

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For the President from Charles Ruff. Subject: Line Item Veto Negotiation. (6 pages)	12/16/1997	P5 1135
002a. letter	From Janet Reno to the President. Subject: Use of the Line Item Veto. (5 pages)	12/16/1997	P5 1136
002b. memo	For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages)	12/15/1997	P5 1137
003. memo	For the President from Phil Caplan. Subject: Memo from Charles Ruff. (1 page)	12/17/1997	P5 1138
004. memo	For Walter Dellinger from Malcolm Stewart. Subject: Line Item Veto Act. (2 pages)	08/16/1997	P5 1139
005. memo	For the President from Charles Ruff, William Marshall, Liza Hertzner. Subject: Line Item Veto Litigation. (3 pages)	11/03/1997	P5 1140
006. memo	Anaylisis of OMB Summary on CSRS/FERS Provision. (2 pages)	11/11/1997	P5 1141
007. memo	The CSRS/FERS Cancellation Provides...[CSRSDISA.WPD] (3 pages)	01/1997	P5 1142
008. memo	Memorandum RE NTEU v. U.S. (D.D.C., Civ. No. 1:97CV02399) (10 pages)	11/19/1997	P5 1143
009. memo	Summary of CSRS/FERS Provision. (4 pages)	12/04/1997	P5 1144

COLLECTION:

Clinton Presidential Records
Counsel's Office
Charles Ruff
OA/Box Number: 14400

FOLDER TITLE:

Line-Item Veto

Van Zbinden
2007-0624-F
vz1223

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.

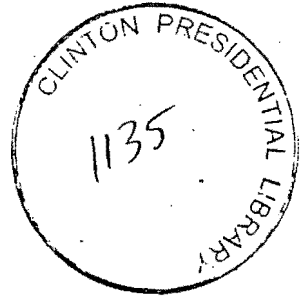
Freedom of Information Act - [5 U.S.C. 552(b)]

- 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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THE WHITE HOUSE
WASHINGTON

December 16, 1997



MEMORANDUM FOR THE PRESIDENT

THROUGH: ERSKINE BOWLES

FROM: CHARLES F.C. RUFF

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).

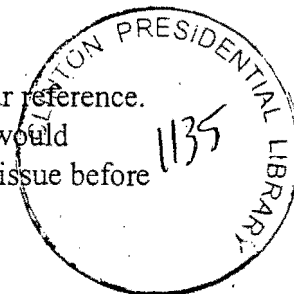
In all three cases, the plaintiffs are challenging the constitutionality of the Act. The NTEU also contends, however, that the cancellation of Section 642 exceeded your statutory authority under the Act because it canceled lost receipts (in the form of reduced employee contributions to federal trust 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.)

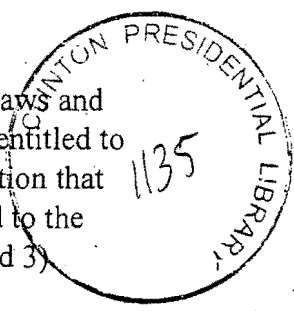
The statutory question raised by this cancellation is whether the Act authorizes the President to cancel a provision (other than a limited tax benefit) whose budgetary effect consists of a loss of federal receipts rather than an outlay of federal funds. A secondary issue is whether this cancellation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

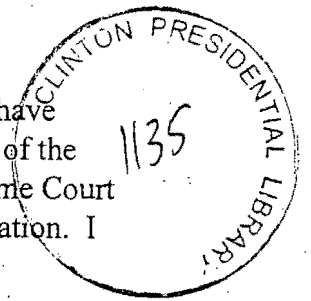
Finally, OMB notes that DOJ's constitutional concerns would be triggered only if the district court upheld your statutory authority to effect this cancellation. If the lower court invalidated the cancellation on statutory grounds, that decision would strengthen, rather than weaken, the constitutional 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

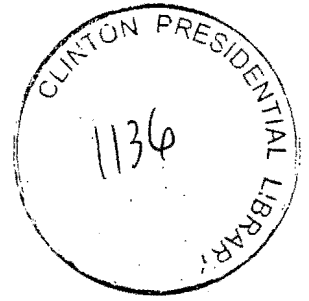
I am reluctant to acquiesce in a decision to assert error in the exercise of the veto, I have concluded that we should, in the final analysis, give dispositive weight to the views of the Solicitor General. I respect his assessment of the litigation risks posed in the Supreme Court even though I disagree 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:

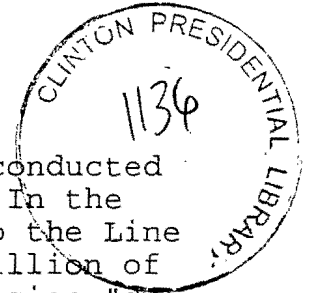
- The Solicitor General has advised me that defense of this cancellation would severely undermine our constitutional defense of the Act.
- The defense of this cancellation will require us to advance an extremely broad interpretation of the Line Item Veto Act, which finds very little support in the statutory 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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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.

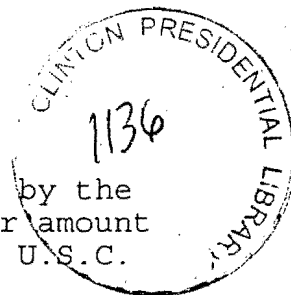
Overview of the Line Item Veto Act

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.

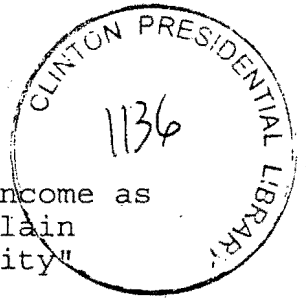
Second, we will argue that, irrespective of what the cancellation did or what OMB did, Section 642 does contain budget authority because employees who switch retirement programs trigger a series of government outlays, including permanent appropriations to cover the fund's unfunded liability and additional 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.

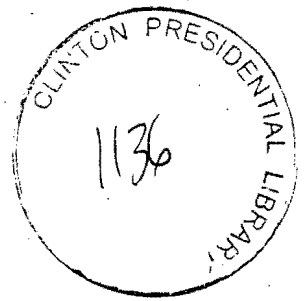
The second possible argument -- that Section 642 contains budget authority because it triggers additional government payments -- is flawed because such payments are not directly mentioned in your special message to Congress concerning the cancellation. There is no evidence to indicate that the findings 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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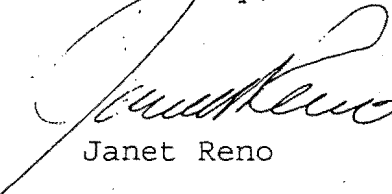


- Our best chance to defend the constitutionality of the Act is by arguing that the President's cancellation authority is narrow and closely analogous to his historic discretion to decline to spend appropriated funds. This cancellation cannot be defended on that narrow basis, because it involves reductions 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

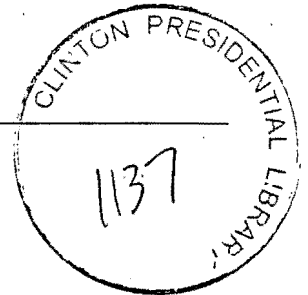
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U. S. Department of Justice
Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530



December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL *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.

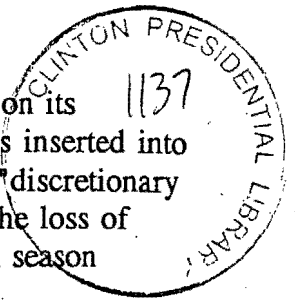
The Theory of Defense

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.

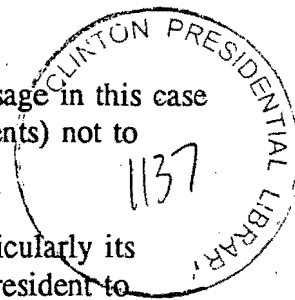
1. Cancellation of the CSRS/FERS provision cannot credibly be analogized to any power the President has historically exercised.

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.



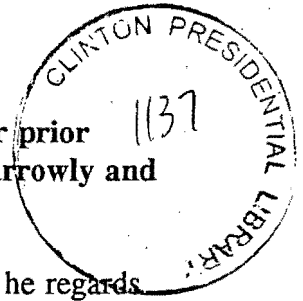
That analogy will be wholly undercut if we construe the Act (and particularly its provision for cancelling "discretionary budget authority") as permitting the President to invalidate an entire substantive provision of law simply by identifying some form of "budget authority" contained in or affected 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 BEEN
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.

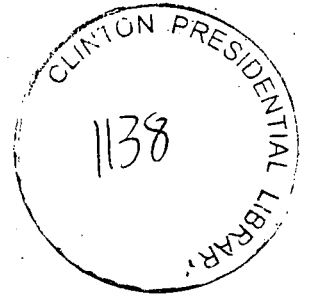
In short, Chuck believes we should defer to Justice and permit them to enter into a consent judgement stipulating that your cancellation of a pension provision in the Treasury/Postal Appropriations Bill exceeded your *statutory* authority under the Act. Justice has serious reservations about the statutory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

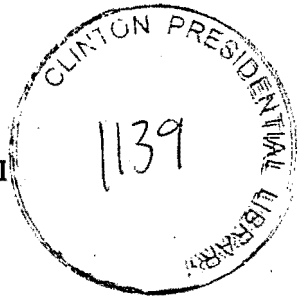


*I'll go by Caplan
but...
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the...
BJS*

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



Washington, D.C. 20530

August 6, 1997

To: Walter Dellinger
Solicitor General

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

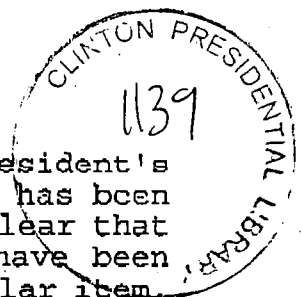
Re: Line Item Veto Act

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

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

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

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

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

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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

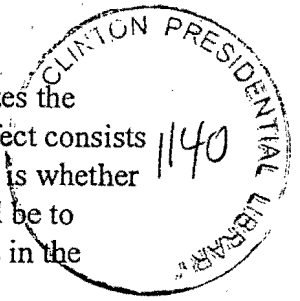
On Friday, we met with attorneys from the Department of Justice and the Office of Management and Budget regarding whether the President's cancellation of Section 642 of the "Treasury and General Appropriation Act, 1998" exceeded his statutory authority under the Line Item Veto Act (Act). This statutory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

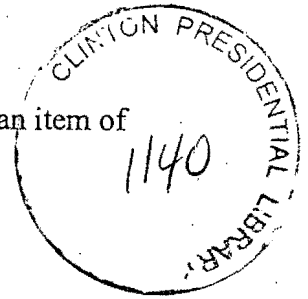
DOJ raises two separate concerns. The first is that they are not persuaded that the cancellation of Section 642 was permissible under the Act. As they point out, the Act allows cancellations based upon lost receipts only in very narrow and highly specified circumstances (limited tax benefits). The fact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

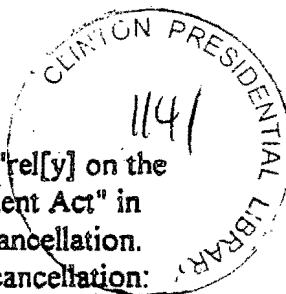
During our discussions, the question was also raised as to whether the line item veto of Section 642 could be re-characterized as a cancellation of outlays in order to avoid the question of whether the Act allows for the cancellation of lost receipts. As noted previously, allowing federal employees to 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.

Analysis of OMB Summary on CSRS/FERS Provision



Summary. Contrary to OMB's analysis, the Line Item Veto Act does not "rel[y] on the rules for measuring the costs of legislation contained in the 1990 Budget Enforcement Act" in order to determine the dollar amount of discretionary budget authority subject to cancellation. The Line Item Veto Act expressly defines the only three things that are subject to cancellation: (1) "any dollar amount of discretionary budget authority;" (2) "any new item of direct spending;" and (3) "any limited tax benefit." It defines "dollar amount of discretionary budget authority" to mean "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). Although the Line Item Veto Act does not define "budget authority," it incorporates, as an amendment to the Congressional Budget and Impoundment Control Act of 1974, the definition of "budget authority" given in that act, which is the same definition that applies to the term "budget authority" in the Budget Enforcement Act (2 U.S.C. 900(c)(1) ("[t]he term[] 'budget authority' * * * ha[s] the meaning[] given to such term[] in section 3 of the Congressional Budget and Impoundment Control Act of 1974 [2 U.S.C. §622] * * *").

