issue before any formal action is taken.



A. BACKGROUND

The Act allows the President to cancel "any dollar amount of discretionary budget authority" but requires him to specify the dollar amount canceled in a Special Message to Congress. In this case, your Special Message specified \$854,000,000 (over five years) as the amount canceled. This figure was based on OMB's estimates of the amount of federal receipts from employee contributions that would be lost if employees were allowed to switch from CSRS to FERS. OMB's decision to treat these lost receipts as "discretionary budget authority" was in accord with its customary practice and was based on its understanding of the statutes and rules governing budget scoring.

An alternative measure of Section 642's cost is the amount of additional federal outlays to employee trust funds that would have been required if employees were allowed to switch from CSRS to FERS. In accordance with its customary practice, OMB did not estimate the cost of increased outlays and your Special Message, therefore, did not directly reference such a cost. The Congressional Budget Office, however, relied upon this cost, 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 difference in approach between OMB and CBO, in this respect, is attributable to differing understandings of budgetary scoring rules.)

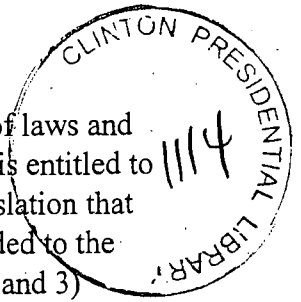
The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation 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 Special Message.

B. ARE LOST RECEIPTS CANCELABLE UNDER THE ACT?

1. The Position of OMB

OMB argues that the Act must be interpreted, and was intended to be interpreted, in light of the Congressionally mandated rules governing budget scoring. Those rules, according to OMB, require that the lost employee contributions be scored as positive budget authority. Thus, even though the Act does not explicitly allow for the cancellation of lost receipts (other than in the context of a limited tax benefit), OMB's contention that the Act incorporates the budgetary scoring rules leads to the conclusion that the lost employee contributions at issue are cancelable.

OMB also asserts that, as the agency charged with estimating the budgetary effects of laws and applying budgetary scoring rules, its expertise in interpreting the statutory language is entitled to judicial deference. Finally, OMB contends that Section 642 is the exact type of legislation that should be subject to cancellation because it 1) was essentially a pay raise; 2) was added to the Appropriations Bill at Conference without debate by either the House or the Senate; and 3) would have a substantial budgetary effect.



2. The Position of DOJ

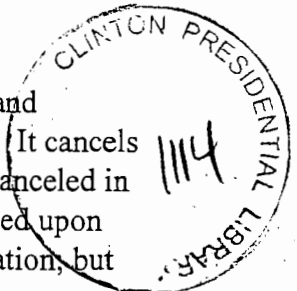
DOJ views the Act as an outgrowth of the President's limited power to impound appropriated funds and not as an extension of budgetary enforcement legislation. Accordingly, it does not read the Act as incorporating budgetary scoring rules. Rather, it contends that the Act must be strictly construed in light of its historical antecedents -- the President's historical power to impound funds. DOJ, therefore, stresses that because the Act does not contain explicit language authorizing cancellations of the kind at issue in this case, that power can not be inferred. Moreover, DOJ argues that because the Act explicitly allows cancellations based upon lost receipts only in very highly specified circumstances (limited tax benefits), Congress did not intend for the President to have a broad authority to cancel such lost receipt provisions outside the limited tax benefit context.

Finally, DOJ is concerned that a broad reading of the President's statutory powers to cancel receipt-reducing provisions would be inconsistent with the position it has taken in its constitutional defense of the Act. Throughout the line item veto litigation, DOJ has argued that the Act grants only very modest, and clearly defined, powers to the President. Arguing that the line item veto power extends beyond the express wording of the statute would undercut its previous position.

C. RE-CHARACTERIZING THE CANCELLATION

OMB and DOJ also disagree as to whether the cancellation of Section 642 could be defended as a cancellation of future outlays in order to avoid, or to supplement, the argument that 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 and the Congressional Budget Office (CBO) relied on this fact in its review of the budgetary effect of the cancellation. Arguably, therefore, the cancellation would have been proper if the Special Message set forth these estimated future outlays rather than the lost receipts as the items to be canceled. OMB asserts that the cancellation could also be justified on this ground. OMB submits that, if the Court rejects its scoring as the appropriate standard for evaluating what is cancelable under the Act, the CBO position (and the common sense position) that increased outlays are cancelable items should provide the governing standard.

DOJ raises several objections. First, 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 \$854,000,000 in lost receipts. Substituting a new dollar amount based upon amounts of future outlays, therefore, would not simply "amend" the previous cancellation, but would instead constitute an entirely new cancellation. Second, DOJ is troubled by an argument that would suggest you made specific determinations (as the Act requires) about the effects of canceling one item (future outlays) when in fact you specified another (lost receipts). Although a "functional" argument can be made suggesting that the two items (future outlays and lost receipts) are equivalents, DOJ is concerned that such an argument would appear disingenuous. Finally, DOJ is uncomfortable with relying on the future outlay theory when OMB did not rely upon that theory in the first instance.



D. WOULD DEFENSE OF THIS PROVISION HARM THE BROADER, CONSTITUTIONAL ARGUMENT?

DOJ rightly asserts that, even in the best case scenario, the constitutionality of the line item veto is precarious. DOJ is, therefore, understandably wary about any statutory construction that would appear to stretch the President's powers under the Act beyond a narrowly confined authority analogous to impoundment. DOJ has acknowledged to the Supreme Court, for example, that the provision authorizing the President to cancel limited tax benefits is on less firm historical footing than is the cancellation of a typical appropriation, and is constitutionally sustainable only because that power is carefully limited under the statute. Supporting the cancellation of the lost receipts in this case, DOJ fears, would not only be viewed by the Court as an expansion of the President's power beyond traditional boundaries, but also as an expansion that would occur in a seemingly boundless manner. (In this respect, DOJ is also concerned that the cancellation of Section 642 is particularly problematic because it encompasses a cancellation of a non-budgetary provision of law -- the right of employees to switch pension programs.)

DOJ also believes that its constitutional case would be harmed if the Senate Counsel files on the side of the NTEU on the statutory issue. It is concerned that if the President and the Congress do not agree on the powers the Act gives to the President, the Court might void the legislation entirely in order to avoid a series of inter-branch disputes raising intractable separation of powers issues.

Finally, DOJ is concerned that the secondary argument (that the cancellation could be recharacterized as a line item veto of future outlays rather than lost receipts) could harm the constitutional defense by suggesting that the provisions of the Act directing the President to make specific findings about the nature and impact of the cancellation are not mandatory. DOJ has argued that the findings provisions confine the power of the President and, therefore, serve to refute the plaintiffs' contention that the Act improperly delegates broad and unchecked powers to the Executive. Accordingly, DOJ believes that if it now asserts that the findings provisions are not mandatory, its position on the improper delegation claim will be weakened.

While DOJ's position has force, there are some competing considerations. First, the scoring rules OMB employed in this case do not give unlicensed authority to the President. Rather those rules are Congressionally mandated provisions designed to measure compliance with the Congressional Budget Act and constrain budgetary scoring decisions. Although the power conferred to the President, under OMB's approach, is broader than the statutory construction offered by DOJ, that power is not unlimited. For example, the scoring rules would not authorize the President to cancel a broad tax benefit. Additionally, while the power to cancel lost receipts is broader than the President's historical impoundment prerogative, it is not considerably greater than that granted to the President in the Act's provision that allows for the cancellation of limited tax benefits.

Second, OMB argues that if the Act were not construed to allow the cancellation of provisions such as 642, its value as a budget enforcement tool would be seriously diminished because so few provisions worth canceling fit the model of a simple dollar appropriation.

Third, in its response to the findings-recharacterization issue, OMB would contend that requiring strict adherence to the findings requirements of the Act is also problematic. The Act provides only five days in which to cancel an item, and demanding precision in the findings would be both impractical and unrealistic. Indeed, even DOJ concedes that the Act would not require that the exact dollar amount of a cancellation be established in order for a cancellation to be upheld. Accordingly, OMB argues, if the Act does not require an exact dollar determination, there is no reason to concede that the Act does require an exact determination as to the specific source of the cancelable budget authority.

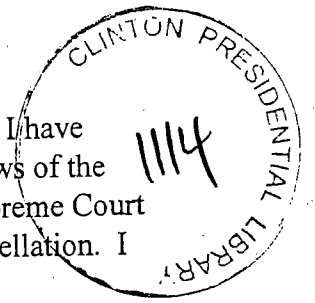
Finally, OMB notes that DOJ's constitutional concerns would be triggered only if the district court upheld your statutory authority to effect this cancellation. If the lower court invalidated the cancellation on statutory grounds, that decision would strengthen, rather than weaken, the constitutional case. OMB, therefore, concludes that the risk in litigating the statutory issue in district court is not as substantial as DOJ would suggest.

E. RECOMMENDATION

In my judgment, the arguments advanced in support of your statutory authority to cancel Section 642 are stronger than DOJ believes them to be, and the legitimacy of the cancellation could be appropriately defended in district court, albeit with no guaranty of success. In addition, Frank Raines strongly believes that the cancellation was valid under the Act and that it furthered important budgetary and policy interests. He also disagrees with the Solicitor General's position that defending the cancellation would undermine the broader, constitutional defense of the Act; and he would, therefore, request that you direct DOJ to defend the cancellation in district court..

I believe, however, that we must give great weight to the Solicitor General's fear that to defend the cancellation in the case that will trigger the Supreme Court's first ruling on the constitutionality of the Act would undermine the government's constitutional position. Although

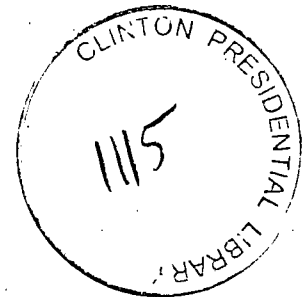
I am reluctant to acquiesce in a decision to assert error in the exercise of the veto, I have concluded that we should, in the final analysis, give dispositive weight to the views of the Solicitor General. I respect his assessment of the litigation risks posed in the Supreme Court even though I disagree with DOJ's position on the merits of the Section 642 cancellation. I recommend, therefore, that we allow DOJ to consent to judgment in this case.





Office of the Attorney General
Washington, D.C. 20530

December 16, 1997



The President
The White House
Washington, DC 20500

Dear Mr. President:

This letter outlines the issues related to the defense of your exercise of the Line Item Veto Act to cancel the budget authority contained in Section 642 of the Treasury and General Government Appropriations Act of 1998, enacted October 10, 1997. The Department of Justice believes that defense of this cancellation would be a mistake for several reasons, including the following:

- The Solicitor General has advised me that defense of this cancellation would severely undermine our constitutional defense of the Act.
- The defense of this cancellation will require us to advance an extremely broad interpretation of the Line Item Veto Act, which finds very little support in the statutory text.
- Defense of this cancellation will undermine the inter-branch unity we have enjoyed with the Congress on issues concerning the Act because the Senate will file a brief against us.

We have had extensive consultations with the Office of Management and Budget ("OMB") concerning this cancellation. As a result of those discussions, we have formulated an argument that comports with OMB's theory. If directed, we will defend the cancellation on this basis in the district court. We believe, however, that such a defense is not legally correct, and is not in the best interests of the Executive Branch, and thus we believe that the United States should accept a consent judgment that the cancellation was invalid.

Overview of the Case

Section 642 allows individuals subject to the Civil Service Retirement System ("CSRS") to switch to the Federal Employee

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The President
Page 2



Retirement System ("FERS") during an open season to be conducted by the Office of Personnel Management ("OPM") in 1998. In the cancellation message transmitted to Congress pursuant to the Line Item Veto Act, you specified you were cancelling \$854 million of "discretionary budget authority" contained in that provision "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund" over the next five years. The message also explained that you had made the findings required by the Line Item Veto Act. The report attached to the special message explained how the \$854 million in reduced employee contributions was calculated.

The National Treasury Employees Union ("NTEU") and two of its members have challenged the cancellation. National Treasury Employees Union v. United States, Civ. Act. No. 1:97CV02399 (D.D.C.). They claim that reduced employee contributions are not "discretionary budget authority" under the Line Item Veto Act, or, in the alternative, that the Line Item Veto Act is unconstitutional.

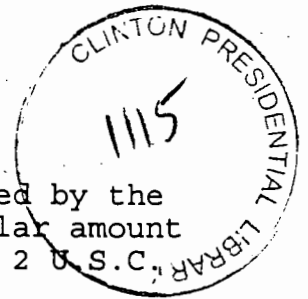
Overview of the Line Item Veto Act

The Line Item Veto Act authorizes the President to "cancel," as prescribed by the Act, "any dollar amount of discretionary budget authority," "any item of new direct spending," or "any limited tax benefit." 2 U.S.C. § 691(a). Each of those terms has a distinct meaning. The term "dollar amount of discretionary budget authority" is defined, among other things, to include "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).

In making a cancellation under the Act, the President must make express findings that the cancellation will reduce the federal deficit, not impair any essential government functions, and not harm the national interest. The President must, within five days of signing the law, transmit a "special message" to Congress that specifies, among other things, the "dollar amount of discretionary budget authority, . . . which has been canceled," the "account, department, or establishment of the Government for which such budget authority was to have been available for obligation and the specific project or governmental functions involved," and adjustments to be made to the federal government's discretionary spending limits. 2 U.S.C. § 691a.

Cancellation of a dollar amount of discretionary budget authority acts to "rescind" that authority. 2 U.S.C.

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§ 691e(4)(A). Pursuant to the Act, the caps established by the Budget Enforcement Act are reduced by the canceled dollar amount so that the funds may not be spent on other projects. 2 U.S.C. § 691c(a)(1)(B).

Defending the Cancellation

If so directed, we propose to defend the cancellation on two grounds. First, applying OMB's interpretation of the scoring rules that Congress has adopted for purposes of the Budget Enforcement Act, we will argue that reductions in governmental receipts, such as the lost employee contributions to the retirement fund in this case, are "discretionary budget authority" within the meaning of the Line Item Veto Act if the reductions are the result of substantive provisions of law inserted into an appropriations law. We will argue that OMB's interpretation of the Act is entitled to deference, and that OMB properly followed the scoring rules.

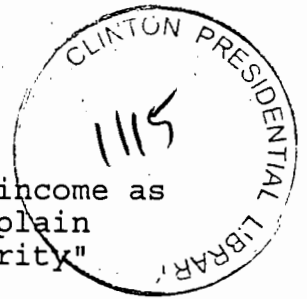
Second, we will argue that, irrespective of what the cancellation did or what OMB did, Section 642 does contain budget authority because employees who switch retirement programs trigger a series of government outlays, including permanent appropriations to cover the fund's unfunded liability and additional agency contributions to the CSRS/FERS fund. Moreover, both NTEU and the Congressional Budget Office ("CBO") have admitted that there is budget authority triggered by Section 642. Although CBO's estimate of the financial impact of the cancellation is different from the figure given in your cancellation message to Congress, we will argue that this discrepancy does not invalidate the cancellation.

Reasons Why This Cancellation Is Unlikely to Stand

Although we believe that this argument is not altogether unreasonable -- and that it is the best that can be made under the statute -- we believe that it is legally incorrect and has little chance of ultimate success. To defend this cancellation, we must argue either that reductions in income are "budget authority" or that the cancellation should be upheld even if the special message identified the wrong "budget authority" and the wrong "dollar amount." Neither approach is promising.

With respect to the first argument, the statute was plainly designed to apply to legislated spending (and "limited tax benefits"). To argue that it permits cancellation of a reduction in income gives every appearance of unjustifiably expanding the President's powers under the Act. The plain language of the Act

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appears to preclude treating reductions in governmental income as "budget authority," and Scoring Rule 3 does not, by its plain terms, support the broader construction of "budget authority" that OMB favors. Moreover, Section 642 is significantly different from the examples of cancelable provisions discussed in the legislative history of the Act.

It would also be problematic to rely on scoring rules developed under the Budget Enforcement Act to control interpretation of the Line Item Veto Act. The scoring rules are subject to frequent change and are interpreted differently by OMB and CBO; in this situation, one would not expect the Line Item Veto to be subject to such variations. Significantly, any argument relying on OMB's interpretation of the scoring rules will provoke a sharp response from Congress; the Senate Legal Counsel has informed us that he will file a brief against us if we pursue this argument.

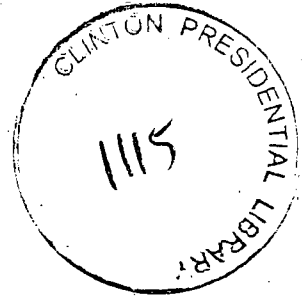
The second possible argument -- that Section 642 contains budget authority because it triggers additional government payments -- is flawed because such payments are not directly mentioned in your special message to Congress concerning the cancellation. There is no evidence to indicate that the findings required by the Line Item Veto Act were made with respect to those payments, and it is clear that the \$854 million identified in the message does not correlate with those payments.

Cancellation of Section 642 raises other, very thorny problems. For example, under the Act, cancellation of discretionary budget authority operates to "rescind" the funds allocated; it does not repeal the provision of law. This cancellation, however, does not purport to rescind any funds allocated; it effectively seeks to repeal the provision of law. Nevertheless, there is a strong argument that, even though the lost employee contributions were "canceled," OPM will still have to run the open season because some employees may want to switch programs.

Defense of This Lawsuit Will Jeopardize Our Defense of the
Constitutionality of the Line Item Veto Act

The single most important reason not to defend this cancellation is the impact that it is likely to have on a defense of the constitutionality of the Line Item Veto Act. As the Solicitor General explains in the enclosed memorandum to me, defense of this cancellation will jeopardize our constitutional arguments in several ways:

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- Our best chance to defend the constitutionality of the Act is by arguing that the President's cancellation authority is narrow and closely analogous to his historic discretion to decline to spend appropriated funds. This cancellation cannot be defended on that narrow basis, because it involves reductions in receipts.
- Our best chance to defend the constitutionality of the Act depends on the support of the Congress, who can argue to the Court that their power is not infringed by the Act. They will oppose the lawfulness of this cancellation.
- Defense of this cancellation will leave us susceptible to the argument that the President's cancellation authority is being exercised without consideration of all of the effects of the canceled provisions. This will undermine our central argument that the Act's requirements of formal presidential findings and a special message place meaningful constraints on the President's discretion.

Conclusion

In sum, we believe that the chances of winning this lawsuit are slim because the Line Item Veto Act should not be read to extend to cancellation of provisions such as Section 642. Moreover, the expansive reading that we will be forced to give the Act in defense of this cancellation will make the Solicitor General's efforts to defend the constitutionality of the Act dramatically more difficult, and could cost us critical votes in the Supreme Court. For these reasons, we strongly urge that the United States not defend the cancellation of Section 642, and instead submit to a consent judgment in the district court.

Sincerely,

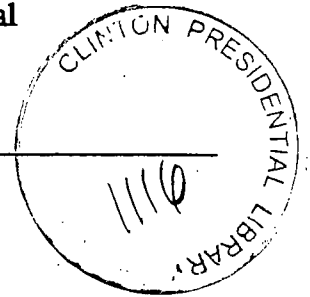
Janet Reno

Enclosure

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



The Solicitor General

Washington, D.C. 20530

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL *SAU*

Re: NTEU Line Item Veto Case

I understand that the Civil Division and OMB have concluded that a statutory defense in the NTEU line item veto case is at least theoretically possible. For the reasons that follow, however, I urge you and the President not to defend this cancellation -- even in the district court -- but, instead, to accept a consent judgment. I firmly believe that attempting to justify the NTEU cancellation as a proper exercise of the President's authority would seriously undermine our ability to defend the Line Item Veto Act against constitutional challenge.

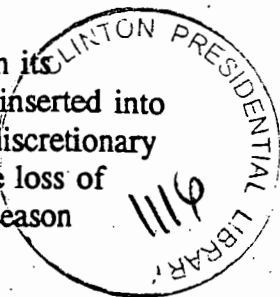
The Theory of Defense

This case involves the President's effort, pursuant to his authority under the Line Item Veto Act, to cancel a provision of law that would have established an "open season" during which certain federal employees could have switched their retirement coverage from CSRS to FERS. The President's special message stated that he was cancelling a "dollar amount of discretionary budget authority" totalling \$854 million. That amount represented the reduction in employee contributions to the retirement fund that was expected to occur during the five-year period following the cancellation if the option to switch from CSRS to FERS became available. The cancellation message itself did not make clear whether the President intended to cancel the entire open season provision or only the reduction in employee contributions. We know from OMB, however, that the intent was to prevent the open season from going forward.

To understand the theory of defense, it is necessary to understand something about "scoring rules" OMB uses to carry out its responsibilities under a different statute, the Budget Enforcement Act (BEA). Under that Act, OMB is required to provide an "estimate of the amount of discretionary new budget authority and outlays" contained in an

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appropriations law. 2 U.S.C. 901(a)(7).¹ OMB's established practice (based on its interpretation of "Scoring Rule 3") is that a substantive provision of law that is inserted into an appropriations law to reduce the government's income will be "scored" as "discretionary new budget authority."² Consistent with its general practice, OMB "scored" the loss of employee contributions that was expected to result from the CSRS/FERS open season provision as "discretionary new budget authority."



The Civil Division has prepared a draft brief that attempts to defend the cancellation at issue on two alternative theories. The draft argues, first, that because Congress was aware of OMB's scoring practices when it enacted the Line Item Veto Act, therefore since OMB "scored" the reduced employee contributions as "discretionary new budget authority" for BEA purposes, the reduced contributions should likewise be regarded as "discretionary budget authority" subject to cancellation under the Line Item Veto Act. Significantly, the draft brief does not argue that the reduced contributions satisfy the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i) -- a provision that expressly applies to the Line Item Veto Act. The draft brief does contend, however, as an alternative theory, that because certain outlays that would result from the open season provision do fall within the Section 622 definition, the cancellation may be upheld on that basis if the court concludes that the Section 622 definition of "budget authority" is controlling.

Reasons Not To Defend the CSRS/FERS Cancellation

The theory of defense reflected in the draft brief is extremely weak, even as a statutory matter. What is more, the defense rests upon an expansive interpretation of presidential power under the Line Item Veto Act that is inconsistent with the arguments we have made in favor of the Act's constitutionality. At this critical stage, establishing the constitutionality of the President's cancellation authority under the Line Item Veto Act is simply too important a goal to jeopardize with a dubious and immoderate assertion of statutory authority.

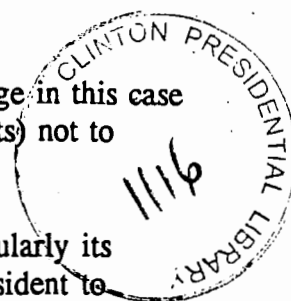
1. **Cancellation of the CSRS/FERS provision cannot credibly be analogized to any power the President has historically exercised.**

Opponents of the Line Item Veto Act have contended, inter alia, that it results in an unconstitutional delegation by Congress to the President of legislative power because the President's cancellation authority is broad and standardless. Our brief in Raines v. Byrd responded to that constitutional attack by arguing that the President's authority under the Act (at least as applied to spending items) is closely analogous to the discretion Executive Branch officials have historically possessed with respect to the decision whether or not to spend appropriated sums. Indeed, our brief essentially equated the cancellation of "discretionary

¹ Such estimates might ultimately trigger a "sequestration" under the BEA if discretionary spending caps for the fiscal year are exceeded.

² The Congressional Budget Office does not agree with that interpretation of Scoring Rule 3.

budget authority" -- the category invoked by the President's cancellation message in this case -- with decisions historically made by Presidents (in the nature of impoundments) not to spend money appropriated to an agency.



That analogy will be wholly undercut if we construe the Act (and particularly its provision for cancelling "discretionary budget authority") as permitting the President to invalidate an entire substantive provision of law simply by identifying some form of "budget authority" contained in or affected by the provision. The reduction in employee contributions to the retirement fund is only one of a number of substantive provisions of law that are triggered by the special open season Congress enacted, and it is only one of many financial consequences that follow from an employee's decision to switch from CSRS to FERS. The authority to cancel the open season provision therefore cannot plausibly be compared to any power the President has traditionally exercised to decline to spend the full amount of funds that Congress has appropriated to a particular agency, or for a particular purpose, for a fiscal year. Rather, our defense of the cancellation will (necessarily) blur the line between the refusal to spend appropriated funds and the invalidation of substantive provisions of law.³

2. Defending the CSRS/FERS cancellation will jeopardize our alliance with Congress in the constitutional defense.

In defending the Line Item Veto Act against the claim that the Act violates separation of powers principles by authorizing the President to "repeal" Acts of Congress, it will be very important to have the full support of the Senate and House as amici curiae, arguing that Congress does not regard the Act as an infringement on its constitutional prerogatives. If we defend the cancellation on the theory described above, the Senate Legal Counsel is expected to file an amicus brief arguing that the cancellation was improper. (Such an argument would be consistent with the Congressional Budget Office's longstanding view that reductions in governmental income resulting from provisions contained in appropriations laws should not be scored as "discretionary new budget authority.") Such a filing would impair the image of interbranch unity we need to project, and might lead the Supreme Court to conclude that if the Act is sustained, the judiciary will be required (in the course of ruling on challenges to individual cancellations) to resolve disputes between the political branches concerning arcane budgetary matters.

³ Cancellation of limited tax benefits is also concededly different from the authority that the President has historically possessed to decline to spend appropriated funds. The President's authority to cancel tax provisions, however, is subject to limitations of its own -- most obviously, the requirement that no more than 100 taxpayers be affected. The President's power to cancel limited tax benefits, moreover, is clear on the face of the Line Item Veto Act, while the contention that the President may cancel entire provisions of law based on relatively modest budget impacts has no apparent textual basis (and no apparent stopping point). Finally, invalidation of the President's authority to cancel limited tax benefits would (assuming that authority to be severable) leave the core of the Line Item Veto Act intact. The provisions governing discretionary budget authority, by contrast, have always been regarded as the most important and most defensible feature of the Act.

3. **Defending the CSRS/FERS cancellation is inconsistent with our prior representations that the President will exercise his authority narrowly and with care and circumspection.**

The President has tried, in a variety of ways, to convey the message that he regards the cancellation authority under the Line Item Veto Act as an especially important presidential prerogative, to be exercised with particular care and circumspection. It is quite important that we do all we can to persuade the Court that the Act is in fact being administered on that basis. The Supreme Court's decisions during the last Term suggest a particular aversion to anything that smacks of "symbolic legislation," and we should make every effort to prevent the Court from regarding the Line Item Veto Act in that light.

To defend the CSRS/FERS cancellation -- even in the district court -- would significantly undermine that effort. The draft brief does not contend that the reduction in employee contributions that the President's special message identified as the cancelled item falls within the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i). Instead, the draft brief argues (in essence) that established OMB scoring practices can be used to replace rather than to elucidate the statutory definition. OMB sincerely regards the various scoring rules (and its own construction of them) as substantial constraints on its own discretion. The contention that the President's cancellation authority extends beyond items covered by the statutory definition, however, is likely to strike the Supreme Court as an extraordinary assertion of executive power.

Similarly, to defend the cancellation on the alternative theory that the "open season" provision of the Treasury Appropriations Act triggers certain provisions of other laws that might fit the definition of "budget authority" in 2 U.S.C. 622(2) would require us to offer a rationale that is not set forth in the President's cancellation message -- suggesting that the President may rely on statutory provisions and financial consequences that are far afield from the appropriations provision that he purported to cancel. That alternative would undermine another important point we made in Raines v. Byrd in defense of the Act: that the President is subject to important procedural limitations on the exercise of his cancellation authority by the requirements that he (a) make specific determinations and (b) include particular information about the cancellation in his cancellation message, both of which are lacking here with respect to the suggested alternative rationale.

At worst, a defense of the cancellation along the lines set forth in the draft brief may suggest to the Court that the President's authority is being exercised cavalierly or carelessly. Even if the Court does not regard our position as wholly unreasonable, however, it will surely conclude that the President is intent on construing his own cancellation authority under the Line Item Veto Act in the broadest possible manner. That perception cannot help but lessen the Court's willingness to sustain the Act against constitutional challenge.

THE PRESIDENT'S CANCELLATION OF THE
DOLLAR AMOUNT OF DISCRETIONARY BUDGET
AUTHORITY IN THE CSRS/FERS PROVISION
WAS AUTHORIZED BY 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 Line Item Veto Act.¹ Under the Line Item Veto Act, the President is authorized to cancel "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," such as the CSRS/FERS provision. 2 U.S.C. 691e(7)(A)(i). As required by 2 U.S.C. 901(a)(7)(C), 902(d), OMB determined, on the basis of "scorekeeping guidelines" prescribed by Congress and mandated for use in this situation, that the CSRS/FERS provision contained discretionary budget authority, and it estimated that the amount of this authority was \$854 million

¹ NTEU added this claim as a new cause of action in its amended complaint (¶¶ 23-24), but did not cite any statutory basis for it. The Line Item Veto Act authorizes suits by affected individuals for declaratory and injunctive relief only upon the ground that the Act is unconstitutional. 2 U.S.C. 692(a)(1). However, NTEU has alleged that the effect of the challenged cancellation is prevent its CSRS employee members from switching to FERS during an "open season" conducted by OPM (Amended Complaint, ¶¶ 18, 22, 24), and it has named the United States as a defendant. Therefore, we have construed NTEU's amended complaint to state a cause of action under the Administrative Procedure Act, 5 U.S.C. 702, and to seek an injunction compelling the government to conduct the "open season," on the ground that the President's underlying cancellation is not authorized by the Line Item Veto Act. Under this construction, judicial review is limited strictly to the question of whether the President complied with the Act in exercising his cancellation authority.

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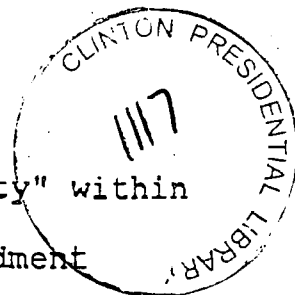
over the next five fiscal years, due to the anticipated reduction in contributions to the Civil Service Retirement and Disability Fund ["CSRDF"] by the CSRS employees who were authorized under the CSRS/FERS provision to switch to FERS.

The President relied upon OMB's determination and estimate in canceling the entire amount of discretionary budget authority in the CSRS/FERS provision, which he identified in his special message to Congress as \$854 million "due to reductions in employee contributions to the [CSRDF]."

Attachment A.

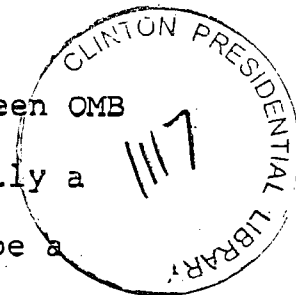
Because Congress left to the President the task of specifying the dollar amount of discretionary budget authority in the CSRS/FERS provision, the President properly relied upon OMB's determination and estimate, and it is entitled to judicial deference. Nationsbank of North Carolina v. Variable Annuity Life Ins., 115 S. Ct. 810, 813-814 (1995); Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Such deference is particularly warranted where, as here, the President was required to make this complex budgetary determination under a new statute within a five day period.

NTEU claims that, in his special message to Congress, the President identified the reduced employee contributions to the CSRDF as the discretionary budget authority he was canceling. NTEU contends that a reduction in receipts to



the government, such as a reduction in employee contributions to the CSRDF, is not "budget authority" within the meaning of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622(2)(A), to which the Line Item Veto Act was added by amendment. In contrast, NTEU says that an increase in agency contributions to the CSRDF is "budget authority" under 2 U.S.C. 622(2)(A), and it points out that the amount of that increase under the CSRS/FERS provision, as opposed to the amount of lost employee contributions, was deemed "budget authority" by the Congressional Budget Office ["CBO"] in its estimate of the costs of that provision. NTEU therefore argues that the reduced employee contributions were not subject to cancellation under the Line Item Veto Act.

However, as his special message clearly states, the President canceled \$854 million in discretionary budget authority contained in the CSRS/FERS provision "due to reductions in employee contributions" to the CSRDF (emphasis added). The President's cancellation, and the OMB estimate upon which the President relied, thus used the dollar amount of lost employee contributions to the CSRDF as a yardstick to measure the fiscal effects of the CSRS/FERS provision. One of those effects, which is expressly mentioned in the President's special message, is an increase in agency costs, which NTEU and CBO say are "budget authority" within the



meaning of 2 U.S.C. 622(2)(A). The difference between OMB and CBO over the lost employee contributions is really a difference over whether those contributions should be a yardstick for measure the dollar amount of discretionary budget authority in the CSRS/FERS provision, and that difference stems from their contrasting interpretations of the prescribed scorekeeping guidelines rather than a contrasting constructions of 2 U.S.C. 622(2)(A). Therefore, the President's cancellation was not inconsistent with 2 U.S.C. 622(2)(A).

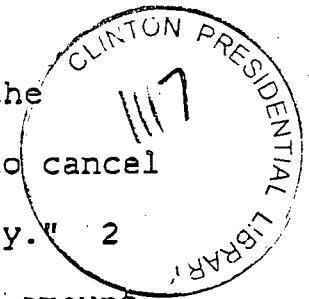
Moreover, the President's reliance upon OMB's estimate of the dollar amount of discretionary budget authority in the CSRS/FERS provision, rather than CBO's, reflects the statutory preference with OMB's estimate enjoys, and was essential to implementation of the important "lockbox" provisions of the Line Item Veto Act, 2 U.S.C. 691c(a)(1)(B), (b). Those provisions, which are designed to prevent the expenditure of canceled dollar amounts for other purposes, require that the dollar amount canceled be exactly the same as the dollar amount estimated by OMB.