Thus, all three acts define "budget authority" precisely the same way. Under that definition, "budget authority" is: (1) "provisions of law that make funds available for obligation and expenditure * * *," (2) "borrowing authority * * *," (3) "contract authority," or (4) "offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority" (i.e., voluntary payments made to the government in carrying out business-like activities, such as payments for postage stamps and entrance fees to national parks). Employee contributions do not fall into any of these four categories, and, therefore, they are not "budget authority" under any of these acts. Rather, like taxes, they are "governmental receipts," which are involuntary payments to the government in exercising its sovereign power. Indeed, they were specifically identified as "Federal receipts" in the President's cancellation message. Therefore, these contributions cannot be "dollar amount[s] of discretionary budget authority," and they are not subject to cancellation under the Line Item Veto Act.

The Line Item Veto Act does rely on the Budget Enforcement Act rules for taking account of the results of a cancellation (the so-called "lockbox" provisions). Thus, if something meets the definition of a "dollar amount of discretionary budget authority," the cancellation of that dollar amount must be measured under the same Budget Enforcement rules that are used to measure the costs of all legislation that costs or saves the government money. But while the Budget Enforcement Act was intended to cover all legislation that costs or saves the government money, the Line Item Veto Act does not, and was not intended to, confer upon the President authority to cancel all legislation that costs the government money. In particular, the Line Item Veto Act does not, and was not intended to, confer upon the President authority to cancel any revenue-losing provisions -- such as tax cuts or reductions in employee contributions to retirement funds -- except those few which meet the definition of "limited tax benefit."

Background. The background in OMB's analysis does not mention that the dollar amount of discretionary budget authority canceled by the President was the \$854 million, and this

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amount was identified as a reduction in "Federal receipts" attributable to the reduction in employee contributions to the Civil Service Retirement and Disability Fund.

Official Estimates of Budget Authority. While, as noted above, the Line Item Veto Act refers to and relies upon the Budget Enforcement Act for taking account of the results of a cancellation, its use of the term "discretionary budget authority" incorporates the definition of "budget authority" in the Congressional Budget and Impoundment Control Act of 1974, and the Budget Enforcement Act applies that same definition. As noted above, employee contributions to retirement funds are not "budget authority" under that definition.

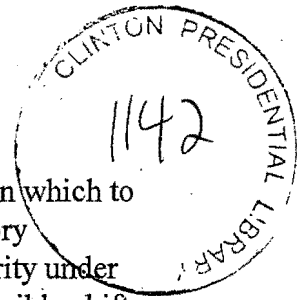
Rules for Estimating Budget Authority. The Budget Enforcement Act scoring rules do not, and were never intended, to define what things are subject to cancellation under the Line Item Veto Act.

Rule 3 for Estimating Budget Authority. Since 1990, OMB and the Congressional Budget Office have differed over whether, under Scoring Rule 3, a provision in an appropriations law which changes a "governmental receipt" -- such as taxes or employee contributions to retirement plans -- should be "scored" to "discretionary spending" or "PAYGO." OMB scores such changes to discretionary spending, while CBO scores them to PAYGO. Thus, if an appropriations law contained a provision cutting excise taxes, OMB would "score" it to discretionary spending and lower the discretionary spending caps by the amount of that tax cut. CBO, on the other hand, would "score" it to PAYGO, as if it were a new entitlement, and, to avoid a "sequestration," the amount of that "entitlement" would have to be offset either by the elimination of an equivalent entitlement or by raising other taxes in an equivalent amount.

But even if OMB is right and CBO is wrong, that has nothing to do with whether a reduction in governmental receipts, such as a tax cut or a reduction in employee contributions to retirement funds, is subject to cancellation under the Line Item Veto Act. Thus, even if OMB properly should "score" the \$854 million in reduced employee contributions to the Civil Service Retirement and Disability Fund caused by the CSRS/FERS provision to discretionary spending, and lowers the discretionary spending caps by \$854 million, that does not make the \$854 million subject to cancellation under the Line Item Veto Act. The \$854 million would be subject to cancellation as a "dollar amount of discretionary budget authority" only if it meets the definition of "budget authority" in the Line Item Veto Act, the Congressional Budget and Impoundment Control Act of 1974, and the Budget Enforcement Act -- which it does not. Thus, while for "scoring" purposes it makes a difference whether a provision is contained in an appropriations law or an entitlement law, it makes no such difference for determining whether it is subject to cancellation under the Line Item Veto Act.

Under the Estimating Rules, the CSRS/FERS Switch Increased Discretionary Budget Authority. The CBO report on the CSRS/FERS provision did not say that the reduced employee contributions caused by that provision constitute reductions in "budget authority" and did not say that they were subject to cancellation under the Line Item Veto Act. Indeed, congressional budget experts say that neither these reduced contributions nor any reduction in governmental receipts (except for a "limited tax benefit") is subject to cancellation.

**The CSRS/FERS Cancellation Provides a Good Case in Which
to Defend the Constitutionality of the Line Item Veto Act.**



The argument has been made that the CSRS/FERS cancellation presents a poor case in which to defend the constitutionality of the Line Item Veto Act. The concern is that the statutory challenge to this cancellation, which contends that the President's exceeded his authority under the Act, would increase any concerns that the Court might have that the Act impermissibly shifts power from Congress to the President.

However, another aspect of the CSRS/FERS cancellation supports the opposite argument -- that this cancellation presents an especially good case in which to defend the Act's constitutionality.

The constitutional challenge, at bottom, rests on the contention that the Act unconstitutionally transferred lawmaking power to the President, and thereby impermissibly allows the President to "thwart" the will of Congress (without the President having to use his constitutional veto power).

A person arguing that the Line Item Veto Act allows the President to "thwart" the will of Congress would likely point to the President's cancellation of 38 items in the Military Construction Appropriations Act. In response to those cancellations, the House and Senate passed a disapproval bill by wide margins (H.R. 2631 passed the House by 352-64 and the Senate by unanimous consent). The President responded by vetoing the disapproval bill (the disapproval bill arrived, and was vetoed, as Congress adjourned).

By contrast, a person arguing that the Line Item Veto Act allows the President to "thwart" the will of Congress can derive no support whatsoever from the cancellation of the CSRS/FERS provision. In fact, the CSRS/FERS provision offers a classic example of the kind of provision that prompted Congress to authorize the President to cancel items -- a provision that would benefit a small group at the expense of the national interest, and that did not reflect the considered judgment of Congress.

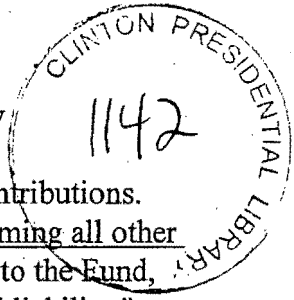
First, the CSRS/FERS provision was added to the Treasury Appropriations bill at the very end of the legislative process, in conference. The provision had not been the subject of hearings, it had not been included in either the Senate or House bills, and it was not even the subject of extensive debate after being added to the conference bill.

Second, no disapproval bill was ever introduced in response to the President's cancellation of the provision. In other words, apparently not one of the 535 Members of Congress believed sufficiently strongly in the policy merits of the provision -- or in the view that the President exceeded his statutory authority by canceling it -- so as to warrant taking the simple step of introducing a disapproval bill.

A provision that is added to a bill at the final hour, is canceled by the President, and then can find no Member willing to introduce a disapproval bill, can hardly be characterized as a provision that reflects the will of Congress. It is, rather, a provision that demonstrates the wisdom of Congress granting the President the authority to cancel items.

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**Reducing CSRS Contributions Increases
Treasury Payments to the CSRS Fund for its Unfunded Liability**



The question has been posed as to the effect of a reduction in employees' CSRS contributions. The answer is that a reduction in employee contributions to the CSRS Fund -- assuming all other variables remain constant -- would increase the amount that the Treasury must pay to the Fund, under a permanent appropriation (5 U.S.C. 8348(g)), to cover the Fund's "unfunded liability."

1. There is no direct permanent appropriation from the Treasury of CSRS benefits. Instead, CSRS benefits are paid out of the CSRS Fund pursuant to a permanent appropriation of amounts that are in the Fund. 5 U.S.C. 8348(a)(1)(A).

2. CSRS benefits are funded through the following (excluding the Postal Service and Panama Canal Commission):

- * employee contributions (i.e., deductions from pay) -- 5 U.S.C. 8334(a);
- * employing-agency contributions from agency appropriations -- 5 U.S.C. 8334(a);
- * amounts appropriated by Congress to cover "new or liberalized benefits," "extension of the coverage . . . to new groups of employees," and "increases in pay on which benefits are computed" -- 5 U.S.C. 8348(f);
- * interest earned on the Fund's balances -- 5 U.S.C. 8348(c);
- * gifts to the Fund -- 5 U.S.C. 8348(b); and
- * amounts paid by Treasury to the Fund, pursuant to a permanent appropriation, to cover the Fund's "unfunded liability"-- 5 U.S.C. 8348(g).

3. The CSRS Fund's "unfunded liability" is defined in 5 U.S.C. 8331(19):

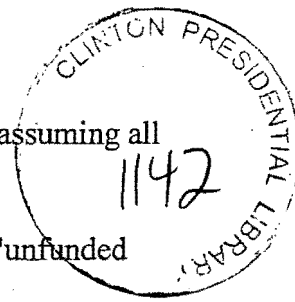
"(19) 'unfunded liability' means the estimated excess of the present value of all benefits payable from the Fund to employees and Members, and former employees and Members, subject to this subchapter, and to their survivors, over the sum of --

(A) the present value of deductions to be withheld from the future basic pay of employees and Members currently subject to this subchapter and of future agency contributions to be made in their behalf; plus

(B) the present value of Government payments to the Fund under section 8348(f) of this title; plus

(C) the Fund balance as of the date the unfunded liability is determined;"

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4. Under 5 U.S.C. 8331(19), reducing employees' contributions to the CSRS Fund (assuming all other variables are held constant) increases the Fund's "unfunded liability."

5. There is a permanent appropriation from the Treasury to cover the CSRS Fund's "unfunded liability"; this appropriation is set forth in 5 U.S.C. 8348(g):

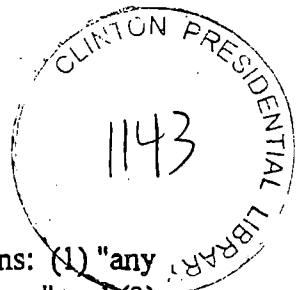
"At the end of each fiscal year, [OPM] shall notify the Secretary of the Treasury of the amount equivalent to (1) interest on the unfunded liability computed for that year at the interest rate used in the then most recent valuation of the System, and (2) that portion of disbursement for annuities for that year which [OPM] estimates is attributable to credit allowed for military service, less an amount determined by [OPM] to be appropriate to reflect the value of the deposits made to the credit of the Fund under section 8334(j) of this title. Before closing the accounts for each fiscal year, the Secretary shall credit to the Fund, as a Government contribution, out of any money in the Treasury of the United States not otherwise appropriated, the following percentages of such amounts: 10 percent for 1971; 20 percent for 1972; 30 percent for 1973; 40 percent for 1974; 50 percent for 1975; 60 percent for 1976; 70 percent for 1977; 80 percent for 1978; 90 percent for 1979; and 100 percent for 1980 and for each fiscal year thereafter. [OPM] shall report to the President and to the Congress the sums credited to the Fund under this subsection."

6. If the CSRS Fund's "unfunded liability" increases, then the Treasury must increase its annual "unfunded liability" payment to the Fund under 5 U.S.C. 8348(g).

7. Thus, if employees' contributions to the CSRS Fund are reduced, and all other variables are held constant, then the Fund's "unfunded liability" will increase, and thus the Treasury's "unfunded liability" payment to the Fund will increase.