The President Properly Relied Upon
OMB's Estimate of Budget Authority
Required to be Allocated by the CSRS/FERS
Provision in Making the Challenged Cancellation

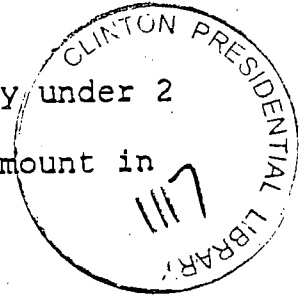
1. Discretionary Budget Authority. As we described in

the opening section of this brief, supra pp. , the President is authorized by the Line Item Veto Act to cancel "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). Accordingly, if a "dollar amount of budget authority" was "required to be allocated" by the CSRS/FERS provision, which was enacted in the Treasury and General Government Appropriations Act, 1998, the President was authorized to cancel the entire amount of it, even though a "specific dollar figure was not included" in that provision.

Although Congress defined a "dollar amount of discretionary budget authority" to include 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), it also required the President to specify, in every special cancellation message, "the dollar amount of discretionary budget authority" being canceled. 2 U.S.C. 691a(b)(1)(A). Necessarily, Congress expected the President to determine the missing "specific dollar figure" of budget



authority when exercising his cancellation authority under 2 U.S.C. 691e(7) (A) (i), and to identify that dollar amount in the special message.



Thus, in explaining the purpose of 2 U.S.C. 691e(7) (A) (i), the conferees on the Act said they "sought to provide the President the ability to rescind entire dollar amounts, even if not specified as a dollar amount in the law itself, so long as the dollar amount can be clearly identified and is in an indivisible whole with which Congress has previously agreed" (emphasis added). H. Conf. Rep. No. 104-491, 104th Cong. 2d Sess. 31 (1996). The conferees gave an example of the task of estimating budget authority that was given to the President under 2 U.S.C.

691e(7) (A) (i):

[I]f the appropriation law does not include a specific dollar amount, but does include a specific proviso that requires the allocation of a specific dollar amount, then the President may rescind the entire dollar amount that is required by the proviso. * * * [T]he conferees note that the General Construction Account in Public Law 104-46, the Energy and Water Development Appropriations Act, 1996, states:

'\$804,573,000 to remain available until expended, * * * for one-half of the costs of construction and rehabilitation of inland waterways projects, including rehabilitation costs for the Lock and Dam 25, Mississippi River, Illinois and Missouri * * *'

In this example, the President could cancel the entire \$804,573,000 or could cancel an amount equal to the entire dollar amount that would be required to fund the rehabilitation costs of the Lock and Dam 25 project, noting in his message all information as

required by [2 U.S.C. 691a].

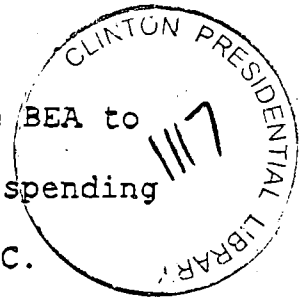
H. Conf. Rep. No. 104-491, supra, at 32. In the example, the President would have been required to determine "the entire dollar amount that would be required" to fund the Lock and Dam 25 project.



2. Estimating the Cost of Legislation. Congress dealt with the matter of estimating the cost of fiscal legislation when it enacted the Budget Enforcement Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-573 [the "BEA"], as an amendment to the Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. 900 et seq. Prior to enactment of the BEA, Congress attempted to control federal spending through "allocations" of discretionary spending to the congressional committees and subcommittees in the joint statement of managers accompanying the annual concurrent resolution on the budget. See H. Conf. Rep. No. 101-964, 101st Cong., 2d Sess. 1151 (1990). But the results were not completely satisfactory, and Congress determined to strengthen its effort to control federal spending by adding new estimating, reporting, and enforcement requirements under the BEA. Id.

The BEA divided all fiscal legislation into two categories: "discretionary appropriations" and "direct spending and receipts."² 2 U.S.C. 901, 902. The term

² "Budgetary resources" means "new budget authority, unobligated balances, direct spending authority, and



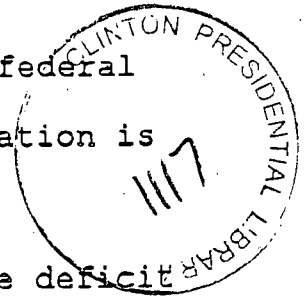
"discretionary appropriations" was defined in the BEA to mean "budgetary resources (except to fund direct-spending programs) provided in appropriation Acts. 2 U.S.C. 900(c)(7). "Direct spending" was defined to mean "(A) budget authority provided by law other than appropriation Acts; (B) entitlement authority; and (C) the food stamp program." 2 U.S.C. 900(c)(8). The BEA did not define the term "receipts."

The principal mechanism for controlling discretionary appropriations are the "discretionary spending limits," or "caps," established for each fiscal year. 2 U.S.C. 901. The caps are overall ceilings for aggregate discretionary "budget authority" and total expenditures under that budget authority ("outlays") in each fiscal year. 2 U.S.C. 665(a)(2)(1994); 2 U.S.C. 901(c). If Congress enacts legislation that results in budget authority or outlays exceeding the caps (that is, causing a "breach" in the caps), a "sequestration" is triggered which automatically reduces spending in discretionary programs by a uniform percentage to eliminate the breach. Id.

The principal mechanism for controlling direct spending and receipts legislation are the "pay-as-you-go" ["PAYGO"]

obligation limitations." 2 U.S.C. 900(c)(6). "Budget authority" is defined as having the same meaning as in the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622(2)(A). 2 U.S.C. 900(c)(1).

rules, under which the combined net effect on the federal deficit of all direct spending and receipts legislation is zero. 2 U.S.C. 902. Direct spending and receipts legislation whose combined net effect increases the deficit triggers a sequestration. Id.



To assist Congress in keeping track of the cost of legislation and avoiding the serious consequence of a sequestration, the BEA added estimating and reporting requirements. CBO is required to provide OMB, as soon as practicable after Congress completes action on any discretionary appropriation, "an estimate of the amount of discretionary new budget authority and outlays" in the legislation. 2 U.S.C. 901(a)(7)(A). Within seven days after enactment of discretionary appropriation legislation, OMB must transmit a report to Congress containing the CBO estimate and "an OMB estimate of the amount of discretionary new budget authority and outlays" in that legislation, together with "an explanation of any difference between the 2 estimates." 2 U.S.C. 901(a)(7)(B).³ As between these two estimates, "OMB shall use the OMB estimates transmitted to the Congress" for purposes of implementing the BEA. 2

³ As originally enacted in the BEA, OMB was required to transmit this report within five days after enactment of the legislation. 2 U.S.C. 901(a)(7)(1994). The period was extended to seven days by the Budget Enforcement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 698.

U.S.C. 901(a)(7)(C). CBO and OMB must make similar estimates with respect to direct spending and receipts legislation. 2 U.S.C. 902(d).

CBO and OMB must also prepare and submit to Congress, under a prescribed timetable, preview, updated, and final sequestration reports. 2 U.S.C. 904. These reports contain estimates of discretionary new budget authority and outlays for the current year and future years. If the final OMB sequestration report estimates that a sequestration is required, the President must implement it by issuing a sequestration order. 2 U.S.C. 904(g)(6).

Because of the difficulty in determining the cost of legislation, and because of the potential consequences (such as a sequestration), Congress has prescribed rules, called "scorekeeping guidelines," and mandated that CBO and OMB use them in making the estimates and reports required by 2 U.S.C. 901, 902, and 904. Thus, 2 U.S.C. 901(a)(7)(C) requires that, with respect to the estimates of "the amount of discretionary new budget authority and outlays" in discretionary appropriations legislation, "OMB and CBO shall prepare estimates * * * in conformance with scorekeeping guidelines determined after consultation among the House and Senate Committees on the Budget, CBO, and OMB" (emphasis added). There is a similar provision mandating the use of the prescribed scorekeeping guidelines with respect to the

estimates of direct spending and receipts. 2 U.S.C. 962(d).

In light of the significance of the scorekeeping guidelines, Congress published them in the conference report to the BEA. H. Conf. Rep. No. 101-964, supra, 1172-1176 (1990) (Attachment B). The conferees viewed them as a constraint upon the substantial power vested in OMB to estimate the cost of legislation. Id., at 1172. They were re-published in the conference report to the Budget Enforcement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 677, which, among other things, made minor amendments to the Line Item Veto Act (see 111 Stat. 696, 697). H. Conf. Rep. No. 105-217, 105th Cong., 1st Sess. 1007-1014 (1997). There the conferees emphasized that the purpose of the scorekeeping guidelines "is to ensure that the scorekeepers measure the effects of legislation on the deficit consistent with established scorekeeping conventions and with the specific requirements in those Acts regarding discretionary spending, direct spending, and receipts." Id., at 1007. Thus, when it enacted the Line Item Veto Act, Congress was well aware of the importance of the scorekeeping guidelines in estimating discretionary budget authority.

In fact, cancellations under the Line Item Veto Act are implemented through the OMB estimates and reports which OMB makes on the basis of the prescribed scorekeeping guidelines. Thus, under 2 U.S.C. 691c(a)(1)(A), OMB is

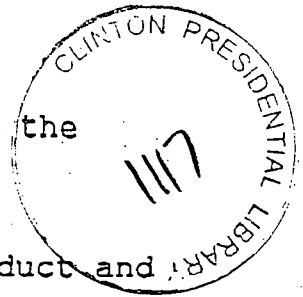
required to reduce the estimate it must make under 2 U.S.C. 901(a)(7) of the amount of discretionary new budget authority contained in a discretionary appropriation by the exact dollar amount of canceled discretionary budget authority.⁴ Furthermore, under 2 U.S.C. 691c(a)(1)(B), known as the "lockbox" provision, OMB is required to include a reduction to the caps for all applicable fiscal years by the exact dollar amount of the canceled discretionary budget authority.⁵ This ensures that the canceled amount will be devoted to deficit reduction. Ten days after the expiration of the time period for expedited congressional consideration of a disapproval bill, OMB makes the reduction to the caps effective by including it in the next sequestration report.

2 U.S.C. 691c(b).

3. The CSRS/FERS Provision. The CSRS/FERS provision authorized covered individuals, including members of Congress, to switch from CSRS to FERS. Such a switch has a

⁴ Similarly, OMB is required by 2 U.S.C. 691c(a)(2)(A) to estimate the deficit decrease caused by the cancellation of any item of new direct spending and limited tax benefit, and include that decrease in the estimate it is required to make under 2 U.S.C. 902(d).

⁵ The parallel "lockbox" provision for items of new direct spending and limited tax benefits is 2 U.S.C. 691c(a)(2)(B), which instructs OMB not to include any change in the deficit resulting from the cancellation of those items in the sequestration reports it makes under 2 U.S.C. 902(b), 904(d). Thus, that deficit decrease cannot be used as an offset against an increase in other direct spending.

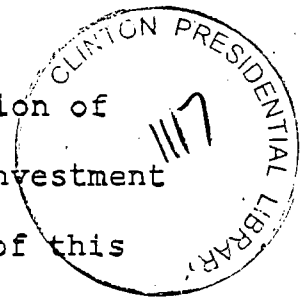


number of fiscal consequences, as can be seen from the following description of the two systems:

a. CSRS. Employing federal agencies deduct and withhold 7% of the basic pay of employees subject to CSRS, and contribute an equal amount from the annual appropriation available to pay the salaries of those employees. 5 U.S.C. 8334(a). These amounts are deposited in the Treasury to the credit of the CSRDF. Id. The CSRDF exists as a permanent appropriation within the Treasury, and is dedicated to the payment of retirement annuities and other benefits to covered individuals. 5 U.S.C. 8348(a). The assets of the CSRDF, from which all payments are disbursed, consist of the employee and employer contributions, donations, interest earnings, and other government payments designed to maintain the solvency of the CSRDF. 5 U.S.C. 8348(b), (c), (f), (g).

The retirement annuity for a typical CSRS employee, which is paid from the CSRDF, is computed by multiplying the employee's highest average basic pay during any three consecutive years of service [the "high three"] by different percentages for each year of service. The "high three" is multiplied by 1.5% per year of service for the first five years of service; 1.75% per year for the next five years of service; and 2% per year for each succeeding year of service. 5 U.S.C. 8339(a).

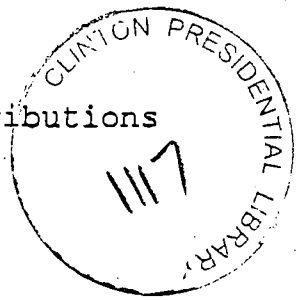
CSRS employees may contribute up to 5% of basic pay to



the Thrift Savings Fund, which is the federal version of private sector "401(k)" tax-deferred savings and investment plans. 5 U.S.C. 8351(b)(2). However, no portion of this contribution is matched by the employing agency. 5 U.S.C. 8351(b)(3). CSRS employees also are not covered by Social Security, and neither they nor their employing agencies pay Social Security taxes. 26 U.S.C. 3121(b)(5); 42 U.S.C. 410(a)(5).

b. FERS. Employing agencies deduct and withhold 0.8% of the basic pay of employees subject to FERS, and contribute 10.7% of the basic pay from the appropriation available to pay the salaries of these employees, and these amounts are deposited in the Treasury to the credit of the ~~CSRDF~~. 5 U.S.C. 8422(a); see 62 Fed. Reg. 19,153 (1997). FERS employees are covered by Social Security, and they and their employing agencies respectively pay Social Security taxes of 6.2% of basic pay to the Social Security trust fund. 26 U.S.C. 3121(b)(5)(H)(i); 42 U.S.C. 410(a)(5)((H)(i)).

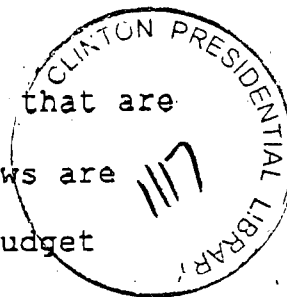
A FERS employee may contribute up to 10% of basic pay to the Thrift Savings Fund. 5 U.S.C. 8432(a). The employing agency must contribute 1% of the employee's basic pay to the Thrift Savings Fund, and also must match, up to an additional 4% of basic pay (for a maximum agency contribution of 5%) the employee's contributions to the



Thrift Savings Fund. 5 U.S.C. 8432(c). These contributions are paid from the appropriation available to pay the salaries of these employees. 5 U.S.C. 8432(e). The retirement annuity for a FERS employee, which is also paid from the CSRDF, is computed by multiplying the employee's "high three" by 1% per year for each year of service, except for employees who retire at age 62 or later with at least 20 years of service, for whom a factor of 1.1% is used. 5 U.S.C. 8415.

4. OMB's Estimate for the CSRS/FERS Provision. The enactment of the CSRS/FERS provision in the Treasury and General Government Appropriations Act, 1998, required CBO and OMB to estimate and report on the fiscal costs of that provision. OMB estimated the cost of the provision by applying the prescribed "scorekeeping guidelines," as required by 2 U.S.C. 901(a)(7)(C).

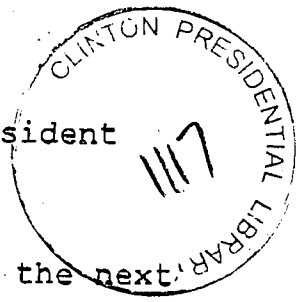
Under scoring rule 3 ("direct spending programs"), "[s]ubstantive changes to or restrictions on entitlement law or other mandatory spending law in appropriations bills will be scored against the Appropriations Committee section 302(b) allocations in the House and the Senate * * * ." Attachment B, at 1008. The "section 302(b) allocations" are the allocations of "budget authority" and "outlays" under section 302(b) of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 633(b). In other words,



changes to an entitlement or mandatory spending law that are made by a provision enacted in an appropriations laws are deemed by scoring rule 3 to be "discretionary new budget authority and outlays" under 2 U.S.C. 900.(c) (7). The purpose of scoring rule 3 is to ensure that the budget costs of "direct spending and receipts" legislation are addressed when they are included in an appropriations bill.

Applying scoring rule 3 to the CSRS/FERS provision (which made a substantive change to the law governing eligibility for the retirement programs, which are an entitlement), OMB proceeded under 2 U.S.C. 901(a) (7) (C) to prepare for Congress an "estimate of the amount of discretionary new budget authority and outlays." OMB ~~estimated~~ that, as authorized by the CSRS/FERS provision, 5% of eligible CSRS employees would switch to FERS, and this would result in a loss of \$854 million in employee contributions to the CSRDF over the next five fiscal years. Therefore, applying scoring rule 3, OMB estimated that the CSRS/FERS provision contained \$854 million in discretionary new budget authority, and it reported this estimate to Congress.⁶ Attachment B.

⁶ CBO also prepared an estimate of the costs of the CSRS/FERS provision, which was based on an interpretation of scoring rule 3 that differed from OMB's. According to CBO's interpretation, the CSRS/FERS provision contained both "discretionary appropriations" subject to the caps and "direct spending and receipts" subject to the PAYGO rules.

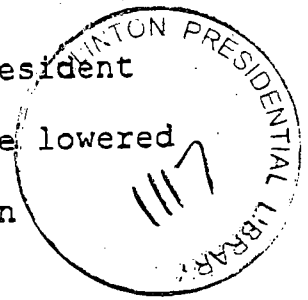


5. The Cancellation. OMB provided to the President its estimate that the CSRS/FERS provision contained discretionary budget authority of \$854 million over the next five fiscal years, to assist him in the exercise of his authority under the Line Item Veto Act. The President decided to cancel the entire \$854 million.

As required by 2 U.S.C. 691a(b), the President sent a special message to Congress specifying that the dollar amount of discretionary budget authority he was canceling was \$854 million over the next five fiscal years, "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund (CSRDF)." Attachment A. In the special message, the President explained that an estimated 5% of eligible CSRS employees would have switched to FERS under the CSRS/FERS provision, reducing their contributions to the CSRDF from 7% to 0.8% of basic pay, and that, among other things, this reduction "would require the employing agencies to absorb increased retirement costs, using funds that otherwise would be available for payroll and other agency needs." Attachment A.

Attachment E to NTEU Br. Based on the assumption that 1% of eligible CSRS employees would switch to FERS under the provision, CBO estimated that it contained \$660 million in discretionary budget authority over the next ten fiscal years subject to the caps, \$434 million in reduced direct spending subject over the next ten years subject to PAYGO, and \$312 million in reduced receipts over the next ten fiscal years subject to PAYGO. Id.

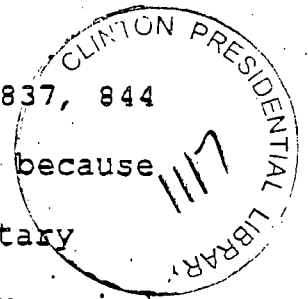
As required by 2 U.S.C. 691a(b)(1)(F), the President noted that the discretionary spending caps would be lowered for the applicable fiscal years by \$854 million, in accordance with the "lockbox" provisions, 2 U.S.C. 691c(a)(1)(B), (b). This reduction in the caps became effective when OMB published them in its next sequestration report, as provided by 2 U.S.C. 691c(b). Attachment C.



6. The Cancellation was Authorized. Given the absence of a specific dollar figure of budget authority in the CSRS/FERS provision, the President relied upon the expertise of his budgetary arm, OMB, to determine whether the CSRS/FERS provision contained discretionary budget authority and the amount (if any) of that authority. OMB, applying the scorekeeping guidelines prescribed by Congress and mandated for use in this situation, determined that the CSRS/FERS provision contained discretionary budget authority, and it "clearly identified" the amount of that authority, namely, \$854 million over the next five fiscal years due to the anticipated loss of employee contributions to the CSRDF. See H. Conf. Rep. No. 104-491, supra, at 31.

The President properly relied upon OMB's determination and estimate in filling the gap left by Congress. This reliance is entitled to substantial judicial deference. Nationsbank of North Carolina v. Variable Annuity Life Ins., 115 S. Ct. 810, 813-814 (1995); Chevron U.S.A. Inc. v.

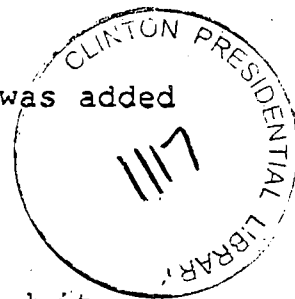
Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). Deference is particularly warranted here, because the President was required to make a complex budgetary determination under a new statute within a five day period.



Because the President properly determined that the CSRS/FERS provision required the allocation of \$854 million in budget authority, he was authorized to cancel it by 2 U.S.C. 691e(7) (A) (i). Accordingly, NTEU has failed to state a claim for relief against that cancellation.

B. The President's Reliance Upon OMB's Estimate of the Amount of Discretionary Budget Authority in the CSRS/FERS Provision was Not Inconsistent with 2 U.S.C. 622(2) (A) and Fulfilled the "Lockbox" Requirement of the Act

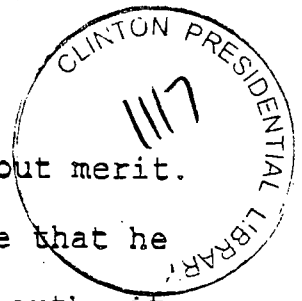
1. NTEU challenges the President's cancellation of \$854 million in discretionary budget authority contained in the CSRS/FERS provision, as determined by OMB. According to NTEU, the President specified that what he was canceling was reduced employee contributions to the CSRDF. Amended Complaint, ¶20. NTEU alleges and argues that "[e]mployee contributions are not, however, correctly viewed as involving a 'dollar amount of discretionary budget authority' within the meaning of the Act," because they are not "budget authority" within the meaning of the Congressional Budget and Impoundment Control Act of 1974, 2



U.S.C. 622(2)(A), to which the Line Item Veto Act was added by amendment. Id., ¶21; NTEU Br., pp. 14-15.

Even though it challenges the President's identification of "budget authority," NTEU freely admits that the CSRS/FERS provision did, in fact, contain "budget authority" within the meaning of 2 U.S.C. 622(2)(A), which it identifies as the increased agency contributions to the CSRDF that would have resulted from the switch of CSRS employees to FERS under the CSRS/FERS provision. NTEU Br., p. 18 n. 18. NTEU refers to these agency contributions as "offsetting receipts," which is "budget authority" under 2 U.S.C. 622(2)(A)(iv). Id. NTEU also cites CBO's estimate of the cost of the CSRS/FERS provision, which states that ~~the~~ provision contained \$660 million in budget authority over the next ten fiscal years due to increased agency contributions to the CSRDF and the Thrift Savings Fund. Attachment E to NTEU Br.

Notwithstanding its recognition that the CSRS/FERS provision contained "budget authority" within the meaning of 2 U.S.C. 622(2)(A), NTEU challenges the President's cancellation on the grounds that reduced receipts to the government, such as reduced employee contributions to the CSRDF, are not "budget authority" within the meaning of 2 U.S.C. 622(2)(A). NTEU Br., pp. 16-21. Therefore, NTEU contends that the President's cancellation was not valid.



Id.; Amended Complaint, ¶24.

2. NTEU's allegations and arguments are without merit.

The President clearly stated in his special message that he was canceling \$854 million in discretionary budget authority over the next five fiscal years contained in the CSRS/FERS provision "due to reductions in employee contributions" (emphasis added) to the CSRDF caused by that provision. The words "due to" demonstrate that the President's cancellation, and the OMB estimate upon which the President relied, were using the dollar amount of lost employee contributions to the CSRDF as a yardstick to measure the fiscal effects of the CSRS/FERS provision. One of those effects, which is expressly mentioned in the President's special message, is an increase in agency retirement costs, which NTEU and CBO say are "budget authority" within the meaning of 2 U.S.C. 622(2)(A).

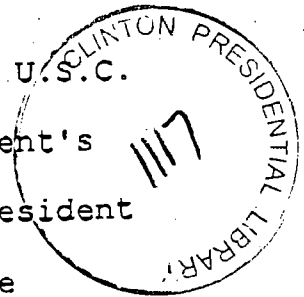
It was appropriate to use the lost employee contributions to the CSRDF as a yardstick, because the assets of the CSRDF, which consist of employee and government payments and their earnings, are required by law to be available for the payment of benefits. Any reduction in employee contributions to the CSRDF, unaccompanied by a commensurate reduction in the payment of benefits, requires a like increase in government payments and, if needed, earnings withdrawals.

CBO's estimate of the amount of discretionary budget authority in the CSRS/FERS provision was not measured by the amount of reduced employee contributions to the CSRDF, which CBO estimated at \$312 million over the next ten fiscal years. Attachment E to NTEU Br. The reason for that, however, is not because CBO construed 2 U.S.C. 622(2)(A) differently from OMB. Rather, it is because CBO interpreted scoring rule 3 differently from OMB. According to CBO's interpretation, that part of the CSRS/FERS provision which would have resulted in the loss of \$312 million in employee contributions to the CSRDF over the next five fiscal years was "direct spending and receipts" legislation, subject to the PAYGO rules, and not "discretionary appropriations" ~~subject~~ to the discretionary spending caps.

In accordance with 2 U.S.C. 901(a)(7)(C), which gives statutory preference to OMB's estimates of the dollar amount of discretionary budget authority over CBO's estimates, the President properly relied upon OMB's interpretation of scoring rule 3 and its estimate of discretionary budget authority, and not CBO's contrary interpretation and estimate. OMB's estimate was consistent with 2 U.S.C. 622(2)(A) because it took into account the increase in agency contributions to the CSRDF, which NTEU and CBO identify as "budget authority" under 2 U.S.C. 622(2)(A).

Therefore, it is indisputable that the President

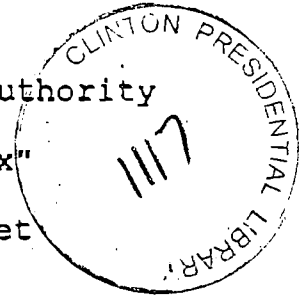
canceled "budget authority" within the meaning of 2 U.S.C. 622(2)(A). It is also indisputable that the President's cancellation reduced the federal deficit, as the President determined and as CBO concluded in its report on the cancellation. Attachment E to NTEU Br. NTEU's challenge to the President's cancellation must be rejected.



3. Furthermore, the President's reliance on OMB's estimate that the CSRS/FERS provision contained \$854 million in discretionary budget authority over the next five fiscal years, in place of CBO's estimate that the provision contained \$660 million in discretionary budget authority over the next ten fiscal years, was essential for implementation of the "lockbox" requirements of the Line Item Veto Act. The reasons are as follows:

Under the Line Item Veto Act, 2 U.S.C. 691c(a)(1), once the President canceled the dollar amount of discretionary budget authority in the CSRS/FERS provision, OMB was required to reduce the estimates it reported to Congress of the amount of discretionary new budget authority in the Treasury and General Government Appropriations Act, 1998, by the exact dollar amount of discretionary budget authority canceled by the President. Similarly, under 2 U.S.C. 691c(a)(1)(B), (b), OMB was required to reduce the discretionary spending caps for all applicable fiscal years

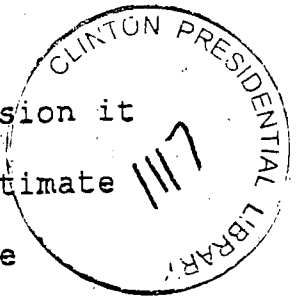
by the exact dollar amount of discretionary budget authority canceled by the President. Thus, under this "lockbox" provision, the amount of canceled discretionary budget authority must be exactly the same as the amount of estimated discretionary budget authority. If the amount placed in the "lockbox" were less than the estimated amount of discretionary budget authority, the remainder would not be devoted to deficit reduction, contrary to Congress' intent in enacting the Line Item Veto Act. In other words, the treatment of the CSRS/FERS provision under the BEA had to mirror its treatment under the Line Item Veto Act.



Here, OMB determined, in accordance with the prescribed scorekeeping guidelines and as required by 2 U.S.C.

--901(a)(7)(C), that the CSRS/FERS provision contained discretionary budget authority, and it estimated that the amount of that authority was \$854 million over the next five fiscal years. Under 2 U.S.C. 901(a)(7)(C), OMB's estimate of \$854 million over the next five fiscal years was required to be used for purposes of the BEA, rather than CBO's estimate of \$660 million over the next ten fiscal years. In other words, OMB's estimate was the only legally sanctioned estimate of the amount of discretionary budget authority in the CSRS/FERS provision, under 2 U.S.C. 901(a)(7)(C).⁷

⁷ The statutory preference for OMB's estimates is an outgrowth of the Supreme Court's decision in Bowsher v.



Consequently, to comply with the "lockbox" provision it was essential for the President to rely upon OMB's estimate of the amount of discretionary budget authority in the CSRS/FERS provision, namely \$854 million over the next five fiscal years, for cancellation purposes. Unless the amount the President canceled was exactly the same as the amount OMB estimated, the "lockbox" provision could not have been implemented as required by 2 U.S.C. 691c(a)(1)(B), (b).

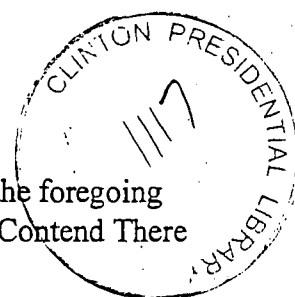
In sum, the President's reliance on OMB's indisputable determination that the CSRS/FERS provision contained discretionary budget authority, and his reliance on OMB's estimate of the amount of that authority, was essential to the implementation of the key "lockbox" provisions in the Line Item Veto Act and was consistent with 2 U.S.C.

622(2)(A). Accordingly, NTEU's challenge to the President's cancellation cannot stand.

Synar, 478 U.S. 714 (1986). In that case the Supreme Court struck provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, under which the sequestration process was triggered by a report to the President from the Comptroller General, who considered estimates prepared by CBO and OMB. The Supreme Court held that the Comptroller General is part of the Legislative Branch, and Congress constitutionally could not assign to the Comptroller General Executive Branch functions. 478 U.S. at 732-734. In the wake of this decision, Congress amended the Balanced Budget and Emergency Deficit Control Act of 1985 by having the sequestration process triggered by a report from the Director of OMB, after giving due regard to CBO's report. Pub. L. No. 100-119, 101 Stat. 754; H. Conf. Rep. No. 100-313, 100th Cong., 2d Sess. 746-747 (1987).

Certificate of Service

I hereby certify that on November 26, 1997, I arranged to have a copy of the foregoing Statement of Material Facts as to Which Snake River Potato Growers, Inc., et al. Contend There is No Genuine Issue by hand on the foregoing:



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COLLECTION:

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Counsel's Office
Steve Neuwirth
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FOLDER TITLE:

Line Item Veto

2007-0624-F

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- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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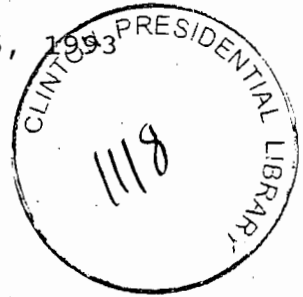
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

January 25, 1993



M E M O R A N D U M

TO: Bernard Nussbaum
FROM: Larry Simms
RE: Some Legal and Policy Implications for the President's
Seeking "Line-Item-Veto" Authority

Because the debate whether to seek additional statutory authority to cut unnecessary expenditures from appropriated funds will presumably take place within the senior staff in the relatively near future, I wanted you to have a copy of a memorandum that I prepared as a member of the Budget Policy Group during transition addressing some of the legal and policy implications of various proposals that were, at least at the time, under active consideration.

The most important reason for you to review the attached memorandum is that other legal analyses of these issues prepared during the campaign and then during Transition that actually went to the President are either incomplete, confusing or just plain wrong on the constitutional point. One of those analyses that went to Little Rock from Transition was a memorandum from the Budget Policy Group to which I declined to have my name affixed because it was thoroughly confused. I point that out because that memorandum may be the most recent attempt to treat this subject and therefore might be relied upon by the decisionmakers.

Of secondary importance is the view expressed in the attached memorandum (as well as the attached editorial from The New Republic) that the President should aggressively seek what is commonly referred to as "enhanced rescission authority"--the functional equivalent of a line-item veto. I personally hold this view very strongly; the President is going to be held responsible for the budget deficit, and I believe it would border on the irresponsible for his advisers not to lay out for him the full range of constitutional options that is available so that fully informed political judgment can be exercised.

LLS/dmc
Attachments

cc: Vince Foster (w/attchs.)
Steve Neuwirth (w/attchs.)

WL930250.004

COPY

December 9, 1992



M E M O R A N D U M

TO:

FROM:

RE: Political, Legal and Practical Aspects of Securing
Additional Presidential Authority To Control the Deficit
Through Impoundment of Appropriated Funds

This memorandum assumes that the Administration will seek, as part of an overall deficit reduction legislative package to be submitted to Congress during the first 100 days, some form of additional Executive authority to control the deficit by rescinding--refusing to spend--appropriated funds. The use of such authority would be primarily aimed at "pork" projects that the Administration has been unable to keep out of appropriations bills during the legislative process. It should be recognized, however, that there is no limiting legal definition of "pork" and that additional rescission authority could be applied to any appropriations unless other legal constraints prevented rescission (as with certain entitlement programs). This subject raises substantial political issues because the most useful and powerful addition to existing rescission authority involves a transfer of significant power from Congress to the Executive.

Under the present rescission authority contained in the Impoundment Control Act of 1974 (discussed more fully below), the Executive can rescind appropriated funds only if Congress passes

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legislation, signed into law by the President, specifically authorizing that rescission. The internal procedures by which the Senate and House consider such proposed legislation are designed to expedite Congress's consideration of that legislation and ensure a relatively quick vote on the legislation. There are two generic types of additional rescission authority that are on the table for discussion. One type, commonly referred to as "expedited" rescission authority, generally seeks to speed up the process by which Congress considers a proposed rescission bill and to guarantee, within limits, that there will be an up-or-down vote on every rescission bill proposed by the Executive.