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

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

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

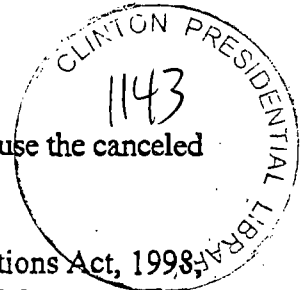
- (i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
- (ii) borrowing authority * * *;
- (iii) contract authority * * *; and
- (iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

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

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

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

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

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

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

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

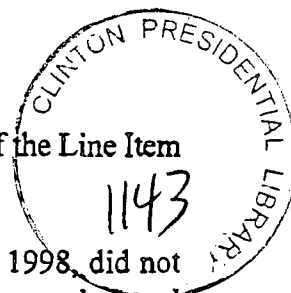
Plaintiffs in this lawsuit, the National Treasury Employees Union and two of its members, allege that the President purported to cancel as "dollar amounts of discretionary budget authority" employee contributions to the Civil Service Retirement and Disability Fund, but that such contributions are not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

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

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



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

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

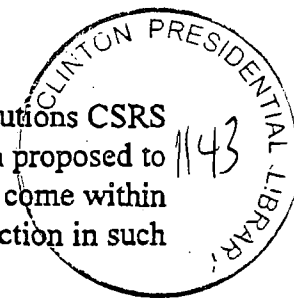
Employee contributions to the Civil Service Retirement and Disability Fund are considered "governmental receipts," or revenue, just like taxes. Indeed, the challenged cancellation message itself identifies them as "Federal receipts." The President's annual budget and various OMB circulars and congressional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

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

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



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

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

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

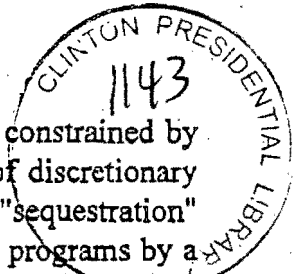
Under the Budget Enforcement Act, legislation affecting spending and receipts are subject to constraints intended to prevent any increase in the federal deficit. One category of spending

² Supra.

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

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

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

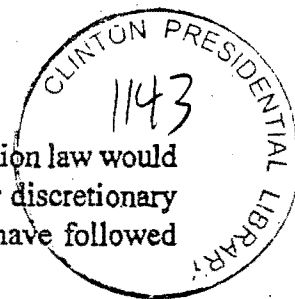
Both OMB and the Congressional Budget Office ["CBO"] keep track of the amount of discretionary and mandatory spending and receipts by "scoring" all legislation affecting such spending and receipts under conventions ("scoring rules") adopted in consultation with Congress. The scoring is reflected in reports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

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

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

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

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

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

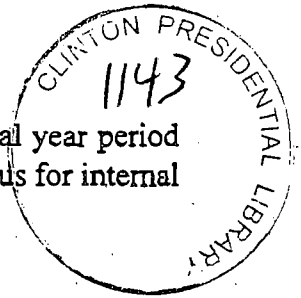
For seven years, OMB consistently has scored reductions in governmental receipts which are contained in appropriation laws as discretionary spending. Evidently, OMB believes that, because the Budget Enforcement Act treats all receipts the same way it does mandatory spending, Scoring Rule 3 should be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

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

⁷ Scoring Rule 3 states:

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

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

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

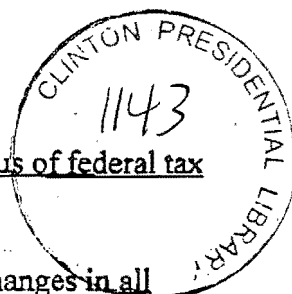
Until now, the difference between OMB and CBO in the scoring of reductions in governmental receipts that are contained in appropriation laws has not had any practical significance, because there have been no sequestrations. As a result, there has been no litigation raising this issue in court.

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

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

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

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

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

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

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

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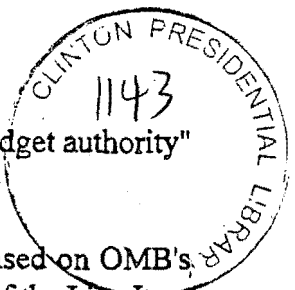
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Government Appropriations Act, 1998, is not a "dollar amount of discretionary budget authority" within the meaning of the Line Item Veto Act.

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

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

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



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

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

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

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

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

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

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

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

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

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

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applies to appropriations government-wide, and does not simply allocate the funds appropriated by the FY 1998 Treasury appropriation, it may not be a "proviso in an appropriation law." 1144

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

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

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

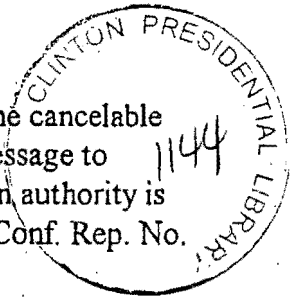
No. The Act authorizes the President only to cancel a "dollar amount of discretionary budget authority" contained in a provision of law, not the provision of law itself. Congress specifically defined "cancel" with respect to "dollar amount of discretionary budget authority" to mean "rescind," a budgetary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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Franklin Raines et al. v. Robert Byrd et al. Jurisdictional Statement. (25 pages)	04/16/1997	P5 1145
002a. note	to Charles Ruff. (1 page)	04/11/1997	P5 1146
002b. draft	Guidance on Line Item Veto. (1 page)	04/11/1997	P5 1147
003. email	To Jake Siewart and Robert Schroeder from Barry Toiv. Subject: LIV Statement. (1 page)	04/11/1997	P5 1148

COLLECTION:

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

FOLDER TITLE:

[Line Item Veto] [1]

Van Zbinden
2007-0624-F
vz1224

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]

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

RR. Document will be reviewed upon request.

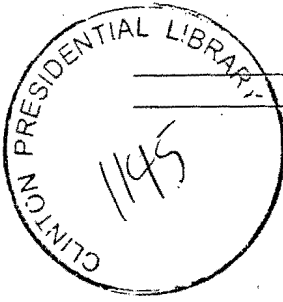
Freedom of Information Act - [5 U.S.C. 552(b)]

- 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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No.



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

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

JURISDICTIONAL STATEMENT

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

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Deputy Solicitor General

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QUESTIONS PRESENTED

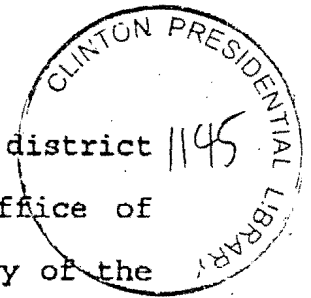
The Line Item Veto Act, 2 U.S.C. 691 et seq., gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The questions presented are as follows:

1. Whether individual Members of Congress have standing to challenge the constitutionality of the Act, when the President has neither exercised the authority conferred by the Act nor identified any bill with respect to which he intends to exercise that authority.

2. Whether the Act violates the Presentment Clause of the Constitution, Article I, Section 7, Clause 2.

PARTIES TO THE PROCEEDINGS

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



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JURISDICTIONAL STATEMENT

OPINION BELOW

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

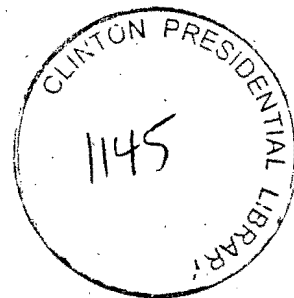
JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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



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

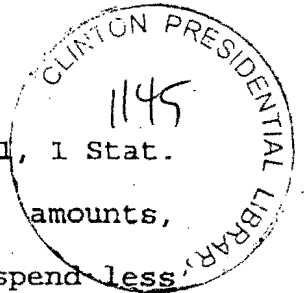
2. The Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 et seq. (1996) (to be codified at 2 U.S.C. 691 et seq.), is reproduced at App., infra, 32a-59a.

STATEMENT

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

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

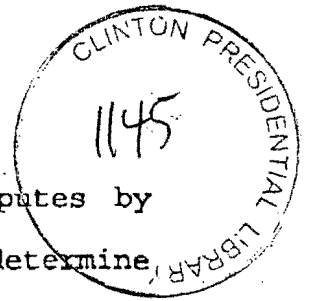
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ch. 23, § 1, 1 Stat. 95; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. By appropriating funds "not exceeding" fixed amounts, Congress left the Executive Branch with discretion to spend less than the appropriated amount if the full measure of the appropriation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

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

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

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

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

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

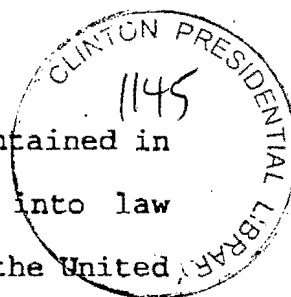
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"cancel in whole" specific spending and revenue items contained in any bill or joint resolution "that has been signed into law pursuant to Article I, Section 7, of the Constitution of the United States." § 1021(a); App., infra, 32a.²

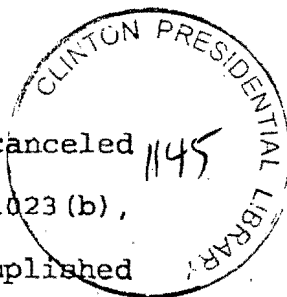
The President's authority under the Act extends to three budgetary categories: "dollar amount[s] of discretionary budget authority," "item[s] of new direct spending," and "limited tax benefit[s]." § 1021(a); App., infra, 32a-33a. A "dollar amount of discretionary budget authority" is the entire amount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

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

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



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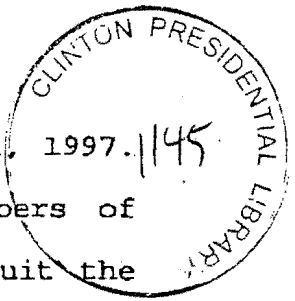


(C); App., infra, 48a-49a. The President may not use canceled funds for any purpose other than deficit reduction. §§ 1023(b), 1024; App., infra, 36a-39a. Deficit reduction is accomplished through a statutory "lockbox" procedure, under which the Office of Management and Budget (OMB) must calculate the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

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

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

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

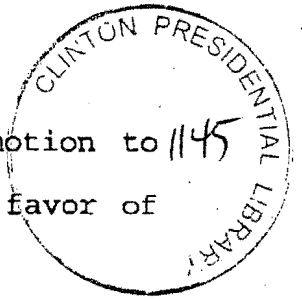
[t]he Act directly and concretely injures the [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the [appellees] of their constitutional role in the repeal of legislation,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

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

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

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

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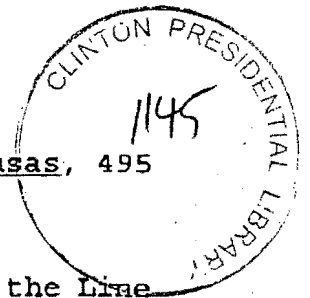


3. The district court denied the government's motion to dismiss the complaint and entered summary judgment in favor of appellees. App., infra, 1a-29a.

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

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

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

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

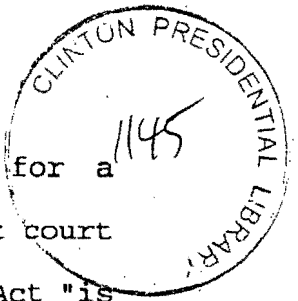
Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such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

App., infra, 21a.

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

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

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

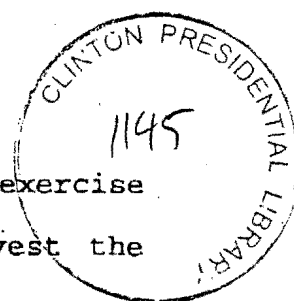
[c]ancellation forever renders a provision of federal law without legal force or effect, so the President who cancelled an item and his successors must turn to Congress to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time, in light of changed circumstances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

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

THE QUESTIONS ARE SUBSTANTIAL

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

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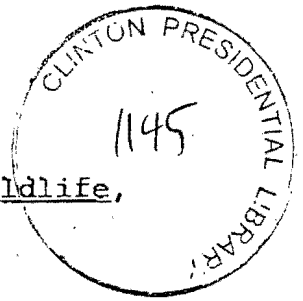
enacted federal law. Rather, the Act is simply the latest exercise of Congress's longstanding and well-settled power to vest the Executive Branch with discretion over the expenditure of appropriated funds.

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

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

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

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



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

The complaint in this case alleges that

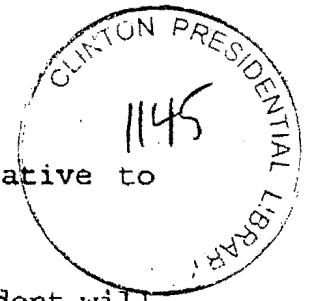
[t]he Act directly and concretely injures the [appellees], in their official capacities, by (a) altering the legal and practical effect of all votes they may cast on bills containing such separately vetoable items, (b) divesting the [appellees] of their constitutional role in the repeal of legislation,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

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

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

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

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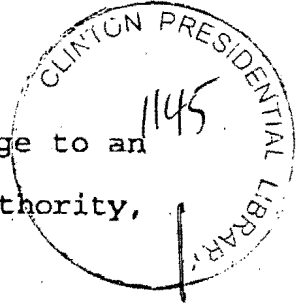


federal law, appellees' claims would be far too speculative to provide a basis for federal jurisdiction.