The other type, commonly referred to as "enhanced" rescission authority, generally seeks to reverse the burden by making the Executive's decision to rescind funds final unless Congress affirmatively acts to override the Executive's otherwise final decision. Enhanced authority affects the balance of power between the Executive and Legislative Branches in two ways. First, if Congress does not act to block a rescission, that inaction leaves the Executive's decision in place. This negates the use of clever parliamentary tactics by opponents of a particular rescission. Second, and more importantly, action by Congress to block an Executive decision to rescind must, as discussed more fully below, come in the form of legislation subject to the President's veto power which can be overridden only by a two-thirds vote of the Senate and House.

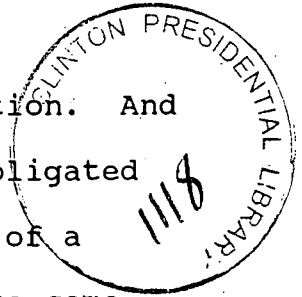
The contrast is stark. It defies common sense to believe that the same Congress that recently appropriated funds

would readily enact legislation to undo that appropriation. And because appropriated funds frequently start becoming obligated near the beginning of a fiscal year; Congress's repeal of a particular appropriation may, in many instances, have to come virtually on the heels of the appropriation itself if the appropriation is enacted towards the end of the preceding fiscal year. On the other hand, it may be assured, at least generally, that the President could always put together a one-third plus one coalition in either the House or Senate to sustain his expected veto of a bill designed to overturn a decision to rescind appropriated funds.

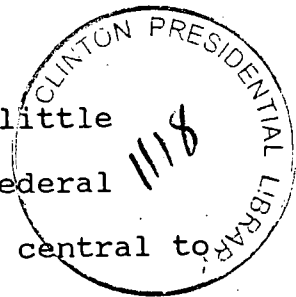
Some key members of Congress, including Chairman Robert Byrd, have very strongly held views antagonistic towards such a transfer of power. As a general rule, greater opposition to enhanced rescission authority can be expected to come from more senior Democrats in the Senate and House who forced the Impoundment Control Act of 1974 on a shattered Nixon Administration two weeks before President Nixon's resignation.

This subject also raises legal issues because several of the proposals recently or currently being suggested by well-meaning Members of Congress present substantial, disqualifying constitutional problems. These proposals generally try to find a middle ground to bridge the gap between "expedited" and "enhanced" rescission authority.

Finally, this subject raises practical issues because constitutional proposals that stand the best chance of passing Congress--expedited rescission--may provide only marginally



enhanced rescission authority that may prove to be of little utility in a serious effort to cut the pork from the federal budget and achieve the kind of deficit control that is central to the Administration's long-term economic plan.



I. Background

The Commitment

In Putting People First, as well as during the campaign, President-elect Clinton proposed some form of line-item veto as a means for cutting as much as \$9.8 billion in spending for "pork barrel" projects over the next four years. For purposes of this memorandum, the concepts of "line-item veto" and "rescission authority" are fungible and the latter term will be used because the former carries some extra baggage by engendering, in some of its forms, the need for amending the Constitution.

A rescission approach to deficit control differs substantially from a mandatory "balance-the-budget" approach to curbing the deficit (such as Gramm-Rudman or a constitutional "balance-the-budget" amendment). The latter focuses primarily on the budget process within Congress and essentially attempts to put front-end constraints on appropriations bills. It is, at least in theory, mandatory. The former focuses on the outcome of the appropriations process and provides a mechanism for the Executive to refuse to spend appropriations for programs deemed to be wasteful without any reference to the size of the budget deficit at any particular time. In short, a decision to rescind appropriated funds is discretionary.

The "balance-the-budget" approach to deficit control has been pushed very hard by Republicans in both Houses and might have succeeded in the last Congress but for extraordinary efforts by Speaker Foley, Chairman Byrd and other Democrats. It has been fairly characterized as sheer gimmickry and totally unworkable, but the Republican minority has indicated that it will attempt to attach a "balance-the budget" rider to the federal debt ceiling bill that will need to be passed and signed into law by the President in February or March 1993. The Republican minority clearly intends to press this issue and, by doing so, to create the impression that its not the Clinton Administration, is seriously committed to deficit control. The Republican minority cannot be allowed to seize the initiative on this issue.

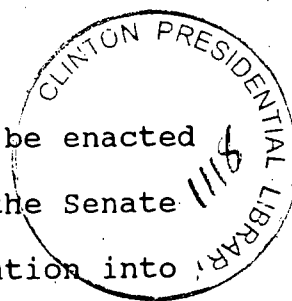
Existing Impoundment Authority

In the waning and fractious days of the Nixon Administration, Congress passed the Impoundment Control Act of 1974. The significant substantive feature of the 1974 Act was to place on the Executive Branch for the first time in our Nation's history a broad, mandatory requirement that all funds appropriated be expended. Relief from this unprecedented requirement could be had in two ways. First, if the Executive desired to defer the expenditure (or obligation) of appropriations to a later time within a fiscal year, a "deferral" message could be transmitted to the Senate and House. Either the Senate or House could then, by a simple resolution passed by a majority, "veto" that deferral within a set time frame. Second, if the Executive decided that appropriated funds should never be

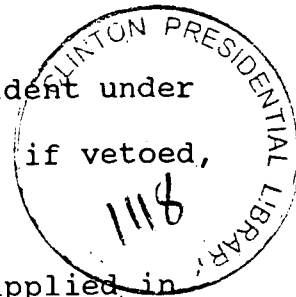
obligated, it could transmit to the Senate and House a "rescission message." Such rescission messages had to be enacted into positive law by passage of a Joint Resolution by the Senate and House and the President's signing that Joint Resolution into law. As with the deferral mechanism, the 1974 Act contained procedures designed to get rescission messages to votes on the floors of the Senate and House and to prevent their being bottled up in committees.

The 1974 Act remained essentially unchanged until its amendment in 1987 in response to the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). In Chadha, the Court held unconstitutional a provision in the Immigration and Nationality Act under which either the House or Senate, acting through passage of a simple one-House resolution, could disapprove--veto--a final decision of the Attorney General to suspend the deportation of otherwise deportable aliens.

In Chadha, the Court wrote broadly, effectively striking down as unconstitutional all varieties of "legislative veto" devices found at that time in more than two hundred federal statutes. Those devices ranged from statutes authorizing veto by a simple committee vote (or even a subcommittee chair) to two-House veto devices. The bright-line principle for which Chadha stands is that if the Executive has either inherent constitutional power or statutory power (or a combination of the two) to take a certain action in execution of the law, Congress cannot override the Executive's decision to take that action



other than by passage of a bill submitted to the President under the Presentation Clauses for his approval or veto and, if vetoed, repassed by a two-thirds vote of each House.



The constitutional principle announced and applied in Chadha was subsequently applied to invalidate the one-House veto provision pursuant to which the 1974 Act (prior to its amendment in 1987), provided for a one-House veto of the President's exercise of so-called "policy" deferral authority conferred by that Act--the power defer the expenditure of appropriated funds for a period not to exceed the end of the pertinent fiscal year. City of New Haven v. United States, 809 F.2d 900 (D.C. Cir. 1987).

In 1987, Congress finally responded to Chadha by stripping the Executive of its power to engage in so-called "policy" deferrals (deferrals based on the Executive's dislike for a particular program expenditure), thereby eliminating the need for an unconstitutional legislative veto device. The rescission procedure went untouched because it complied fully with Chadha. The absence of "policy" deferral authority has apparently not been viewed as a problem and will not be considered herein.

Current Proposals

Although a number of proposals to provide either "enhanced" or "expedited" rescission authority have been discussed over the past few years, two examples will illustrate the basic options available to the Administration in negotiating with Congress on this issue. Speaker Foley has suggested that

the 1974 Act be amended to provide "enhanced" rescission authority to the Executive. Under the Speaker's proposal, the President could rescind appropriated funds subject to a "veto" or override of any Presidential rescission decision by a simple majority vote of both Houses. That majority vote in each House would apparently be on a concurrent resolution that would not be subject to the President's veto power under Article I, § 7 of the Constitution. The exercise of such a two-House "veto" would be flatly unconstitutional under Chadha. Speaker Foley's proposal would enhance existing rescission authority by requiring Congress to act, but it is designed to ameliorate the transfer of power to the Executive by negating the President's veto power.

Representative Carper offered and the House passed on October 2, 1992 a substitute for H.R. 2164 which would have provided rescission authority to the Executive by strengthening the procedures by which the Joint Resolution mechanism in the 1974 Act attempts to guarantee an early vote in the Senate and House on a rescission bill. As passed by the House, however, the Carper bill contains a provision effectively allowing continued rescission by the Executive until either the Senate or House defeats, on a floor vote, a specific rescission bill. By attempting to give legal force to the vote of a single House, the Carper bill as passed also violates Chadha.

City of New Haven is important to keep in mind at this point not merely for the result it reaches but because it illustrates how quickly a successful constitutional challenge could be mounted in the federal district court in the District of

Columbia to a statute such as that proposed by Speaker Foley or the substitute for H.R. 2194 offered by Representative Carper. Under Judge Edward's analysis, any person affected adversely by the Executive's decision to rescind an appropriation would be entitled to an immediate declaratory judgment prohibiting the rescission (assuming, as we do, that the rescission power attached to the two-House veto were held to be inseverable from that veto device). We raise this point lest anyone believe that a consensual arrangement with Congress putting an unconstitutional legislative veto device into place could achieve the stated policy objective, which is to provide enhanced authority to the Executive to control the deficit through lawful impoundment of appropriate funds.

There are, however, some constitutional alternatives to the current version of the 1974 Act that should be considered from a policy perspective as possible counteroffers.

II. Constitutional Alternatives to Speaker Foley's Proposal

A. Enhanced Rescission Authority

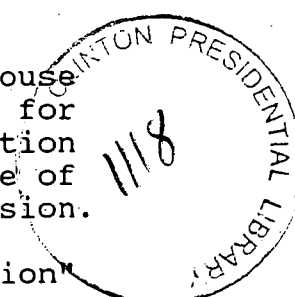
If Speaker Foley's proposal were to be modified in order to his avoid the constitutional flaw, the Executive would receive an extremely powerful tool. That modification would involve requiring that Congress disapprove a rescission decision by a Joint, rather than Concurrent, Resolution to be submitted to the President pursuant to the Presentation Clauses and therefore to be subject to his veto and the two-thirds override requirement. That adjustment, however, requires the very cession of congressional authority that Speaker Foley has indicated he is

extremely reluctant to see Congress cede--effectively requiring Congress to act by a two-thirds majority of each House to override the Executive's decision to rescind appropriated funds. Such a congressional check would, at least in theory and certainly in Speaker Foley's mind, be minimal if we assume a President willing to exercise his veto power on a regular basis in this context. It should be noted in this regard that such a provision would not set up a "government-by-veto" situation that the Administration would want to avoid. This is so because in enacting such a bill, all sides would assume that the President would back up rescission decisions with his veto power.

There are, however, ways to make such a procedure more palatable to Congress:

- (1) Include, as have several proposals already considered by Congress, a "sunset" provision with the Joint Resolution "veto" procedure, perhaps two years in length; during that period, the President's actual use, if any, of his veto power could be assessed by Congress in determining whether to renew the joint resolution procedure.
- (2) Convert Speaker Foley's procedure into one utilizing a "sense of the Congress" resolution having no legally binding force on the President; this procedure could also provide for the President to transmit to each House a written explanation for his decision not to follow the "advice" embodied in particular resolutions that the President determined not to honor. Like the Joint Resolution procedure, this arrangement could be put under a sunset provision.

- (3) Same as (2) above, but provide for one-House resolutions of disapproval as sufficient for the President to issue a written explanation if he determined not to follow the advice of one Houses regarding a particular rescission.



(Not included in these alternatives is a "joint resolution" procedure under which the President would agree, formally or informally, not to exercise his veto power except under certain specified circumstances. The President cannot legally bind himself not to use his veto power in the future in any particular circumstance, and the appearance of his doing so, even "informally," could cause considerable damage to the Presidency.)

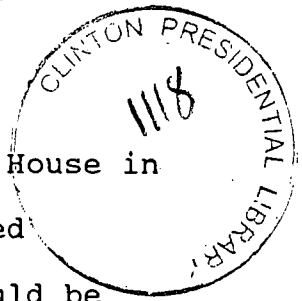
Of these three alternatives, the first seems less desirable because it creates the potential for the President's having to use his veto power, perhaps more often than any of us would hope, in order to constrain a possibly undisciplined Congress. The second and third alternatives blunt the sharpness of the confrontation between the Executive and Congress that any veto, even if preordained, creates. (The media will jump on a veto; they will pay much less attention to the President's rejection of "advice" communicated by Congress or one House thereof in a "sense of the Congress" resolution.) The second alternative might produce less "confrontation" than the third because one-House resolutions expressing disagreement would be more likely to be passed than two-House resolutions. At the same time, the confrontation under the third alternative would be less intense where one House defeated the "disapproval" resolution.

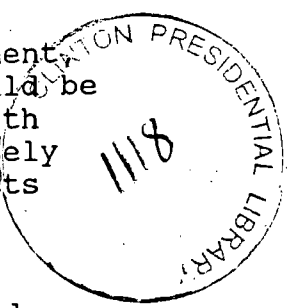
B. Expedited Rescission Authority

The substitute for H.R. 2194 that passed the House in October 1992 could easily serve as a model for expedited rescission authority. The unconstitutional feature could be cured by requiring funds proposed for rescission to be released by OMB unless both Houses have passed and the President has signed into law a rescission bill within a specified number of days following submission of a rescission message.

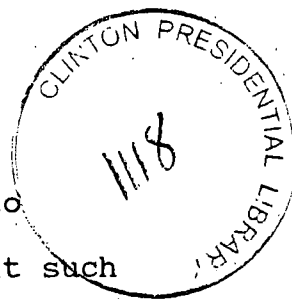
III. Recommendations

A high-level approach to Chairman Byrd also should be made. The constitutional difficulty with Speaker Foley's proposal should be surfaced with the Speaker before that proposal gains additional momentum. Putting one or more alternative enhanced rescission proposals forward at the same time might well be desirable to avoid a break in the dialog over this important issue. The following points should guide negotiations:



- 
- (1) This matter should, at least for the moment, not be discussed with the media but should be addressed in very private discussions with appropriate Members of Congress. Precisely which Members and the sequence of contacts should be decided separately by those involved with congressional relations.
 - (2) Only general principles need be discussed. Working out the details of any proposal can easily be done at the staff level once a basic approach is agreed to.
 - (3) In negotiations with the Democratic side, emphasis should be put on: (1) the need, in the face of likely Republican tactics, to enact truly powerful rescission authority to counter demands for a constitutional "balance-the-budget" amendment or other less workable alternatives to enhanced rescission authority; (2) the fact that the current system under the 1974 Act was an attack by a justifiably furious Congress on a lawless Presidency that should not be allowed to dictate the relationship between the Clinton Administration and Congress in an era where deficit reduction has become critical to long-term growth of the economy; and (3) the acceptance of a sunset provision.
 - (4) In negotiations with the Republican side, points (2) and (3) above should be made, along with an appeal for bipartisanship on this fundamental issue. Any linkage between Republican support for enhanced rescission authority and the Republicans' "balance-the-budget" approach should, however, be avoided. At most, the Administration's negotiators should agree to consider other alternatives if enhanced rescission authority is enacted but, at the end of the sunset period it has not, in combination with other existing tools, succeeded in meet the Administration's deficit-reduction goals.

We would add that many current Members of Congress who served in Congress prior to 1983 when Chadha was decided believed, in good faith, that legislative veto devices are the quintessential vehicle for achieving cooperation between the two political Branches. It may therefore be wise for the President-

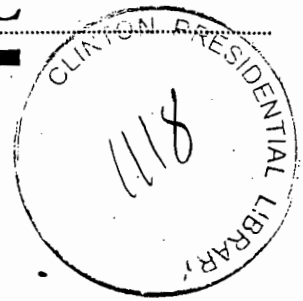


elect and his top advisers to be made aware of this constitutional limitation on the Executive's authority to "cooperate" with Congress, because it is predictable that such devices will be put on the bargaining table in other contexts by other well-intentioned Members of Congress seeking accommodation with the Administration.

LLS/dmc

WL923440.005

DECEMBER 14, 1992



BILL'S BLUE PENCIL

For the first time in twelve years we have an undivided government, and with it the opportunity to put to an end the legislative cold war that has crippled the country. As Bill Clinton has discovered in the weeks since the election, however, there are limits to the cooperation he can expect even from a politically sympathetic Congress. Already he has been put upon by Democratic leaders to relax or retreat from several of his campaign pledges, chief among which is Clinton's request for a line-item veto. Senator Robert Byrd is unalterably opposed, and majority leader George Mitchell will only say the subject is "appropriate to discuss." And though Clinton and House Speaker Thomas Foley have tentatively proposed a compromise version of the line-item veto, a recent congressional letter in support of the measure garnered just two Democratic signatures.