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

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

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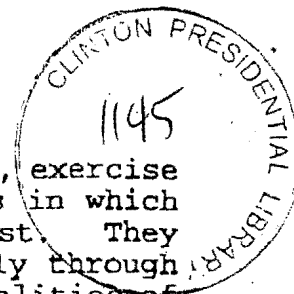
b. Even if this suit had been brought as a challenge to an actual exercise of the President's cancellation authority, appellees would lack standing. This Court has

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

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

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

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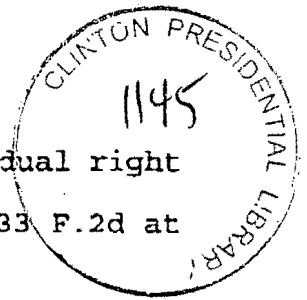


no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold. Whatever the realities of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

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

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

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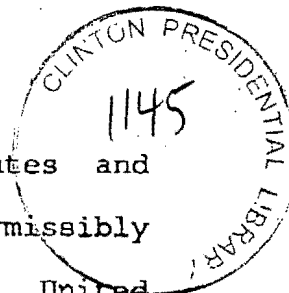
operation of the legislative process is itself an individual right would effectively negate that limitation. See Moore, 733 F.2d at 959 (Scalia, J., concurring).

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

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

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

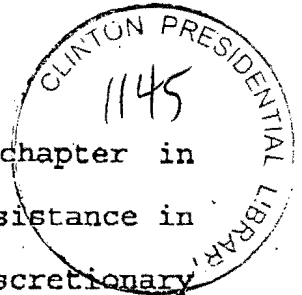
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discretion over the implementation of federal statutes and programs, notwithstanding claims that Congress had impermissibly delegated its legislative powers. See, e.g., Loving v. United States, 116 S. Ct. 1737 (1996); Touby, supra; Skinner v. Mid-America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

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

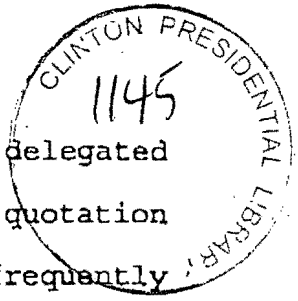
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The Line Item Veto Act is simply the latest chapter in Congress's efforts to enlist the Executive Branch's assistance in controlling spending by giving the President discretionary authority over federal expenditures. By virtue of the Act, the President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

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

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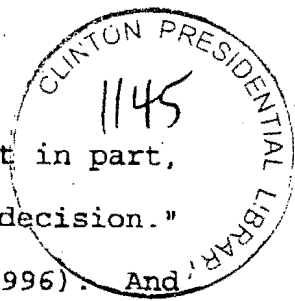
which is to apply it, and the boundaries of th[e] delegated authority." Mistretta, 488 U.S. at 372-373 (internal quotation marks omitted). Under that approach, the Court has frequently "upheld * * * delegations under standards phrased in sweeping terms." Loving, 116 S. Ct. at 1750.⁸

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

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

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

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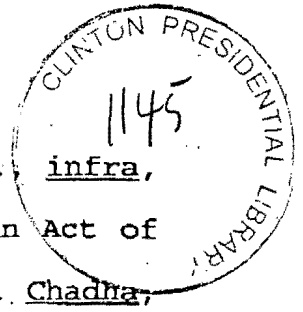
items only "in whole" (§ 1021(a); App., infra, 32a), not in part, thereby requiring him to make "an all or nothing decision."

H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 33 (1996). And, because the Act's "lockbox" feature (see page *, supra) requires the President to devote any cancelled funds to deficit reduction, the President has no authority to spend money on any project beyond the specific amount appropriated by Congress. The Act's requirement that each budgetary item must be devoted (in its entirety) either to a congressionally defined purpose or to deficit reduction is itself a substantial limitation on the President's discretion.

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

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

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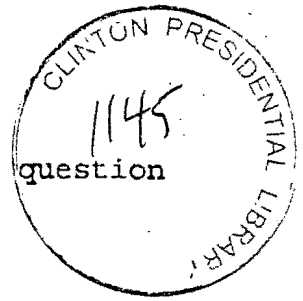


"legislative authority" or to "repeal" federal law. App., infra, 24a, 25a. An Executive Branch official administering an Act of Congress "does not exercise 'legislative' power." INS v. Chadha, 462 U.S. 919, 953 n.16 (1983). "The bicameral process is not necessary as a check on the Executive's administration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

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

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

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

* * * * *

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

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

FRANK W. HUNGER
Assistant Attorney General

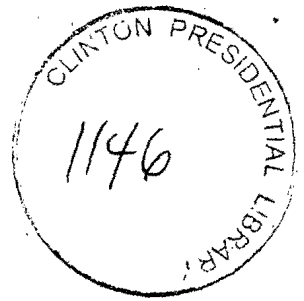
EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

APRIL 1997

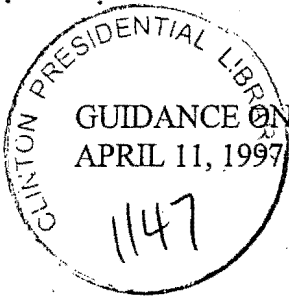
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what presentation
to ct to ask them
to hear quickly?
no injunction but
seems silly → P
sit tight till
resolved

CR: be unhappy but
sit tight till we
get it overturned.
Don't use.

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Filing notice of appeal even as we speak

- * The President is obviously disappointed with today's ruling, but he is confident that the line-item veto will ultimately be ruled constitutional.
- * The President firmly believes that the line-item veto is an important tool with which he will be better able to strike wasteful spending and tax provisions from legislation that reaches his desk.
- * With regard to further action in the courts, we're really not in a position to comment until the Justice Department has completed its review and sets a course of action. Obviously, though, the President has not changed his views.

(JUSTICE HAS TEN DAYS TO FILE A NOTICE OF APPEAL. UNDER THE LAW, THE APPEAL GOES STRAIGHT TO THE SUPREME COURT, BYPASSING THE APPEALS COURT.)

HAAS/TOIV
NEC/Counsel's office

Justice
Sit tight for awhile.
Appeal - immediately.
planning to attempt
to get it heard this
term

act provides for expedited review.

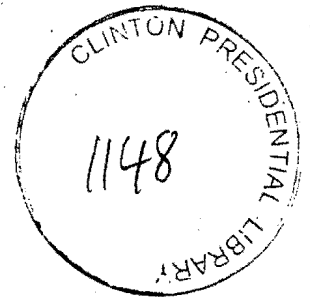
we did voice standing issue.

May 16 → simultaneous brief
10 days later reply brief
5 days later argument.

call opposing counsel
draft joint statement
up in a week.

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Barry J. Toiv

04/11/97 10:39:55 AM

Record Type: Record

To: Jake Siewert/OPD/EOP, Robert W. Schroeder/WHO/EOP

cc: Jennifer D. Dudley/WHO/EOP

Subject: LIV statement

We need to check this.

----- Forwarded by Barry J. Toiv/WHO/EOP on 04/11/97 10:26 AM -----



HAAS L @ A1

04/10/97 05:49:00 PM

Record Type: Record

To: Barry J. Toiv

cc:

Subject: LIV statement

Stressing how unsure I am that this is a good strategy, here's a first draft of what Mike might say; please make sure to vet this WIDELY:

"The President is obviously disappointed with today's ruling. But he is confident that, ~~as the matter continues to work its way through the courts~~, that the line-item veto will be ruled constitutional. The President firmly believes that the line-item veto is an important tool with which he will be better able to strike wasteful spending and tax provisions from legislation that reaches his desk."

Best: DOT is still reviewing and will make a recommendation.

ultimately

Obviously Justice is still reviewing the decision. [I don't think anyone believed this wd be decided at the district ct level.

In the end this is a decision the SC is going to have to decide.]

Bill Marshall doesn't like.

*as far as we
shd go →
tho what it will*

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. note	To Cheryl from Trey. (1 page)	02/26/1997	P5 1149
001b. draft	Robert Byrd et al. v. Frankline Raines et al. 97-0001. Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss. (15 pages)	02/26/1997	P5 1150

COLLECTION:

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

FOLDER TITLE:

[Line Item Veto] [3]

Van Zbinden
2007-0624-F
vz1225

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.

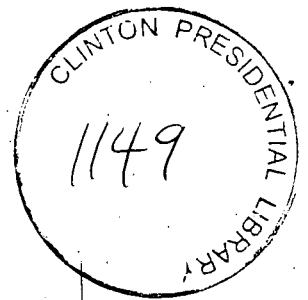
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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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THE WHITE HOUSE
WASHINGTON

2/26

Cheryl -

Attached is DOJ's brief on
standing/vipeness in Byrd v. Ruiz,
the live item veto act case.

We've asked Justice to condense
the paragraphs at pp. 4-5 and to
drop the specific references to
plaintiffs.

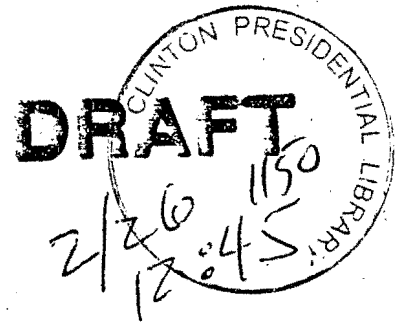
We've also asked that they
make the changes I've indicated
at pp. 11-12.

To be filed this afternoon.

Thanks - -
Lorenz

Thanks,
Trey

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SENATOR ROBERT C. BYRD, et al.,)

Plaintiffs,)

v.)

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

Defendants.)

Civil Action No. 97-0001 (TPJ)

REPLY TO PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

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

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

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

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

ARGUMENT

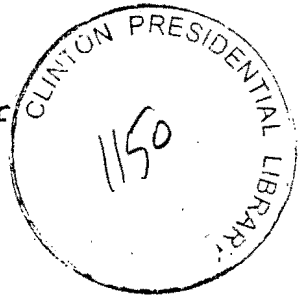
I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

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

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

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

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



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

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

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

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

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

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

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

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

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

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

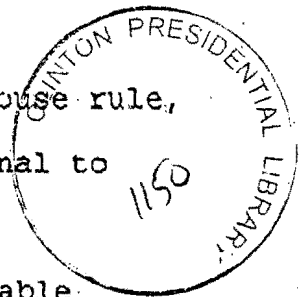
In Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977), the District of Columbia Circuit considered whether a Member of Congress had standing to challenge certain domestic and foreign activities of the Central Intelligence Agency and the manner in which they were funded. Plaintiff in that case, relying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

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

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

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

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



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

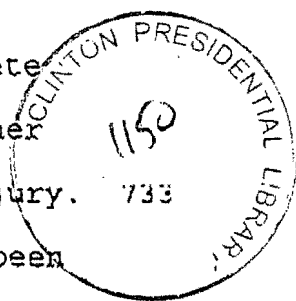
In Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985), members of the House of Representatives sued the House and its officials, alleging that defendants injured them by allowing the Tax Equity and Fiscal Responsibility Act of 1982 to originate in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

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

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

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law, plaintiffs actually had been deprived of the concrete opportunity to vote on a tax revenue measure in the manner prescribed by the Constitution, which was cognizable injury. 733 F.2d at 951, 954. In this case, no similar injury has been inflicted on plaintiffs under the Line Item Veto Act.

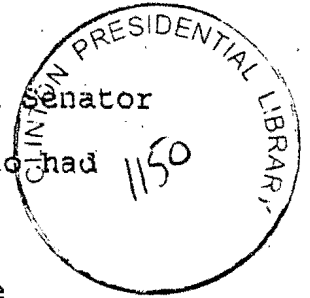


In Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983), members of the House of Representatives sued the Speaker of the House, the Majority Leader, the Chairman of the Democratic Caucus, the Democratic Steering and Policy Committee, and the Democratic Caucus (699 F.2d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

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

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

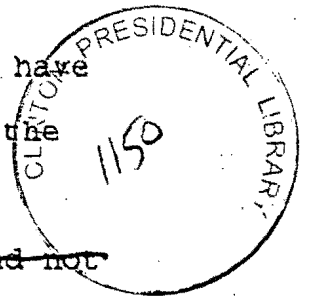


Finally, in Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsheer v. Synar, 478 U.S. 714 (1986), which plaintiffs say is "indistinguishable on the standing issue from the present case" (Pl. Memo, p. 15), members of Congress and the National Treasury Employees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

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

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



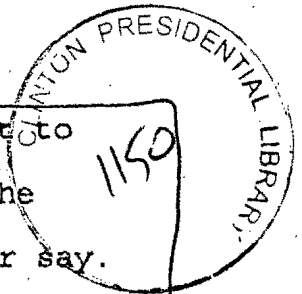
These cases demonstrate that some palpable event, and not ~~merely a legislator's subjective fear about, or taking into account the consequences of, a particular law,~~ is necessary to constitute cognizable injury under Article III. As the District of Columbia Circuit explained in Harrington v. Bush,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

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

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

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



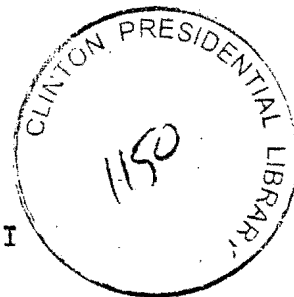
Therefore, plaintiffs do not have standing based merely on the unexercised authority conferred by that Act. As this Court observed in rejecting the claims of plaintiffs to have standing to challenge the Line Item Veto Act in NTEU v. United States, 929 F. Supp. 484, 490 (D.D.C.), aff'd, 101 F.3d 1423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

C. The President Has Not Nullified Plaintiffs' Votes

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

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



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

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

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

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

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

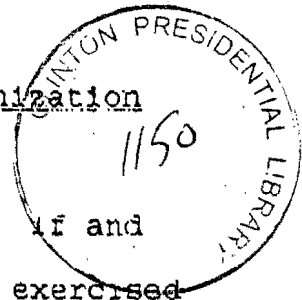


But, as we showed in part I of this reply, plaintiffs are not "suffering present injury." And it is a matter of speculation whether or when they will suffer injury in the future. First, Congress may exempt future laws from the operation of the Line Item Veto Act. Second, even if the President were to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

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

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



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

CONCLUSION

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

Respectfully submitted,

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Summary Judgement and in Support of Defendants' Motion for Summary Judgement. (32 pages)	02/25/1997	P5 1151
002. draft	Robert Byrd et al. v. Franklin Raines et al. 97-0001. Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss. (15 pages)	02/26/1997	P5 1152
003. draft	Franklin Raines et al. v. Robert Byrd et al. 96-1671. Brief for the Appellants. (58 pages)	05/05/1997	P5 1153

COLLECTION:

Clinton Presidential Records
Counsel's Office
Trey Schroeder
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[Line Item Veto] [4]

Van Zbinden
2007-0624-F
vz1226

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).

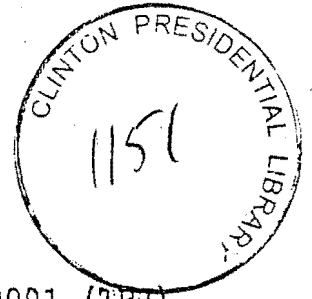
RR. Document will be reviewed upon request.

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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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA



SENATOR ROBERT C. BYRD, et al.,)

Plaintiffs,)

v.)

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

Defendants.)

Civil Action No. 97-0001 (TPJ)

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

On April 9, 1996, the President approved the Line Item Veto Act. Pub. L. No. 104-130, 110 Stat. 1200, to be codified at 2 U.S.C. 681 note, 691, et seq. The Act amends title X of the Congressional Budget and Impoundment Control Act of 1974 (2 U.S.C. 681 et seq.), which authorizes the President to propose a "rescission" of budget authority, but gives the proposal no effect unless it becomes law by Act of Congress within 45 days. The Line Item Veto Act, adopting "enhanced rescission," authorizes the President to "cancel in whole", within five days of their enactment by Congress, any "dollar amount of discretionary budget authority," any "item of new direct spending," and any "limited tax benefit," under specified terms and conditions. The cancellation is effective unless disapproved by an Act of Congress.

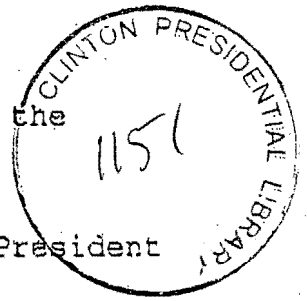
Contrary to plaintiffs' principal contention, the Line Item Veto Act does not authorize the President to take action which

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violates Article I, §7, cl. 2 (the "Presentment Clause") of the Constitution. The Act does not permit the President to revise or repeal any laws. Instead, the Act permits the President to cancel only designated dollar amounts, items, and limited tax benefits contained in future spending and tax laws that have been passed by both Houses of Congress, and presented to and approved by the President, in accordance with the Presentment Clause. ~~Now does the Act permit the President to revise or repeal any laws.~~ Rather, the Act makes permissive and not mandatory, at least for a five-day period, the expenditure of designated funds or the grant of designated tax benefits contained in duly enacted spending and tax laws, and delegates to the President authority, in the execution of those laws, to determine whether the funds should be spent or the benefits should be granted.

There is no constitutional principle that says Congress must mandate spending in appropriation laws. On the contrary, the courts repeatedly have held that the question of whether spending is mandatory or permissive -- that is, did Congress appropriate funds that must be spent or may be spent -- is one of legislative intent and statutory construction. E.g., Train v. City of New York, 420 U.S. 35, 41 (1975); Decatur v. Paulding, 39 U.S. (12 Pet.) 497, 516 (1840); State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099, 1109 (8th Cir. 1973); Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 900-901 (D.D.C. 1973). In granting discretion to the President to determine whether to spend permissive appropriations or grant

permissive tax benefits, Congress is constrained only by the flexible requirements of the delegation doctrine.

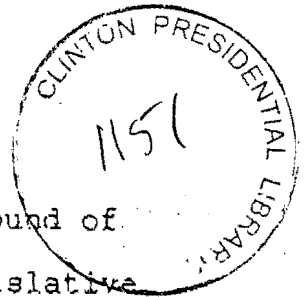


Congress' vesting of cancellation authority in the President under the Line Item Veto Act fully satisfies the test for permissible delegations articulated by the Supreme Court. Mistretta v. United States, 488 U.S. 361 (1989). In the Act, Congress has provided intelligible principles to guide the President in the exercise of this cancellation authority, while retaining its legislative prerogative to override any cancellation by enacting a disapproval bill or to exempt future spending or tax laws from the operation of the Act. Therefore, the delegation of authority under the Act is similar to other delegations which have been sustained by the Supreme Court without exception over the past 60 years.

Moreover, the Line Item Veto Act does not violate the principle of separation of powers. The Act is the logical outgrowth of executive action, congressional legislation, and court rulings spanning nearly two centuries, which have created a system of interdependent and shared responsibilities between the two political branches of government on the matter of controlling federal spending. Placed in historical context, the Act is evolutionary, not revolutionary, and it does not impermissibly transfer the "power of the purse" to the President.

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STATEMENT



A. Historical Background

The Line Item Veto Act was enacted against a background of evolving cooperation and interdependence between the Legislative and Executive Branches on the matter of controlling federal spending. The relationship between the two political branches on this matter has been in flux from the earliest days of the Republic. It has been made manifest through executive action and congressional legislation, and it has been influenced and affected by decisions of the Judicial Branch.

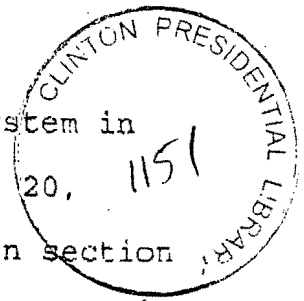
1. 19th century experience. Presidents, at least since Thomas Jefferson, have asserted that the Executive Branch has some discretion to control the expenditure of funds appropriated by Congress. S. Rep. No. 104-9, at 2 (1995). In 1803, President Jefferson made the first significant "impoundment" of appropriated funds by refusing to spend \$50,000 appropriated by Congress for the operation of gun boats on the Mississippi River because he thought their use was unnecessary. *Id.*, at 2-3; see Nile Stanton, History and Practice of Executive Impoundment of Appropriated Funds, 53 Neb. L. Rev. 1 ["Executive Impoundment"].

In 1838, the Supreme Court decided Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), holding that the President could not refuse to make a payment mandated by Act of Congress on a contract for the delivery of mail. But two years later, in Decatur v. Pauling, 39 U.S. (12 Pet.) 497 (1840), the Supreme Court denied a writ of mandamus to compel the Secretary

of the Navy to pay a claim based on a congressional resolution. The Supreme Court distinguished Kendall on the ground that the duty imposed by Congress there was "merely ministerial," while the duty imposed by Congress in the case before it "required the exercise of judgment and discretion." 39 U.S. at 516.

In 1876, President Grant notified Congress that he did not intend to spend the full amount appropriated for harbor and river improvements, because they were of a private or local interest rather than in the national interest. S. Rep. No. 104-9, at 3. Congress did not challenge President Grant's impoundment. *Id.* In the years following President Grant's action, Attorneys General stated in formal opinions that, in addition to statutory language, congressional intent had to be considered in determining whether Congress was mandating an expenditure of funds or simply permitting the President to spend them. *Id.*

2. Early 20th century developments. Congress delegated a measure of budgetary and fiscal discretion to the President in the Anti-Deficiency Acts of 1905 and 1906. Act of Feb. 27, 1906, ch. 510, §3, 34 Stat. 48; Act of March 3, 1905, ch. 1484, §4, 33 Stat. 1257. In addition to requiring the "apportionment" of annual appropriations to avoid the need for supplemental appropriations later in the fiscal year, these Acts allowed the President to waive spending appropriated funds in the event of "some extraordinary emergency or unusual circumstances which could not be anticipated at the time of making such apportionment." Act of Feb. 27, 1906, supra.

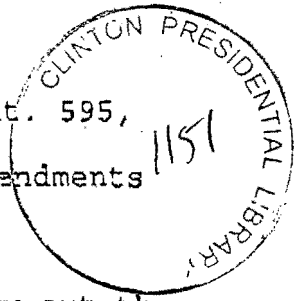


In 1921, Congress established a national budget system in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, repealed by Pub. L. No. 97-258, 96 Stat. 877 (1982). In section 201 of the Act, Congress established the Bureau of the Budget (now the Office of Management and Budget), and required the President to submit a budget to Congress annually for its consideration and approval.¹ In keeping with its constitutional role to make the laws, Congress retained authority to enact the appropriations. Id. However, by this Act Congress shared responsibility for budget preparation with the President.

President Roosevelt used the waiver authority provided by the Anti-Deficiency Acts during the Depression and World War II. S. Rep. No. 104-9, at 3. He also impounded funds for flood control projects, which evoked a legislative response from Congress in 1943 to prohibit any agency or official (except the Commissioner of Public Roads) from impounding funds appropriated for highway construction. Id.

3. The amended Anti-Deficiency Act. In 1950, Congress amended the Anti-Deficiency Act to provide the President limited statutory authority to establish "reserves" (that is, to withhold appropriated funds) "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date [of appropriation]." General

¹ Presently, 31 U.S.C. 1105 contains a similar requirement for submission of an executive budget proposal.



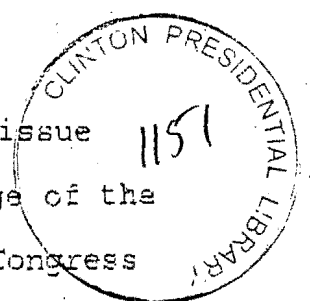
Appropriation Act of 1951, ch. 896, §1211(c)(2), 64 Stat. 595, 765 (current version at 31 U.S.C. 1512(c)(1)).² The amendments also authorized the Executive Branch to "recommend the rescission" of any reserves "not * * * required to carry out the purposes of the appropriation concerned." *Id.*, 64 Stat. at 766 (current version at 31 U.S.C. 1512(c)(2)). These amendments provided the Executive Branch with its first express statutory impoundment authority. Executive Impoundment, at 11.

4. Impoundments in the 1970s. President Nixon's extensive use of impoundment during the early 1970s gave rise to a flurry of litigation and legislation. See City of New Haven v. United States, 634 F. Supp. 1449, 1454-1455 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). Numerous lawsuits were filed in which plaintiffs challenged Executive Branch action withholding funds, which had been appropriated by Congress, for reasons of economic

² Congress deleted the "other developments" language in 1974. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §1002, 88 Stat. 332, 367, 1002.

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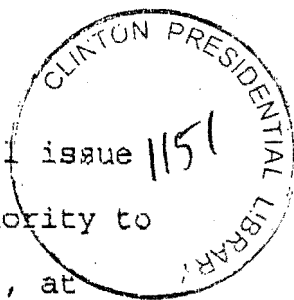
policy.³ The courts in these cases generally framed the issue as one of statutory construction and examined the language of the particular legislation in question to determine whether Congress had provided the President with discretion to delay or withhold appropriations. Most of the courts addressing presidential impoundments found that there was no such discretion in these cases. See City of New Haven v. United States, *supra*, 634 F. Supp. at 1454 n. 6 (citing cases).