Clinton should resist the opposition and stick to his original promise. His new Democratic agenda depends entirely for its public support on the notion that it can keep effective government within reasonable limits. An enhanced veto power as Clinton and forty-two other governors currently enjoy would enable him to gut bits of frivolous legislation from vast spending bills while abolishing the offensive congressional practice of "vote swapping" for pet programs. Clinton, in short, would have the power to hold Congress accountable for the work it does; and government for the waste it generates.

That same power would, of course, hold Clinton to stricter standards of accountability as well. As Michael Kinsley suggested in these pages three years ago (see "Let Him Have It," *TRB*, November 20, 1989), the line-item veto would rid the presidency of one of its cynical inclinations: blaming Congress. Clinton will find that since more than half of the federal budget is consumed by entitlement programs and debt payments, "lining out" pork alone won't significantly restrain spending. Real deficit reduction will require cutting meat, not fat. But unlike Reagan and Bush, should a veto-armed Clinton fail to make those cuts, he won't be able speciously to finger a spendthrift Congress. Nor could he argue, as his predecessors have, that Congress "forced" him to pass legislation he opposed

by embedding it in legislation he favored.

Foley calls his proposed compromise an "enhanced rescission." Under the current system, the president recommends specific cuts in spending bills, and Congress, which isn't required to act on them, usually ignores the suggestions. Under Foley's proposal, the president's rescissions would have the force of law unless Congress overrode them by a simple majority vote. But there is a problem with Foley's proposal: it is unconstitutional under the Supreme Court's 1983 decision in *INS v. Chadha*. The Supreme Court ruled that legislation must be passed by both houses and presented to the president, whose vetoes can be overridden only by a two-thirds vote of both houses. It is unsettling that Foley and former law professor Clinton are so cavalier about basic constitutional requirements.

There is a way to enact a line-item veto without amending the Constitution. Congress can choose among several versions that would satisfy the Supreme Court. The best solution is, unfortunately, also the most cumbersome: Congress could simply resist passing the omnibus spending bills that have robbed the president of his deliberative powers. In the mid-'70s Congress began the now standard practice of sending the president one enormous spending resolution each year instead of several small ones, forcing the president to vote up or down on hundreds of disparate pieces of legislation at once. Instead, Congress could vote on all appropriations, item by item, and present each to the president as a separate bill. Alternatively, Congress could change the definition of a bill by changing the rules of both houses to declare that 200 appropriations bills will be put to a single vote, but that each will be presented separately to the president for his signature or veto. Probably the most durable solution, however, would be to amend the U.S. Code's "Dictionary Act" so that any individual appropriation contained within a bill would be treated as a separate bill. That should be strict enough to satisfy even Justice Scalia—and, with some coaxing from a Democratic president, perhaps Foley and Mitchell as well. •



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Erskine Bowles from Charles Ruff, William Marshall, Lisa Hertzner. Subject: Line Item Veto Negotiation. (3 pages)	11/03/1997	P5 1119
002. letter	From Janet Reno to the President: Subject: Use of Line Item Veto. (5 pages)	12/16/1997	P5 1120
003. memo	For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages)	12/15/1997	P5 1121

COLLECTION:

Clinton Presidential Records
Counsel's Office
Charles Ruff
OA/Box Number: 13213

FOLDER TITLE:

Line Item Veto

Van Zbinden
2007-0624-F
vz1221

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]

- 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]

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

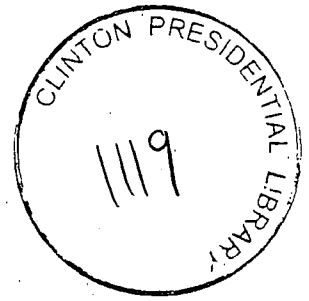
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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THE WHITE HOUSE
WASHINGTON

November 3, 1997



MEMORANDUM FOR ERSKINE BOWLES

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

SUBJECT: LINE ITEM VETO LITIGATION

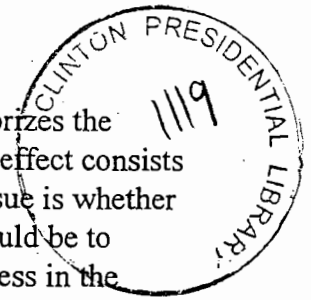
On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory 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

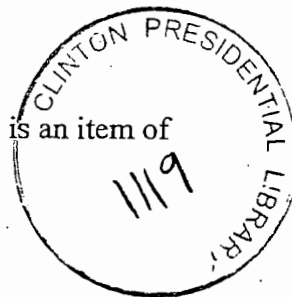
DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact 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.¹ 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

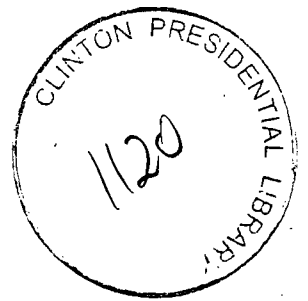
Seth Waxman feels strongly that our already delicate position on the line item veto will be weakened by having to defend the broader interpretation of the Act necessary to encompass the Section 642 cancellation. We are sensitive to the concerns of the Solicitor General as our expert on Supreme Court 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.



Office of the Attorney General
Washington, D.C. 20530

December 16, 1997



The President
The White House
Washington, DC 20500

Dear Mr. President:

This letter outlines the issues related to the defense of your exercise of the Line Item Veto Act to cancel the budget authority contained in Section 642 of the Treasury and General Government Appropriations Act of 1998, enacted October 10, 1997. The Department of Justice believes that defense of this cancellation would be a mistake for several reasons, including the following:

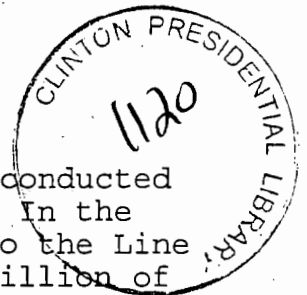
- The Solicitor General has advised me that defense of this cancellation would severely undermine our constitutional defense of the Act.
- The defense of this cancellation will require us to advance an extremely broad interpretation of the Line Item Veto Act, which finds very little support in the statutory text.
- Defense of this cancellation will undermine the inter-branch unity we have enjoyed with the Congress on issues concerning the Act because the Senate will file a brief against us.

We have had extensive consultations with the Office of Management and Budget ("OMB") concerning this cancellation. As a result of those discussions, we have formulated an argument that comports with OMB's theory. If directed, we will defend the cancellation on this basis in the district court. We believe, however, that such a defense is not legally correct, and is not in the best interests of the Executive Branch, and thus we believe that the United States should accept a consent judgment that the cancellation was invalid.

Overview of the Case

Section 642 allows individuals subject to the Civil Service Retirement System ("CSRS") to switch to the Federal Employee

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Retirement System ("FERS") during an open season to be conducted by the Office of Personnel Management ("OPM") in 1998. In the cancellation message transmitted to Congress pursuant to the Line Item Veto Act, you specified you were cancelling \$854 million of "discretionary budget authority" contained in that provision "due to reductions in employee contributions to the Civil Service Retirement and Disability Fund" over the next five years. The message also explained that you had made the findings required by the Line Item Veto Act. The report attached to the special message explained how the \$854 million in reduced employee contributions was calculated.

The National Treasury Employees Union ("NTEU") and two of its members have challenged the cancellation. National Treasury Employees Union v. United States, Civ. Act. No. 1:97CV02399 (D.D.C.). They claim that reduced employee contributions are not "discretionary budget authority" under the Line Item Veto Act, or, in the alternative, that the Line Item Veto Act is unconstitutional.

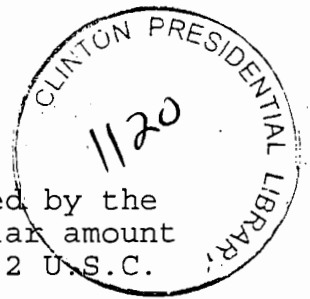
Overview of the Line Item Veto Act

The Line Item Veto Act authorizes the President to "cancel," as prescribed by the Act, "any dollar amount of discretionary budget authority," "any item of new direct spending," or "any limited tax benefit." 2 U.S.C. § 691(a). Each of those terms has a distinct meaning. The term "dollar amount of discretionary budget authority" is defined, among other things, to include "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).

In making a cancellation under the Act, the President must make express findings that the cancellation will reduce the federal deficit, not impair any essential government functions, and not harm the national interest. The President must, within five days of signing the law, transmit a "special message" to Congress that specifies, among other things, the "dollar amount of discretionary budget authority, . . . which has been canceled," the "account, department, or establishment of the Government for which such budget authority was to have been available for obligation and the specific project or governmental functions involved," and adjustments to be made to the federal government's discretionary spending limits. 2 U.S.C. § 691a.

Cancellation of a dollar amount of discretionary budget authority acts to "rescind" that authority. 2 U.S.C.

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§ 691e(4)(A). Pursuant to the Act, the caps established by the Budget Enforcement Act are reduced by the canceled dollar amount so that the funds may not be spent on other projects. 2 U.S.C. § 691c(a)(1)(B).

Defending the Cancellation

If so directed, we propose to defend the cancellation on two grounds. First, applying OMB's interpretation of the scoring rules that Congress has adopted for purposes of the Budget Enforcement Act, we will argue that reductions in governmental receipts, such as the lost employee contributions to the retirement fund in this case, are "discretionary budget authority" within the meaning of the Line Item Veto Act if the reductions are the result of substantive provisions of law inserted into an appropriations law. We will argue that OMB's interpretation of the Act is entitled to deference, and that OMB properly followed the scoring rules.

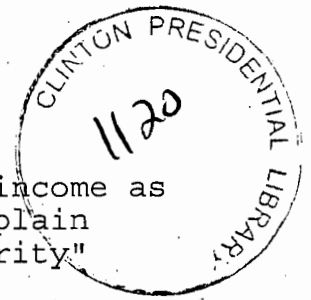
Second, we will argue that, irrespective of what the cancellation did or what OMB did, Section 642 does contain budget authority because employees who switch retirement programs trigger a series of government outlays, including permanent appropriations to cover the fund's unfunded liability and additional agency contributions to the CSRS/FERS fund. Moreover, both NTEU and the Congressional Budget Office ("CBO") have admitted that there is budget authority triggered by Section 642. Although CBO's estimate of the financial impact of the cancellation is different from the figure given in your cancellation message to Congress, we will argue that this discrepancy does not invalidate the cancellation.

Reasons Why This Cancellation Is Unlikely to Stand

Although we believe that this argument is not altogether unreasonable -- and that it is the best that can be made under the statute -- we believe that it is legally incorrect and has little chance of ultimate success. To defend this cancellation, we must argue either that reductions in income are "budget authority" or that the cancellation should be upheld even if the special message identified the wrong "budget authority" and the wrong "dollar amount." Neither approach is promising.

With respect to the first argument, the statute was plainly designed to apply to legislated spending (and "limited tax benefits"). To argue that it permits cancellation of a reduction in income gives every appearance of unjustifiably expanding the President's powers under the Act. The plain language of the Act

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appears to preclude treating reductions in governmental income as "budget authority," and Scoring Rule 3 does not, by its plain terms, support the broader construction of "budget authority" that OMB favors. Moreover, Section 642 is significantly different from the examples of cancelable provisions discussed in the legislative history of the Act.

It would also be problematic to rely on scoring rules developed under the Budget Enforcement Act to control interpretation of the Line Item Veto Act. The scoring rules are subject to frequent change and are interpreted differently by OMB and CBO; in this situation, one would not expect the Line Item Veto to be subject to such variations. Significantly, any argument relying on OMB's interpretation of the scoring rules will provoke a sharp response from Congress; the Senate Legal Counsel has informed us that he will file a brief against us if we pursue this argument.

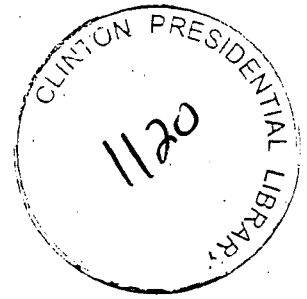
The second possible argument -- that Section 642 contains budget authority because it triggers additional government payments -- is flawed because such payments are not directly mentioned in your special message to Congress concerning the cancellation. There is no evidence to indicate that the findings required by the Line Item Veto Act were made with respect to those payments, and it is clear that the \$854 million identified in the message does not correlate with those payments.

Cancellation of Section 642 raises other, very thorny problems. For example, under the Act, cancellation of discretionary budget authority operates to "rescind" the funds allocated; it does not repeal the provision of law. This cancellation, however, does not purport to rescind any funds allocated; it effectively seeks to repeal the provision of law. Nevertheless, there is a strong argument that, even though the lost employee contributions were "canceled," OPM will still have to run the open season because some employees may want to switch programs.

Defense of This Lawsuit Will Jeopardize Our Defense of the
Constitutionality of the Line Item Veto Act

The single most important reason not to defend this cancellation is the impact that it is likely to have on a defense of the constitutionality of the Line Item Veto Act. As the Solicitor General explains in the enclosed memorandum to me, defense of this cancellation will jeopardize our constitutional arguments in several ways:

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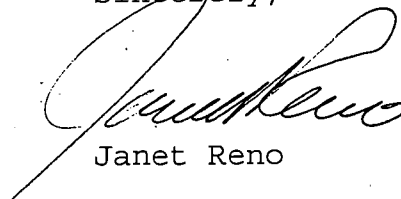


- Our best chance to defend the constitutionality of the Act is by arguing that the President's cancellation authority is narrow and closely analogous to his historic discretion to decline to spend appropriated funds. This cancellation cannot be defended on that narrow basis, because it involves reductions in receipts.
- Our best chance to defend the constitutionality of the Act depends on the support of the Congress, who can argue to the Court that their power is not infringed by the Act. They will oppose the lawfulness of this cancellation.
- Defense of this cancellation will leave us susceptible to the argument that the President's cancellation authority is being exercised without consideration of all of the effects of the canceled provisions. This will undermine our central argument that the Act's requirements of formal presidential findings and a special message place meaningful constraints on the President's discretion.

Conclusion

In sum, we believe that the chances of winning this lawsuit are slim because the Line Item Veto Act should not be read to extend to cancellation of provisions such as Section 642. Moreover, the expansive reading that we will be forced to give the Act in defense of this cancellation will make the Solicitor General's efforts to defend the constitutionality of the Act dramatically more difficult, and could cost us critical votes in the Supreme Court. For these reasons, we strongly urge that the United States not defend the cancellation of Section 642, and instead submit to a consent judgment in the district court.

Sincerely,



Janet Reno

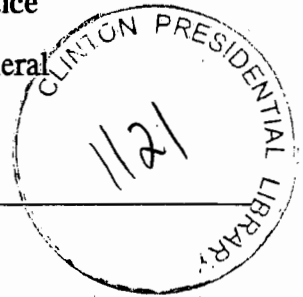
Enclosure

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U. S. Department of Justice

Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL *SPW*

Re: NTEU Line Item Veto Case

I understand that the Civil Division and OMB have concluded that a statutory defense in the NTEU line item veto case is at least theoretically possible. For the reasons that follow, however, I urge you and the President not to defend this cancellation -- even in the district court -- but, instead, to accept a consent judgment. I firmly believe that attempting to justify the NTEU cancellation as a proper exercise of the President's authority would seriously undermine our ability to defend the Line Item Veto Act against constitutional challenge.

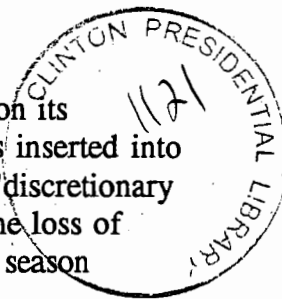
The Theory of Defense

This case involves the President's effort, pursuant to his authority under the Line Item Veto Act, to cancel a provision of law that would have established an "open season" during which certain federal employees could have switched their retirement coverage from CSRS to FERS. The President's special message stated that he was cancelling a "dollar amount of discretionary budget authority" totalling \$854 million. That amount represented the reduction in employee contributions to the retirement fund that was expected to occur during the five-year period following the cancellation if the option to switch from CSRS to FERS became available. The cancellation message itself did not make clear whether the President intended to cancel the entire open season provision or only the reduction in employee contributions. We know from OMB, however, that the intent was to prevent the open season from going forward.

To understand the theory of defense, it is necessary to understand something about "scoring rules" OMB uses to carry out its responsibilities under a different statute, the Budget Enforcement Act (BEA). Under that Act, OMB is required to provide an "estimate of the amount of discretionary new budget authority and outlays" contained in an

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appropriations law. 2 U.S.C. 901(a)(7).¹ OMB's established practice (based on its interpretation of "Scoring Rule 3") is that a substantive provision of law that is inserted into an appropriations law to reduce the government's income will be "scored" as "discretionary new budget authority."² Consistent with its general practice, OMB "scored" the loss of employee contributions that was expected to result from the CSRS/FERS open season provision as "discretionary new budget authority."