For example, in State Highway Comm'n of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973), the Eighth Circuit examined whether the Secretary of Transportation had discretion to defer authority to obligate highway funds previously apportioned to the State of Missouri under the Federal Aid-Highway Act of 1956. "[A]ssuming the proposition to be true * * * that a general appropriation act is deemed permissive in nature as far as it constitutes a mandate to expend funds," the Eighth Circuit ruled that "only an analysis of the statute itself can dictate the latitude of the questioned discretion." 479 F.2d at 1109.

Several district courts that addressed the extent of the President's constitutional authority to impound funds appropriated by Congress generally held that the President had no "inherent" impoundment power. E.g., Guadamuz v. Ash, 368 F. Supp. 1233, 1243 (D.D.C. 1973); Local 2677, AFGE v. Phillips, 358 F. Supp. 60, 77 (D.D.C. 1973). However, it was plain that the constitutional inquiry for those courts was whether the President could act contrary to the legislative will of Congress. See Local 2677, AFGE v. Phillips, *supra*, 358 F. Supp. at 77 ("if the power sought here were found valid, no barrier would remain to the executive ignoring any and all Congressional authorizations.") They did not rule whether an express delegation of impoundment authority would violate the Constitution. See Youngstown Sheet & Tube Co. v. Sawyer, *supra*, 343 U.S. at 635-636 (Jackson, J., concurring).

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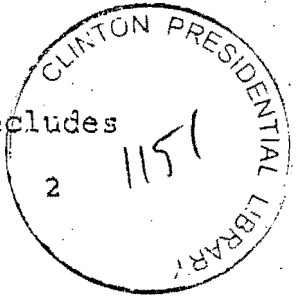


Therefore, the Eighth Circuit said that "[t]he fundamental issue is whether the Secretary possesses direct or implied authority to exercise contract controls for the reason advanced." Id., at 1111. After reviewing the Federal Aid-Highway Act, the Eighth Circuit held that the Secretary's discretion to determine whether funds are made available was limited to certain program related statutory criteria. Id., at 1113-1114 & n. 16.

Similarly, in Train v. City of New York, 420 U.S. 35 (1975), the question before the Supreme Court was whether the Administrator of the Environmental Protection Agency could allot to states less than the entire amount of funds authorized to be appropriated by the Federal Water Pollution Control Act Amendments of 1972. The Supreme Court said the question turned on "the proper construction of Act," 420 U.S. at 41, and after examining the relevant language and legislative history, it concluded that Congress intended to mandate allotment to the states of the full amount authorized to be appropriated.

5. The Impoundment Control Act. In response to President Nixon's impoundment actions, Congress, in 1974, enacted the Impoundment Control Act ["ICA"], title X of the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332. The ICA recognizes two types of impoundment: "deferral" and "rescission."

A deferral is "withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities" or "any other



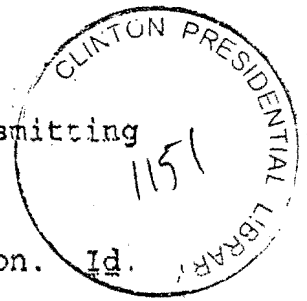
type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority * * * ." 2 U.S.C. 682(1). Deferrals are permissible only (1) for contingencies, (2) to effect savings achieved through changes or efficiency, or (3) as specifically provided by law. 2 U.S.C. 684(b). The ICA authorizes the President and officers of the Executive Branch to propose a deferral by transmitting a special message to both Houses of Congress containing statutorily specified information regarding the deferral. 2 U.S.C. 684(a). A deferral becomes effective upon transmission of the special message, but it may not extend beyond the end of the fiscal year during which the special message was transmitted. *Id.*⁴

A rescission is the cancellation of budget authority. 2 U.S.C. 682(3). Under the ICA, the President may propose a rescission of all or part of any budget authority whenever the President determines that it "will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons * * * ." 2 U.S.C. 683(a). The ICA

⁴ As originally enacted, the ICA provided that a proposed deferral was automatically effective unless either House of Congress passed an "impoundment resolution" disapproving the deferral. 88 Stat. at 335. Subsequently, in light of INS v. Chadha, 462 U.S. 919 (1983), the one-House veto provision was held unconstitutional. City of New Haven v. Pierce, 809 F.2d 900 (D.C. Cir. 1987). In response, Congress amended the ICA to eliminate the legislative veto provision. Pub.L. 100-119, Title II, § 206(a), Sept. 29, 1987, 101 Stat. 785. Congress did not retain a formal check on deferrals, but it authorized the Comptroller General to bring a civil action to require that budget authority be made available for obligation whenever that is mandated by law. 2 U.S.C. 687.

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authorizes the President to propose a rescission by transmitting a special message to both Houses of Congress containing statutorily specified information regarding the rescission. Id.



However, under the ICA the amount proposed to be rescinded must be made available for obligation unless, within 45 days after the special message has been transmitted, Congress passes a bill rescinding all or part of the amount proposed. 2 U.S.C.

683 (b) .⁵

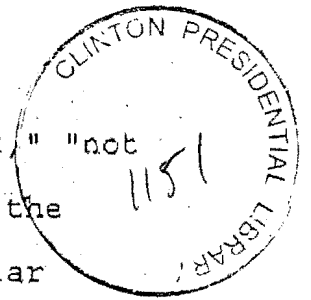
B. The Line Item Veto Act

Under the Line Item Veto Act, the President is authorized, with respect to any bill or joint resolution signed into law pursuant to Article I, section 7, to "cancel in whole" any "dollar amount of discretionary budget authority," any "item of new direct spending," or any "limited tax benefit," as those terms are defined in the Act, if the President determines that

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

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the "cancellation" will "reduce the Federal budget deficit," "not impair any essential Government functions," and "not harm the national interest." 2 U.S.C. 691(a). In identifying dollar amounts, items, and benefits for cancellation, the President must consider the legislative history and purposes of the law containing those dollar amounts, items, or benefits, any specific sources of information to which the law makes reference, and the definitions in the Line Item Veto Act. 2 U.S.C. 691(b).



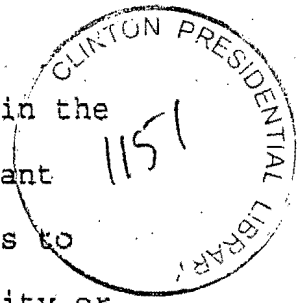
The Act also directs the congressional Joint Committee on Taxation to identify limited tax benefits contained in bills and joint resolutions, and provides that those bills and joint resolutions may include a separate section prohibiting the application of the Act to any provisions but those specifically enumerated in the separate section and identified by the Joint Committee as limited tax benefits. 2 U.S.C. 691f(a), (b). The President must comply with the restrictions in those separate sections, if any, in exercising the authority to cancel limited tax benefits. 2 U.S.C. 691f(c).

The President must notify Congress of a cancellation by transmitting a "special message" within five calendar days after enactment of the law to which the cancellation applies. 2 U.S.C. 691(a). The Act specifies the contents of the special message, and requires that it shall be printed in the Federal Register in the first issue published after it is transmitted to Congress. 2 U.S.C. 691a. The cancellation takes effect upon Congress' receipt of the special message, and, in the case of a

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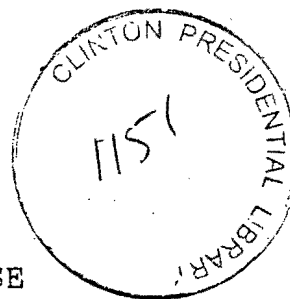
cancellation of discretionary budget authority, results in the simultaneous reduction of the dollar amount of the relevant appropriation. 2 U.S.C. 691b. The cancellation operates to rescind any dollar amount of discretionary budget authority or prevent items of new direct spending or limited tax benefits from having legal force or effect. 2 U.S.C. 691e(4). Both the Office of Management and Budget and the Congressional Budget Office must make designated revisions in budget estimates and reports if a cancellation becomes effective. 2 U.S.C. 691c.

Under the Line Item Veto Act, each special message transmitted by the President is referred to the appropriate congressional committees. During a review period of 30 days following Congress' receipt of the special message, Members of Congress may introduce, and Congress may consider, a "disapproval bill" under a schedule and procedures spelled out in the Act. 2 U.S.C. 691d. A disapproval bill is a bill or joint resolution which disapproves one or more cancellations. 2 U.S.C. 691e(6). If a disapproval bill is enacted into law, then all cancellations disapproved in that law are null and void. 2 U.S.C. 691b(a). The Act does not confer authority on the President to cancel any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit contained in an enacted disapproval bill. 2 U.S.C. 691(c).



ARGUMENT

- I. THE LINE ITEM VETO ACT DOES NOT AUTHORIZE A VIOLATION OF THE PRESENTMENT CLAUSE -- FUTURE SPENDING AND TAX BILLS WILL BE PRESENTED TO AND APPROVED OR VETOED BY THE PRESIDENT IN ACCORDANCE WITH THE CLAUSE



In the wake of the Line Item Veto Act, laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits will be passed by both Houses of Congress, and presented to the President for approval or return, just as they always have been. We agree with the plaintiffs that, under the Presentment Clause, the President must sign or veto the "whole bill," "in toto." See Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment ["Fl. Memo"], pp. 28-32. If the President signs it, the bill becomes law and the President must faithfully execute it.

What is new about the Line Item Veto Act is that, in effect, it makes permissive, and not mandatory, future laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits permissive and not mandatory -- at least for a five-day period. The Act does this by conferring discretion upon the President not to spend appropriations or to grant limited tax benefits. In other words, Congress has delegated authority to the President, in the execution of duly enacted future spending and tax laws, to determine whether particular funds should be spent or particular

tax benefits should be granted.⁶ This determination must be made within five days after enactment of those laws, utilizing the standards set forth in the Line Item Veto Act. In making this determination, the President does not revise or repeal any laws. The President simply exercises the discretion that Congress validly has conferred to determine whether to spend funds or grant benefits that, for a limited time, are permitted but not required to be spent or granted.⁷

Accordingly, the argument that the Line Item Veto Act "evade[s] the central purpose of the Presentment Clause" because it gives the President "the power to approve parts of a bill and reject others," and the "power to repeal provisions of law that

⁶ The language of the Appropriations Clause of the Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Article I, §9, cl. 7) suggests a bias against spending. It constrains the President from expenditures unless and until Congress appropriates funds. OPM v. Richmond, 496 U.S. 414, 424-425 (1990). But this Clause in no way suggests the converse; that the President must spend money that Congress appropriates, at least in the absence of some legislative intent to mandate that result. Decatur v. Paulding, supra, 37 U.S. at 516.

⁷ Plaintiffs contend that this explanation "is on its face inapplicable to 'limited tax benefits,' such as a deduction available to only a few taxpayers, which do not involve spending." Pl. Memo, p. 39. They also claim "it is obvious that cancellation of a limited tax benefit is changing the law." Id.

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

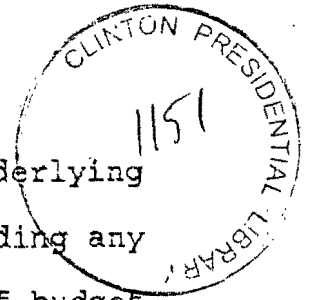
became law between one instant and five days earlier when the President signed the bill" (Pl. Memo, pp. 32, 34, 36), is based on an erroneous premise. The Act does not allow the President to "approve parts of a bill and reject others" or to "repeal" any laws.⁸ Instead, it confers discretion upon the President in respect only of dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits contained in duly enacted spending and tax laws that have been signed, in toto, by the President.⁹

Indeed, in passing the Line Item Veto Act, Congress made clear that it was not attempting to "evade() the central purpose of the Presentment Clause," as plaintiffs contend. As the conferees on the Act noted, Congress "specifically include[d] the requirement that a bill or joint resolution must have been signed into law, in order to clarify that the cancellation authority only becomes effective after the President has exercised the constitutional authority to enact legislation in its entirety. This requirement ensures that the President affirmatively demonstrates support for the underlying legislation from which specific cancellations are then permitted." H.R. Conf. Rep. No.

⁸ Contrary to plaintiffs' suggestions (Pl. Memo, pp. 26, 34), the appearance of the word "veto" in the Act's title has no operational significance, because the actual provisions of the Act nowhere mention a presidential "veto." More importantly, the Act does not authorize a veto in the commonly understood sense of nullification of a law.

⁹ Even plaintiffs concede that, under the Act, the President "physically signs the whole bill," and the bill "becomes law for a scintilla juris" before the President exercises the discretion conferred by the Act. Pl. Memo, pp. 34, 35.