The Civil Division has prepared a draft brief that attempts to defend the cancellation at issue on two alternative theories. The draft argues, first, that because Congress was aware of OMB's scoring practices when it enacted the Line Item Veto Act, therefore since OMB "scored" the reduced employee contributions as "discretionary new budget authority" for BEA purposes, the reduced contributions should likewise be regarded as "discretionary budget authority" subject to cancellation under the Line Item Veto Act. Significantly, the draft brief does not argue that the reduced contributions satisfy the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i) -- a provision that expressly applies to the Line Item Veto Act. The draft brief does contend, however, as an alternative theory, that because certain outlays that would result from the open season provision do fall within the Section 622 definition, the cancellation may be upheld on that basis if the court concludes that the Section 622 definition of "budget authority" is controlling.

Reasons Not To Defend the CSRS/FERS Cancellation

The theory of defense reflected in the draft brief is extremely weak, even as a statutory matter. What is more, the defense rests upon an expansive interpretation of presidential power under the Line Item Veto Act that is inconsistent with the arguments we have made in favor of the Act's constitutionality. At this critical stage, establishing the constitutionality of the President's cancellation authority under the Line Item Veto Act is simply too important a goal to jeopardize with a dubious and immoderate assertion of statutory authority.

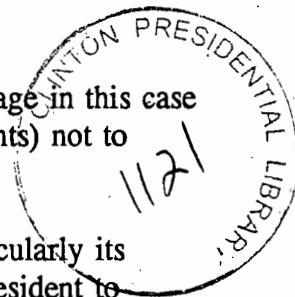
1. **Cancellation of the CSRS/FERS provision cannot credibly be analogized to any power the President has historically exercised.**

Opponents of the Line Item Veto Act have contended, inter alia, that it results in an unconstitutional delegation by Congress to the President of legislative power because the President's cancellation authority is broad and standardless. Our brief in Raines v. Byrd responded to that constitutional attack by arguing that the President's authority under the Act (at least as applied to spending items) is closely analogous to the discretion Executive Branch officials have historically possessed with respect to the decision whether or not to spend appropriated sums. Indeed, our brief essentially equated the cancellation of "discretionary

¹ Such estimates might ultimately trigger a "sequestration" under the BEA if discretionary spending caps for the fiscal year are exceeded.

² The Congressional Budget Office does not agree with that interpretation of Scoring Rule 3.

budget authority" -- the category invoked by the President's cancellation message in this case -- with decisions historically made by Presidents (in the nature of impoundments) not to spend money appropriated to an agency.



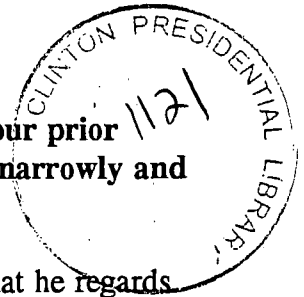
That analogy will be wholly undercut if we construe the Act (and particularly its provision for cancelling "discretionary budget authority") as permitting the President to invalidate an entire substantive provision of law simply by identifying some form of "budget authority" contained in or affected by the provision. The reduction in employee contributions to the retirement fund is only one of a number of substantive provisions of law that are triggered by the special open season Congress enacted, and it is only one of many financial consequences that follow from an employee's decision to switch from CSRS to FERS. The authority to cancel the open season provision therefore cannot plausibly be compared to any power the President has traditionally exercised to decline to spend the full amount of funds that Congress has appropriated to a particular agency, or for a particular purpose, for a fiscal year. Rather, our defense of the cancellation will (necessarily) blur the line between the refusal to spend appropriated funds and the invalidation of substantive provisions of law.³

2. Defending the CSRS/FERS cancellation will jeopardize our alliance with Congress in the constitutional defense.

In defending the Line Item Veto Act against the claim that the Act violates separation of powers principles by authorizing the President to "repeal" Acts of Congress, it will be very important to have the full support of the Senate and House as amici curiae, arguing that Congress does not regard the Act as an infringement on its constitutional prerogatives. If we defend the cancellation on the theory described above, the Senate Legal Counsel is expected to file an amicus brief arguing that the cancellation was improper. (Such an argument would be consistent with the Congressional Budget Office's longstanding view that reductions in governmental income resulting from provisions contained in appropriations laws should not be scored as "discretionary new budget authority.") Such a filing would impair the image of interbranch unity we need to project, and might lead the Supreme Court to conclude that if the Act is sustained, the judiciary will be required (in the course of ruling on challenges to individual cancellations) to resolve disputes between the political branches concerning arcane budgetary matters.

³ Cancellation of limited tax benefits is also concededly different from the authority that the President has historically possessed to decline to spend appropriated funds. The President's authority to cancel tax provisions, however, is subject to limitations of its own -- most obviously, the requirement that no more than 100 taxpayers be affected. The President's power to cancel limited tax benefits, moreover, is clear on the face of the Line Item Veto Act, while the contention that the President may cancel entire provisions of law based on relatively modest budget impacts has no apparent textual basis (and no apparent stopping point). Finally, invalidation of the President's authority to cancel limited tax benefits would (assuming that authority to be severable) leave the core of the Line Item Veto Act intact. The provisions governing discretionary budget authority, by contrast, have always been regarded as the most important and most defensible feature of the Act.

3. **Defending the CSRS/FERS cancellation is inconsistent with our prior representations that the President will exercise his authority narrowly and with care and circumspection.**



The President has tried, in a variety of ways, to convey the message that he regards the cancellation authority under the Line Item Veto Act as an especially important presidential prerogative, to be exercised with particular care and circumspection. It is quite important that we do all we can to persuade the Court that the Act is in fact being administered on that basis. The Supreme Court's decisions during the last Term suggest a particular aversion to anything that smacks of "symbolic legislation," and we should make every effort to prevent the Court from regarding the Line Item Veto Act in that light.

To defend the CSRS/FERS cancellation -- even in the district court -- would significantly undermine that effort. The draft brief does not contend that the reduction in employee contributions that the President's special message identified as the cancelled item falls within the definition of "budget authority" contained in 2 U.S.C. 622(2)(A)(i). Instead, the draft brief argues (in essence) that established OMB scoring practices can be used to replace rather than to elucidate the statutory definition. OMB sincerely regards the various scoring rules (and its own construction of them) as substantial constraints on its own discretion. The contention that the President's cancellation authority extends beyond items covered by the statutory definition, however, is likely to strike the Supreme Court as an extraordinary assertion of executive power.

Similarly, to defend the cancellation on the alternative theory that the "open season" provision of the Treasury Appropriations Act triggers certain provisions of other laws that might fit the definition of "budget authority" in 2 U.S.C. 622(2) would require us to offer a rationale that is not set forth in the President's cancellation message -- suggesting that the President may rely on statutory provisions and financial consequences that are far afield from the appropriations provision that he purported to cancel. That alternative would undermine another important point we made in Raines v. Byrd in defense of the Act: that the President is subject to important procedural limitations on the exercise of his cancellation authority by the requirements that he (a) make specific determinations and (b) include particular information about the cancellation in his cancellation message, both of which are lacking here with respect to the suggested alternative rationale.

At worst, a defense of the cancellation along the lines set forth in the draft brief may suggest to the Court that the President's authority is being exercised cavalierly or carelessly. Even if the Court does not regard our position as wholly unreasonable, however, it will surely conclude that the President is intent on construing his own cancellation authority under the Line Item Veto Act in the broadest possible manner. That perception cannot help but lessen the Court's willingness to sustain the Act against constitutional challenge.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For Jack Quinn and Kathy Wallman from Trey Schroeder. Subject: Line Item Veto Hearing. (1 page)	01/03/1997	P5 1122
002. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [with Jack Quinn and Elena Kagan annotations] (2 pages)	03/18/1996	P5 1123
003. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto. [with Jack Quinn annotations] (2 pages)	03/18/1996	P5 1124
004. memo	For Jack Quinn and Kathy Wallman from Elena Kagan. Subject: Line Item Veto Update. (2 pages)	03/12/1996	P5 1125
005. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Legislation/H.R.2. (4 pages)	06/13/1995	P5 1126
006. memo	For Jack Quinn and Kathy Whalen from Elena Kagan. Subject: Line Item Veto. (2 pages)	12/05/1995	P5 1127
007a. memo	For Jack Quinn and Kathy Whalen from Elena Kagan. Subject: Line Item Veto Memo. (1 page)	12/05/1995	P5 1128
007b. memo	For Chuck Konigsberg from Richard Shiffrin. Subject: Line Item Veto Legislation/House Conference Offer. (4 pages)	12/04/1995	P5 1129
008a. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Senate-Passed Separate Enrollment Line Item Veto/S.4. (4 pages)	03/27/1995	P5 1130
008b. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Proposed Changes to H.R.2. (12 pages)	03/27/1995	P5 1131
009. memo	For Abner Mikva and Alice Rivlin from Walter Dellinger. Subject: Line Item Veto Proposals/S.4, S.14, and S.137. (5 pages)	03/16/1995	P5 1132

COLLECTION:

Clinton Presidential Records
Counsel's Office
Charles Ruff
OA/Box Number: 17983

FOLDER TITLE:

Line Item Veto

Van Zbinden
2007-0624-F
vz1222

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. memo	Duplicate of 009. (5 pages)	03/16/1995	P5 1133 Dup 1132
011. memo	Duplicate of 009. (5 pages)	03/16/1995	P5 1134 Dup 1132

COLLECTION:

Clinton Presidential Records
Counsel's Office
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FOLDER TITLE:

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vz1222

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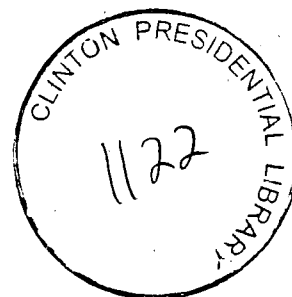
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January 3, 1997



Memorandum for Jack Quinn
Kathy Wallman

From: Trey Schmeder *TSW*
Subject: Line-Item Veto Hearing

I spoke with Gary Grindler this morning regarding the position the Department of Justice intends to take in Monday afternoon's scheduling conference on the suit filed yesterday by six Members of Congress challenging the line-item veto that became effective January 1. Gary is preparing a response to a motion to expedite he expects the plaintiffs will file today. He expects the plaintiffs to propose a simultaneous briefing scheduling with briefs due January 22. Justice will oppose the motion, arguing that plaintiffs may file a motion for summary judgment anytime between now and January 22 but that Justice should be allowed 30 days' time after such motion is filed in which to prepare a response. Because the statute provides for expedited review by the district court, however, the likelihood of success is unclear.

The statute expressly provides standing to Members of Congress or "any individual adversely affected[.]" The statute notwithstanding, Justice plans to argue that the case is not justiciable under Article III requirements: the case isn't ripe since there are no bills pending, no announcement by the President that he will exercise the authority on any given legislation, and, of course, no exercise of this new authority by the President. Justice will argue that there's no case or controversy and, because there's no injury, no standing.

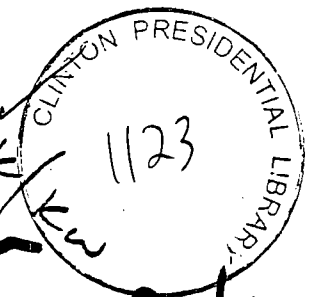
Justice will also seek a bifurcated briefing schedule, separating the merits from the justiciability issues. In last year's National Treasury Employees Union case, Judge Richey agreed to a bifurcation of the issues and, as you may recall, having found that the union failed to show any injury, never reached the merits of the case.

The statute also empowers the House of Representatives with the right to intervene. Justice will argue that this right of intervention is one reason the briefing schedule should not be expedited since the House is not expected to move swiftly.

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*Elena -
Please talk to Cheryl
Knippling at OMB. Alice
said he's the*

THE WHITE HOUSE
WASHINGTON
March 18, 1996



MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EX*
SUBJECT: LINE ITEM VETO

*person who need to
help - this. Perhaps*

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

you already are

Problems we have with the agreement are as follows:

*is this deal-
breaker
for us?*

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

touch.

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

*Thanks
JK*

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

in the new draft, Congress gave the Pres. very limited power to identify

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

tax benefits.

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

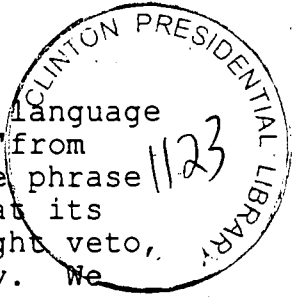
← Congress Picked this.

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

COPY

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

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



*How
this? sending
rec. a veto
it?*

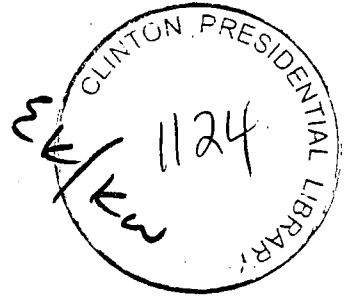
*No problem —
it was fixed.
DOJ and I have
also made some
suggested changes in
the Conference Report
to bolster the argument
that the bill meets
constitutional standards.*

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THE WHITE HOUSE

WASHINGTON

March 18, 1996



MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*

SUBJECT: LINE ITEM VETO

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

Problems we have with the agreement are as follows:

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

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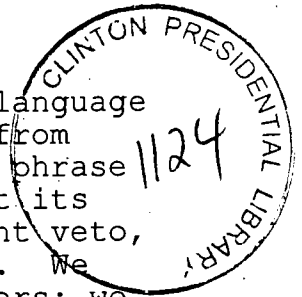
✓
• The conferees retained the provisions on targeted tax benefits to which we had objected. The definition of such a benefit still turns on whether a provision affects fewer than 100 beneficiaries. In addition, Congress has sole power (the President has none) to identify what provisions satisfy this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

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

✓
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COPY

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

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

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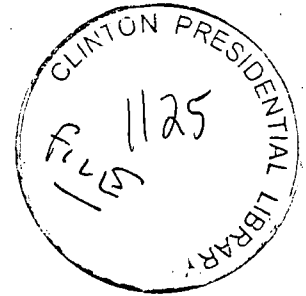
THE WHITE HOUSE

WASHINGTON

March 12, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN *EK*
SUBJECT: LINE ITEM VETO UPDATE



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

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

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

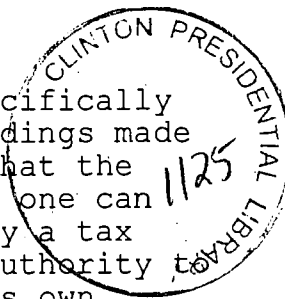
2. We objected to a provision making the Act effective only upon enactment of a seven-year balanced budget and sunsetting the Act in 2002. We urged Congress to grant immediate and permanent authority to eliminate wasteful spending.

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

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

COPY

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



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

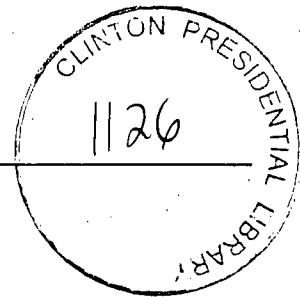
The House offer cures two constitutional problems we previously had raised. First, this version uses the word "cancel" instead of "veto," as OLC had requested. (We do, however, think that the definition of "cancel" is too vague.) Second, this version provides that the JCT's identification of targeted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

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U. S. Department of Justice

Office of Legal Counsel



Office of the
Assistant Attorney General

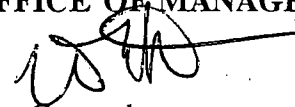
Washington, D.C. 20530

June 13, 1995

MEMORANDUM FOR

ABNER J. MIKVA
COUNSEL TO THE PRESIDENT

ALICE M. RIVLIN
DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

From: Walter Dellinger 
Assistant Attorney General

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

This memorandum summarizes our views on the line item veto legislation that has passed the House of Representatives, H.R. 2, the Line Item Veto Act. In our view, the provisions of the bill that grant the President the power to "rescind" discretionary budget authority are constitutional. However, the provisions that grant the President the power to "veto" targeted tax benefits, thus resulting in the "repeal" of those benefits, raise significant constitutional concerns. We believe that those concerns can be alleviated through drafting changes that we propose below.

I. Overview of H.R. 2

H.R. 2 would authorize the President to "rescind all or part of any dollar amount of any discretionary budget authority . . . or veto any targeted tax benefit which is subject to the terms of [the] Act]." § 2(a). H.R. 2 further provides that this authority can only be exercised if the President makes certain determinations regarding the impact of the rescission or veto (§2(a)(1)), and notifies Congress of the rescission or veto by a "special message" not later than ten calendar days after the enactment of the law containing the discretionary budget authority or targeted tax benefit at issue. § 2(a)(2).

Section 3(a) of the bill describes the effect of the exercise of the President's "rescission" and "veto" power. Section 3(a)(1) states that "[a]ny amount of discretionary budget authority rescinded under this Act shall be deemed cancelled," unless a bill disapproving the President's rescission is enacted. A parallel provision, Section 3(a)(2),

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states that any targeted tax benefit that is vetoed under the Act "shall be deemed repealed," unless a bill disapproving the President's veto is enacted.