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104-491, at 20 (1996). Furthermore, "[t]he cancellation authority does not permit the President to rewrite the underlying law, nor to change any provision of that law, * * * including any restriction, limitation or condition on the expenditure of budget authority, or any other requirement of the law." Id.¹⁰

Congress could achieve the same result it achieved under the Line Item Veto Act by inserting the words of the Act in every future spending and tax law. For example, both Houses of Congress could pass an omnibus bill appropriating \$10 billion for 100 defense projects, subject to a proviso that the President could cancel one or more of those projects over the life of the

¹⁰ Thus, in defining the term "dollar amount of discretionary budget authority," Congress specified that this term "does not include * * * any restriction, condition, or limitation in an appropriation law or the accompanying statement of managers or committee reports on the expenditure of budget authority for an account, program, project, or activity, or on activities involving such expenditure." 2 U.S.C. 691e(7)(B)(iv).

Plaintiffs contend that, by defining the term "dollar amount of discretionary budget authority" to include amounts "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law" (2 U.S.C. 691e(7)(ii)), the Act impermissibly gives these tables, charts, and texts "the force of law." Pl. Memo, pp. 38-39 n. 23. That is not so. As the House conference report on the Act makes clear, this definition "is not intended to give increased legal weight or authority to documents that accompany the law that it enacted. Rather, as an exercise of its authority to specify the terms of the delegation to the President, Congress is choosing to use those documents as a means of allowing the President increased discretion to reduce dollar amounts of discretionary budget authority provided in an appropriation law." H. Conf. Rep. No. 104-491, at 32 (1996). Thus, the tables, charts, and explanatory texts are merely points of reference, reflecting "an agreed upon set of dollar amounts that the President may rescind in their entirety." Id. Congress just as easily could have incorporated by reference tables, charts, or explanatory texts appearing in newspaper articles or other publications without giving them the force of law.

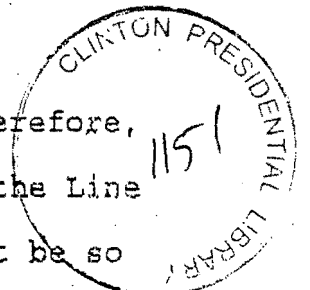
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appropriations if the President determined it would reduce the federal budget deficit. Or both Houses could pass a bill appropriating \$100 million for two defense projects, subject to a proviso that the President could cancel either or both of those expenditures within five days of enactment of the bill if the President determined it would reduce the federal budget deficit. If those bills were presented to and signed by the President, they would become law even though the expenditures were made permissive and not mandatory. If the President then determined that cancelling these expenditures would reduce the federal budget deficit, and the President cancelled them, the President would not be revising or repealing the law. The President merely would be exercising discretion and executing the law consistent with Congress' instructions. Therefore, the President's exercise of the cancellation authority in this example would not violate the Presentment Clause.

It makes no constitutional difference that Congress chose instead to enact a single, free-standing Line Item Veto Act that will put an interpretive gloss on future spending and tax laws. The President's exercise of the discretionary cancellation authority conferred by the Act does not implicate or violate the Presentment Clause because it applies only to spending and tax laws that have been duly enacted in accordance with that Clause.

To be sure, Congress is precluded by the separation of powers principle of our tripartite system of government from delegating its legislative power to the Executive or Judicial

Branches. Field v. Clark, 143 U.S. 649, 692 (1892). Therefore, the instructions Congress has given the President under the Line Item Veto Act for executing spending and tax laws may not be so unbounded as to delegate legislative power to the President. But that means that the constitutionality of the President's exercise of the cancellation authority conferred by the Line Item Veto Act involves primarily a question of delegation doctrine, not the Presentment Clause.



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

A. Congress Has Broad Power to Delegate

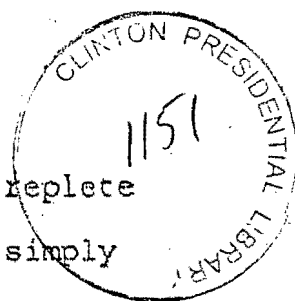
The Supreme Court has observed that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." Mistretta v. United States, 488 U.S. 361, 372 (1989). The test the Supreme Court has used to decide whether Congress has sought too much assistance from another branch is well-settled. "'In determining what Congress may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination. * * * So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation.'" Mistretta v.

United States, supra, quoting from J.W. Hampton, Jr. & Co.

United States, 276 U.S. 394, 406, 409 (1928).

Applying this "common sense" test to the "inherent necessities" of government, the Supreme Court has not struck down a challenged statute on delegation grounds in over 60 years. Indeed, except for invalidating two statutes as excessive delegations in 1935, see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), the Supreme Court has not struck down a single challenged statute on delegation grounds.

At the same time, the Supreme Court consistently has sustained Congress' delegation of sweeping discretionary powers to the Executive Branch, including powers that relate directly to the Nation's fisc. For example, the Supreme Court has held that Congress may authorize the President and other Executive Branch officials to raise or lower tariffs (J.W. Hampton, Jr. & Co. v. United States, supra), establish a minimum wage for industry (Opp Cotton Mills v. Administrator, 312 U.S. 126 (1941)), determine just and reasonable power rates (FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944)), fix fair and equitable commodities prices (Yakus v. United States, 321 U.S. 414 (1944)), define and recover excessive wartime profits (Lichter v. United States, 334 U.S. 742 (1948)), raise license fees on imports (FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976)), and establish and collect pipeline safety user fees or taxes (Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989)).

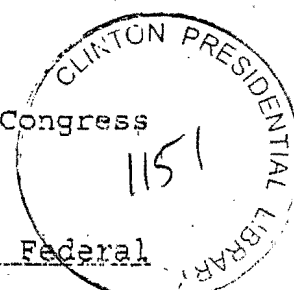


These decisions have been "driven by a practical understanding that, in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives," Mistretta v. United States, supra, 488 U.S. at 372. Nevertheless, delegations of power by Congress to the Executive Branch also have been sustained where the reason for the delegation was not concern about Congress' ability to deal with complex and technical problems.

A good example of this is the series of enactments which, in conferring broad authority on the Secretary of Defense to close military bases, did not specify which bases should be closed. Throughout the 1960s and 1970s, the President attempted to reduce military expenditures by closing or realigning military bases. See Defense Base Closure and Realignment Commission, Report to the President, at 1-1 (1991).

Beginning in 1977, Congress enacted legislation which conferred authority on the Secretary of Defense unilaterally to close military bases, subject to override by Act of Congress. Under the Defense Authorization Amendments and Base Closure and Realignment Act, Pub. L. No. 100-526, 102 Stat. 2623, enacted in 1988, Congress created an independent commission and authorized it to recommend bases for closure or realignment. The commission presented its recommendation to the Secretary of Defense, who had the power to approve or disapprove the entire group of

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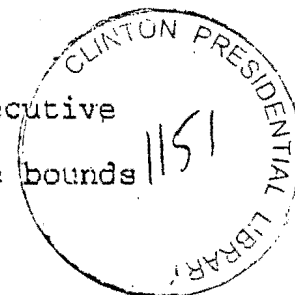
recommendations. If the Secretary of Defense approved, Congress had 45 days to override the approval.

This legislation was challenged in National Fed. of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990), on the ground, among others, that it amounted to "an excessive delegation of legislative discretion in violation of the constitutionally based non-delegation doctrine." 905 F.2d at 404. The District of Columbia Circuit rejected this challenge. It noted that the test applied by the Supreme Court in delegation cases "has not been a tough one." Id. It then concluded that the 1988 act incorporated an intelligible standard to constrain administrative discretion, and that it was "well within the bounds of lawful delegation." Id.

The Line Item Veto Act confers similar delegated authority. The Act delegates to the President the authority to decide, subject to legislative disapproval, whether to spend funds or grant limited tax benefits which are permitted, but not required, to be spent or granted. Whether appropriations are permissive or mandatory is a matter of statutory interpretation. E.g., Train v. City of New York, supra; Decatur v. Paulding, supra; State Highway Comm'n of Missouri v. Volpe, supra; Nat'l Council of Comm. Mental Health Centers, Inc. v. Weinberger, supra. No court has ever suggested that Congress may not leave it to the President's discretion, with whatever guidelines are necessary, to decide whether to spend appropriated funds or grant limited tax benefits. The discretion conferred by the Line Item Veto Act

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on the President, like the discretion conferred on the Executive Branch by the base closing legislation, is well within the bounds of lawful delegation.



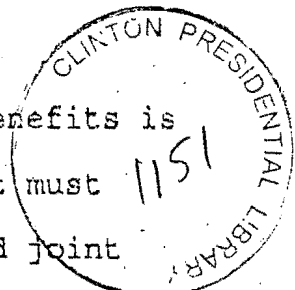
B. The Line Item Veto Act Has More Than Ample Standards to be a Valid Delegation

As the Supreme Court reiterated in Mistretta v. United States, supra, 488 U.S. at 372, congressional delegations of power to the Executive Branch will be upheld if Congress lays down an "intelligible principle" to which the person or body authorized to exercise that power must conform. Congress was satisfied that the Line Item Veto Act included ample intelligible principles, and a review of the Act makes clear that it does.

First, the President may exercise the cancellation authority conferred by the Act only if the President determines that the cancellation will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest," and only if the President notifies Congress of the cancellation by transmitting a special message within five days after enactment of a the law containing the dollar amounts, items, or benefits to be cancelled. 2 U.S.C. 691(a). The cancellation authority "is not separable from the President's duties to comply with these restrictions," so that, if the President "reaches beyond these limits to expand the application of this new authority, the President will be reaching beyond the delegation of these authorities." H.R. Conf. Rep. No. 104-491, at 19 (1996).

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The President's authority to cancel limited tax benefits is particularly constrained. Under the Act, the President must comply with the separate sections, if any, of bills and joint resolutions prohibiting the application of the Line Item Veto Act to any provisions but those specifically enumerated and identified by the Joint Committee on Taxation as limited tax benefits. 2 U.S.C. 691f.

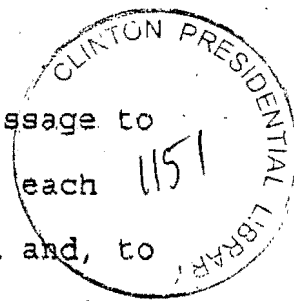


Second, the President may only "cancel in whole" dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits. 2 U.S.C. 691(a). The President may not simply reduce the level of expenditure fixed by Congress for a particular account or program. As the conferees on the Act stated: "It is an all or nothing decision." H. Conf. Rep. No. 104-491, at 33. Similarly, the President may not use the cancellation authority to change, alter, or modify in any way the underlying spending or tax laws containing dollar amounts, items, or benefits subject to cancellation.

Third, in identifying dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits for cancellation, the President must "(1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits; (2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and (3) use the definitions contained in [the Act] in applying this part to the specific provisions of

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such law." 2 U.S.C. 691(b). The President's special message to Congress must include relevant supporting material about each cancellation, including the reasons for the cancellation and, to the maximum extent practicable, its estimated fiscal, economic, and budgetary impact. 2 U.S.C. 691a(b). This helps to cabin the delegation to the President, because it requires an explanation of the President's action. It also serves "to ensure that the Congress and the public receive sufficient information with which to judge the President's action." H.R. Conf. Rep. No. 104-491, at 21 (1996).



Where applicable, the special message must also identify the states and congressional districts affected by the cancellation, and the total number of cancellations imposed during the current session of Congress on those states and districts. 2 U.S.C. 691a(b)(2)(B-C). This is "to ensure that the Congress has information to determine if there is a disproportionate impact on a particular state or congressional district." H.R. Conf. Rep. No. 104-491, at 21 (1996).

Fourth, the Act incorporates a "lockbox" provision, requiring the Office of Management and Budget to take prescribed accounting steps to guarantee that any credit for money not spent or tax benefits not granted is dedicated to deficit reduction. 2 U.S.C. 691c(a-b). "This ensures that the President does not simply cancel a particular dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit in

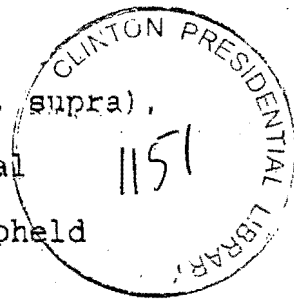
order to increase spending in other areas." H.R. Conf. Rep. No. 1151 104-491, at 20-21 (1996).

Plaintiffs characterize these intelligible principles, so which the President must conform in exercising the cancellation authority conferred by the Line Item Veto Act, as "an illusion." Pl. Memo, p. 40. They claim that the determinations the President is required to make "tell the President only that he should exercise the same judgment a lawmaker would, and do not constrain his authority at all." *Id.*, pp. 40-41.