II. Discussion

A. Discretionary Budget Authority

At bottom, the provisions of H.R. 2 granting the President power to rescind discretionary budget authority give the President discretion to decline to spend funds that previously have been appropriated. We believe that these provisions constitute a permissible delegation to the President. It is well-established that Congress may delegate broad powers to the President, including powers that affect the nation's fisc. In addition, H.R. 2 sets forth discernible standards that serve to guide the exercise of the delegated power: the President may rescind budget authority only when he makes specific determinations, and only during a fixed, limited time period. Furthermore, the type of rescission power conferred on the President under H.R. 2 is not entirely unprecedented, as prior statutes have given the President some modicum of control over the outlay of appropriated funds.

In short, H.R. 2 provides the President with a recognizable tool -- a delegation of power -- to cut government spending. As such, it stands on far more secure constitutional footing than the novel approach to curbing spending that is contained in the line item veto legislation that has passed the Senate. Under that legislation, individual items of spending in an appropriation bill that has passed both Houses of Congress would be disaggregated from one another, enrolled as separate bills, and then voted on en bloc by both Houses. Thereafter, each separately enrolled bill would be presented to the President, who could then veto any of the separate bills. In our view, the separate enrollment procedure of the Senate legislation raises complex questions under the Presentment Clause of the Constitution (Article I, section 7 clause 2) that simply are not posed by the delegation of power to the President in H.R. 2 to rescind discretionary budget authority.

B. Targeted Tax Benefits

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

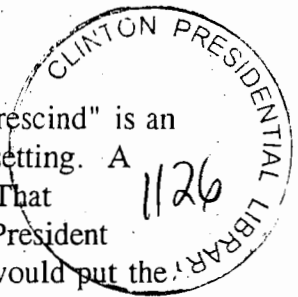
1. Replacing the Word "Veto"

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

One possible alternative would be to change the word "veto" to "rescind," which is the same word that is used in H.R. 2 to describe the nature of the power that the President

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



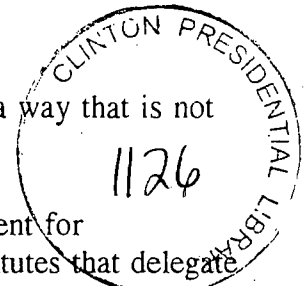
2. Replacing the Word "Repealed"

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

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

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if the President "cancels" a targeted tax benefit, the effect is permanent in a way that is not true of the cancellation of discretionary budget authority.



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

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

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

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THE WHITE HOUSE

WASHINGTON

December 5, 1995



MEMORANDUM FOR JACK QUINN
KATHY WHALEN

FROM: ELENA KAGAN *ek*

SUBJECT: LINE ITEM VETO

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

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

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

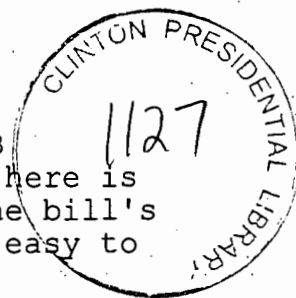
1. Lockbox language. The House offer incorporates a Senate provision that would require the President to reduce statutory discretionary spending caps to reflect presidential rescissions (the so-called lockbox provision). OMB points out that this provision would make supplemental appropriations very difficult.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

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

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

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



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

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

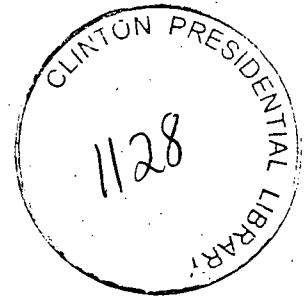
1. Remove Section 7(c). This change relates to the change #2 noted above. For some reason, OMB has left in (though amended slightly) a provision referring to the JCT's views on whether legislation contains a targeted tax benefit. This provision should be taken out. We should not want a mechanism by which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

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

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THE WHITE HOUSE

WASHINGTON
December 5, 1995



MEMORANDUM FOR JACK QUINN
KATHY WALLMAN

FROM: ELENA KAGAN

SUBJECT: LINE ITEM VETO MEMO

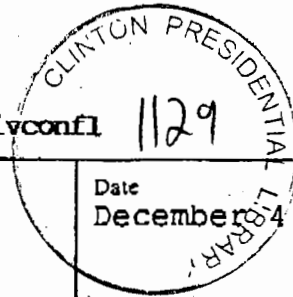
Another issue has reared its head relating to OMB's statement on the latest line item veto proposal. In a memo to OMB dated yesterday, OLC urged OMB to propose that new language be inserted authorizing the President to lift suspensions of direct spending and targeted tax benefits. I am attaching this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

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Memorandum

Johnsen
Roseborough
Shiffren
Schroeder
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Murphy File
Reading file Ret.(Small)billcom/livconfl



Subject
Line Item Veto Legislation/House Conference
Offer

Date
December 14, 1995

To
Chuck Konigsberg
Legislative Affairs
OMB

From
Richard Shiffren
Deputy Assistant
Attorney General
OLC

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

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

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

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

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CLINTON PRESIDENT
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In short, the House conference offer provides the President with a recognizable tool -- a delegation of power -- to cut government spending. As such, it stands on far more secure constitutional footing than the novel approach to curbing spending that is contained in the line item veto legislation that has passed the Senate. Under that legislation, individual items of spending in an appropriations bill that has passed both Houses of Congress would be disaggregated from one another, enrolled as separate bills, and then voted on en bloc by both Houses. Thereafter, each separately enrolled bill would be presented to the President, who could then veto any of the separate bills. In our view, this procedure raises complex questions under the Presentment Clause of the Constitution (Article I, section 7 clause 2) that simply are not posed by the delegation of power to the President in the House conference offer. Therefore, consistent with the views expressed in the draft OMB letter, we strongly recommend that conferees adopt the approach of the House conference offer, and not opt for the Senate's separate enrollment mechanism.

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

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

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

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

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about
this?

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

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

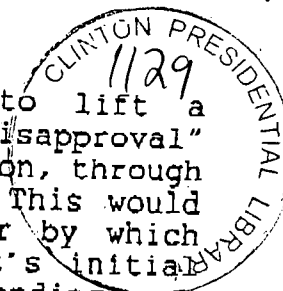
⁴ A provision in the House legislation stated that any targeted tax benefit "vetoed" by the President would be deemed "repealed." In our comments on the legislation, we indicated that the use of the term "repealed" raised constitutional concerns, because it intimated that the President was being given the power to amend existing law on his own. The grant of such power would violate the commands of the Presentment Clause, which specifies the only manner in which federal laws may be made, modified, or annulled: through passage of a bill by both Houses of Congress; presentment of the bill to the President; and approval of the bill by the President (or if the bill is disapproved, passage of a bill overriding the President's action by 2/3 of the members of both Houses of Congress). This constitutional problem is eliminated by the House conference offer, which does not include a provision describing the effect of a presidential veto of targeted tax benefits.

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

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

Such a requirement would essentially track provisions in the House conference offer that cabin the President's discretion to "veto" targeted tax benefits or direct spending in the first place. In

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



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

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

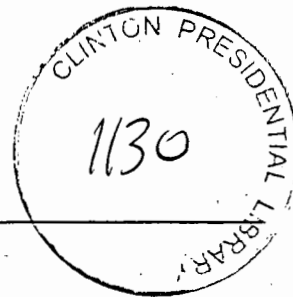
The draft OMB letter proposes to charge the President, not the JCT, with the role of determining which provisions in a bill constitute targeted tax benefits. Like the House conference offer, the letter sets forth specific characteristics that a provision would have to meet in order to be considered a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

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



U. S. Department of Justice

Office of Legal Counsel



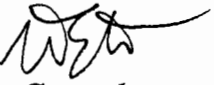
Office of the
Assistant Attorney General

Washington, D. C. 20530

March 27, 1995

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

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

From: Walter Dellinger 
Assistant Attorney General

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

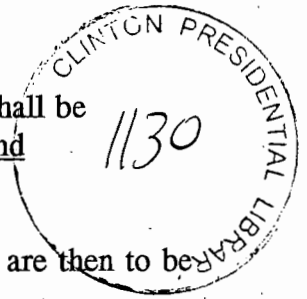
This is to provide you with our views on S.4, "The Separate Enrollment and Line Item Veto Act of 1995," as passed by the Senate, see 141 Cong. Rec. S4484-85 (daily ed. Mar. 23, 1995). We have commented on prior versions of this legislation, and more generally on the constitutionality of "separate enrollment"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

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

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

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



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

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

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

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

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

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

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

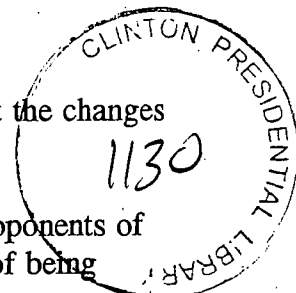
by statute, that each House follow certain procedural rules (e.g., that amendments not be permitted when the disaggregated bills are being voted on en bloc). However, it is questionable whether an Act of Congress could impose internal procedures on the Houses. See March 16 OLC Memo at 5, n.1; Laurence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

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

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

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

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



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

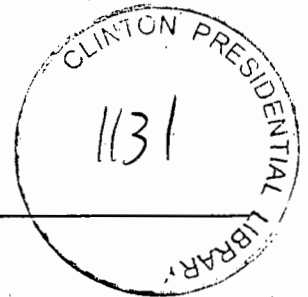
(Attachments)

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



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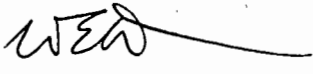
Office of the
Assistant Attorney General

Washington, D.C. 20530

March 27, 1995

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

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

From: Walter Dellinger 
Assistant Attorney General

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

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

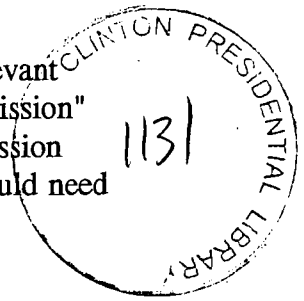
The proposed mark-ups are identical except in one critical respect. The first proposal would give the President the power to "rescind" targeted tax benefits, the effect of which would be to "cancel" such benefits. The terms "rescind" and "cancelled" are used in the bill to describe the President's power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

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

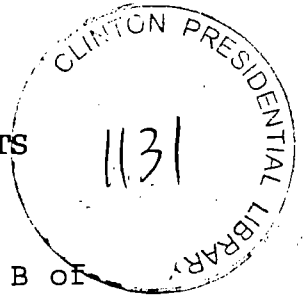
- Existing provisions of the bill are denoted in regular type-face.
- Suggested new words and provisions are denoted in **bold**.
- Suggested deletions are [bracketed and underlined].

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



PROPOSAL # 1: "RESCISSION" OF TARGETED TAX BENEFITS



Sec. 2 LINE ITEM VETO AUTHORITY

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

(1) determines that --

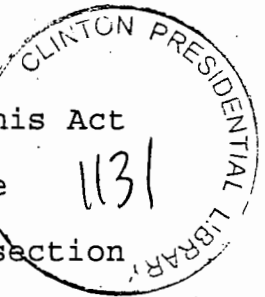
- (A) such rescission [or veto] would help reduce the Federal budget deficit;
- (B) such rescission [or veto] will not impair any essential Government functions; and
- (C) such rescission [or veto] will not harm the national interest; and

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

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Sec. 3

LINE ITEM VETO EFFECTIVE UNLESS DISAPPROVED



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

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

SEC. 4 DEFINITIONS

As used in this Act:

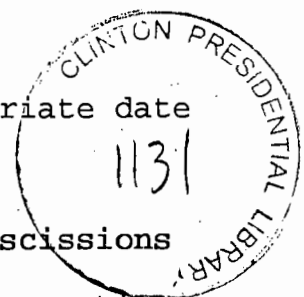
(1) The term "rescission[/receipts] disapproval bill" means a bill or joint resolution which only disapproves, in whole, rescissions of discretionary budget authority or only disapproves rescissions [vetoes] of targeted tax benefits in a special message transmitted by the President under this Act and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

(A) which does not have a preamble;

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

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



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

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

SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

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

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

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

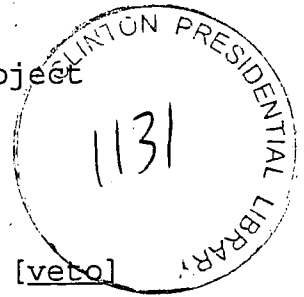
(3) the reasons and justifications for the determination to rescind budget authority or [veto] any targeted tax benefit [provision] pursuant to this Act;

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

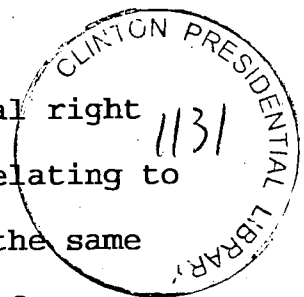
(5) to the maximum extent practicable, all actions, circumstances, and considerations relating to or bearing upon the rescission [or veto] and the decision to effect the rescission [or veto], and to the maximum extent practicable, the estimated effect of the rescission upon the objects, purposes, and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

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

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



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



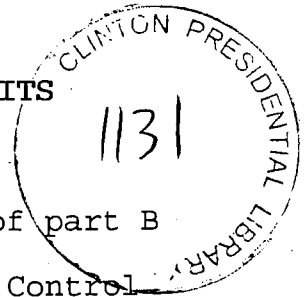
SEC. 8 SEVERABILITY

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

PROPOSAL # 2: "SUSPENSION" OF TARGETED TAX BENEFITS

Section 2

LINE ITEM VETO AUTHORITY



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

(1) determines that --

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

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

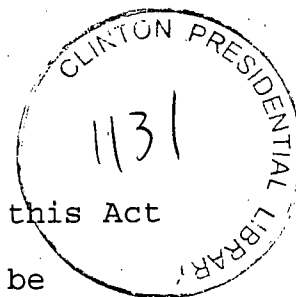
(C) such rescission or suspension [veto] will not harm the national interest; and

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

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

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



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

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

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

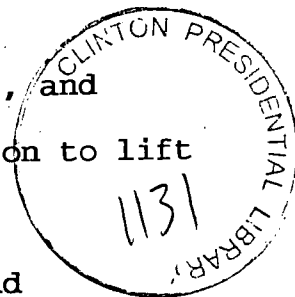
(2) the suspension is lifted by the President, provided that the President

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

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

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

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

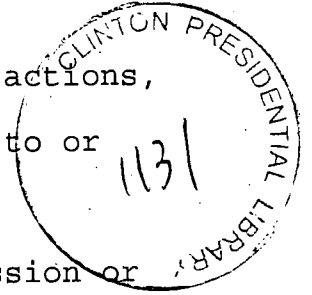


SEC. 5 CONGRESSIONAL CONSIDERATION OF LINE ITEM VETOES

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

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

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



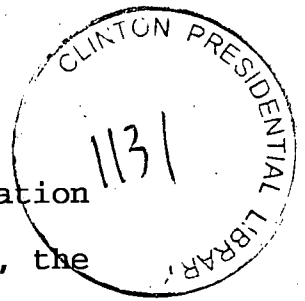
(g) This section is enacted by the Congress--

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

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

SEC. 8 SEVERABILITY

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



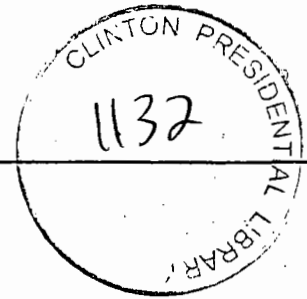


U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530



March 16, 1995

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

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

From: Walter Dellinger 
Assistant Attorney General

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

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

S.4 and S.14

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

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

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

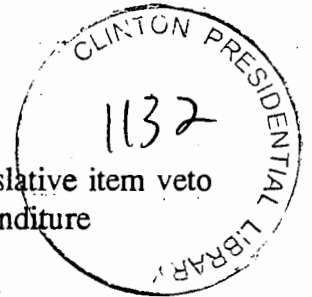
In actual practice, the chief difference between S.4 and S.14 is that under S.4, it would ordinarily require a two-thirds vote of each House of Congress to reinstate a spending item that the President has targeted for elimination, while under S.14, it would require only a majority vote of a single House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

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

Dellinger Statement at 9.

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

S.137



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

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

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

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

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

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

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

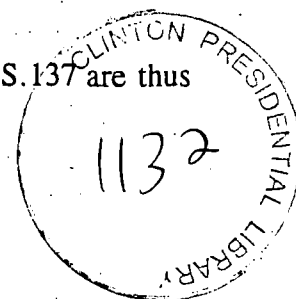
We have not been convinced of the constitutionality of this approach in the past, see Constitutionality of Line-Item Veto Proposal, 9 Op. O.L.C. at 30, and we continue to question its validity. On what seems to us to be the best reading of the Presentment Clause, what must be presented to the President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

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

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

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

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



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