That is not so. The legislative guidelines in the Line Item Veto Act meaningfully constrain the President's discretion, especially those requiring the President to exercise the cancellation authority within five days after enactment of the relevant spending or tax laws, to transmit a special message demonstrating compliance with Congress' instructions, and to comply with the "lockbox" requirement. Those provisions deny the President a roving charter to cancel, at any time as the President sees fit, a particular spending or tax relief measure simply because the President disagrees with its purposes. These guidelines are no more illusory than the guidelines in those laws delegating power to the Executive Branch to decide whether to increase or decrease tariffs (see J.W. Hampton, Jr. & Co. v. United States, *supra*),¹² to fix fair and equitable commodities prices (see Yakus v. United States, *supra*), to define and recover

¹² This delegation is remarkably similar to the delegation to the President under the Line Item Veto Act of the authority to cancel "limited tax benefits."

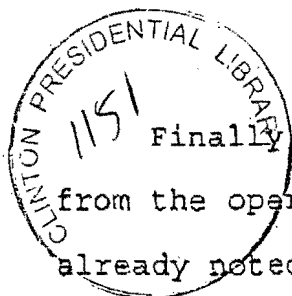
excessive wartime profits (see Lichter v. United States, *supra*), and to close military bases (see National Fed. of Federal Employees v. United States, *supra*), all of which were upheld against a delegation challenge.¹²



Furthermore, because the Line Item Veto Act provides that Congress may pass disapproval legislation that overturns a presidential cancellation, 2 U.S.C. 691d, Congress has retained a sufficient degree of its legislative prerogative. Congress' reservation of the power to examine and override the exercise of delegated power is frequently employed "to make sure that the action under the delegation squares with the Congressional purpose." Sibbach v. Wilson & Co., 312 U.S. 1, 15 (1941).

Plaintiffs presume that all disapproval bills would require a two-thirds vote of each House of Congress to secure passage, because, they imply, the President would not sign a disapproval bill containing provisions he had cancelled. Pl. Memo, p. 11. However, the President may decide to sign a disapproval bill when a specific item has garnered the support of a majority of Congress on its own merits, rather than made a "rider" to a larger appropriations measure. See Nat'l Treasury Employees Union v. United States, 929 F. Supp. 404, 409 (D.D.C.), *aff'd*, 101 F.3d 1423 (D.C. Cir. 1996).

¹² In Skinner v. Mid-America Pipeline Co., *supra*, the Supreme Court held that Congress' delegation of discretionary authority under the taxing power "is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." 490 U.S. at 223. Therefore, the cited cases upholding delegation guidelines plainly apply to the delegation of expending and taxing authority under the Line Item Veto Act.



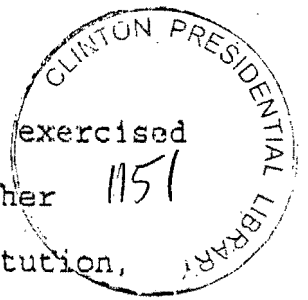
Finally, Congress may exempt any future spending or tax laws from the operation of the Line Item Veto Act. Indeed, as we already noted (supra, p. 24) the Act itself, at 2 U.S.C. 691f, enables Congress to prohibit the President from applying the Act to limited tax benefits.

Congress' reservation of the power to disapprove a presidential cancellation under the Line Item Veto Act, and its continuing power to exempt future spending and tax laws from the operation of the Act, are additional safeguards against the exercise of cancellation authority in a manner that would preclude Congress from "accomplishing its constitutionally assigned functions." Nixon v. Administrator of General Services, 433 U.S. 425, 443 (1977). This provides further support for the Act's delegation of authority to the President.

III. THE LINE ITEM VETO ACT DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

Plaintiffs also argue that the role assigned to the President under the Line Item Veto Act exceeds the constitutional limit of Executive Branch power and encroaches upon the Legislative Branch, in violation of the separation of powers doctrine. Pl. Memo, pp. 31-32, 39-40, 42-43. Placed in the historical context of the evolving relationship between the Legislative and Executive Branches on budgetary matters, the Line Item Veto Act does not violate the separation of powers doctrine.

In the words of James Madison, separation of powers "d[oes] not mean that these [three] departments ought to have no partial agency in, or no controul over the acts of each other," but



rather "that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution, are subverted." The Federalist No. 47, at 325-326 (James Madison) (Cooke ed. 1961). Accordingly, "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" Mistretta v. United States, supra, 488 U.S. at 380 (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)). As Justice Jackson wrote:

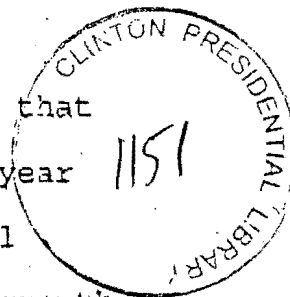
The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Although the Constitution, in Article I, §9, entrusts the "power of the purse" to Congress ("no money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), the expenditure of funds pursuant to congressional authorization is an executive function, consistent with the President's obligation under Article II, §3 to "take Care that the Laws be

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faithfully executed." We showed earlier (supra, pp. 3-11) that the Line Item Veto Act is the latest step in a nearly 200-year cooperative effort by the two political branches to control federal spending. In particular, the Act is a logical outgrowth and refinement of the Impoundment Control Act ["ICA"].

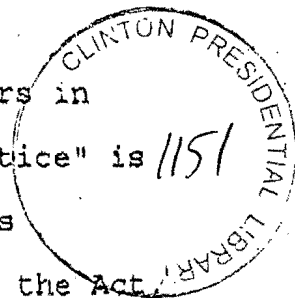


The various committees of Congress that reviewed the ICA found that it was "overly restrictive." S. Rep. No. 104-13, at 1 (1995). See H.R. Conf. Rep. No. 104-491, at 15-16 (1996); S. Rep. No. 104-9, at 1 (1995). In particular, Congress found that the "[t]he statutory procedures for rescission are too stringent to achieve significant savings." S. Rep. No. 104-13, at 2 (1995). From 1974 and forward, Presidents (both Democrats and Republicans) had recommended \$72.8 billion in rescissions, but Congress passed legislation rescinding only \$22.9 billion. *Id.*; H.R. Conf. Rep. No. 104-491, at 16 (1996); S. Rep. No. 104-9, at 5 (1995). Congress decided it should "reverse the burden by adopting a procedure called 'enhanced rescission.'" S. Rep. No. 104-13, at 2 (1995). Under "enhanced rescission," as authorized in the Line Item Veto Act, budget savings will be achieved "by placing the onus on Congress to overturn the President's cancellation of spending and limited tax benefits." H.R. Conf. Rep. No. 104-491, at 16 (1996).

It is clear from the legislative history that the Line Item Veto Act is an evolutionary, rather than a revolutionary, step in the on-going and interdependent effort by the Legislative and Executive Branches to manage the federal budget and federal

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spending. The President has been involved for many years in controlling federal spending. This "precedent and practice" is powerful evidence that there is "no separation-of-powers impediment" to the role assigned to the President under the Act. See Mistretta v. United States, *supra*, 488 U.S. at 390.

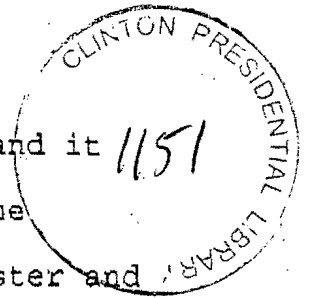


Undoubtedly, the cancellation authority conferred on the President by the Line Item Veto Act is quite broad. Discretionary budget authority and new direct spending make up a significant portion of the total federal budget. Given both the dollar amounts involved and the functions and programs at issue, the Act is a substantial delegation to the President.

Nonetheless, as we have shown in the second section of this Argument, the Act meets the delegation test articulated by the Supreme Court. And, as we have shown in this third section, the Act does not violate the separation of powers doctrine. Instead, it fulfills Justice Jackson's expectation that "practice will integrate the dispersed powers into a workable government" consistent with the dictates of the Constitution. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

As the Supreme Court has observed, "' [w]hen this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.'" Mistretta v. United States, *supra*, 488

U.S. at 384). The Line Item Veto Act has been carefully considered by both Houses of Congress and the President, and it is designed to confront the serious national problem of the federal budget deficit. The Act passes constitutional muster and should be sustained.



CONCLUSION

For the foregoing reasons the Court should grant defendants' motion to dismiss. Alternatively, the Court should deny plaintiffs' motion for summary judgment and grant defendants' motion for summary judgment.

Respectfully submitted,

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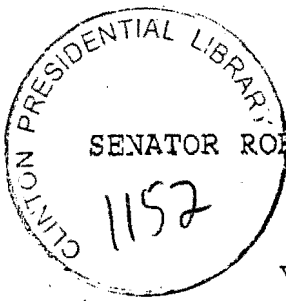
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Attorneys for Defendants

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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SENATOR ROBERT C. BYRD, et al.,

Plaintiffs,

v.

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

Defendants.

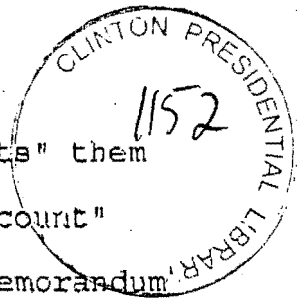
Civil Action No. 97-0001 (TPJ)

REPLY TO PLAINTIFFS' OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

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

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

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

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

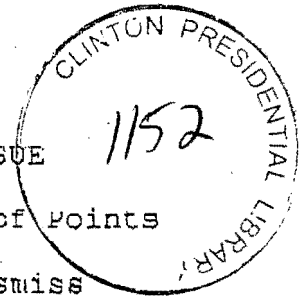
ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING TO SUE

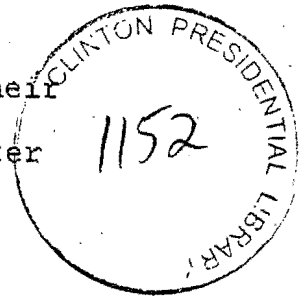
We demonstrated in our opening brief (Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss ["Def. Memo"], pp. 14-17) that plaintiffs failed to allege they have suffered, or certainly will suffer, concrete personal injury inflicted by the defendants or any other federal official.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

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

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



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



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

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

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

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

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

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

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

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

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

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

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

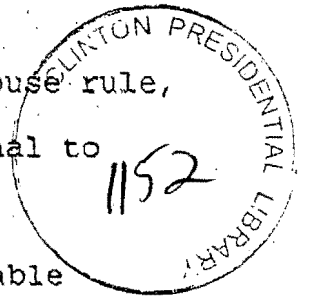
doctrine as developed by the Supreme Court (footnote omitted)."

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

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

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

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



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

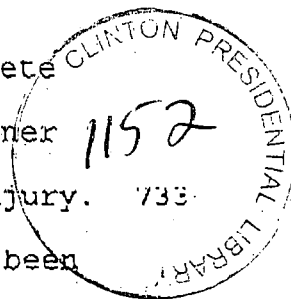
In Moore v. U.S. House of Representatives, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985), members of the House of Representatives sued the House and its officials, alleging that defendants injured them by allowing the Tax Equity and Fiscal Responsibility Act of 1982 to originate in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

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

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

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law, plaintiffs actually had been deprived of the concrete opportunity to vote on a tax revenue measure in the manner prescribed by the Constitution, which was cognizable injury. 733 F.2d at 951, 954. In this case, no similar injury has been inflicted on plaintiffs under the Line Item Veto Act.

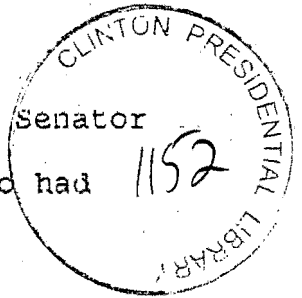


In Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983), members of the House of Representatives sued the Speaker of the House, the Majority Leader, the Chairman of the Democratic Caucus, the Democratic Steering and Policy Committee, and the Democratic Caucus (699 F.2d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

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

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

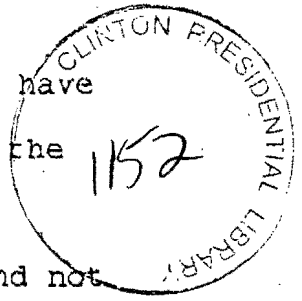


Finally, in Synar v. United States, 626 F. Supp. 1374 (D.D.C.) (three-judge court), aff'd sub nom. Bowsher v. Synar, 478 U.S. 714 (1986), which plaintiffs say is "indistinguishable on the standing issue from the present case" (Pl. Memo, p. 15), members of Congress and the National Treasury Employees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

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

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



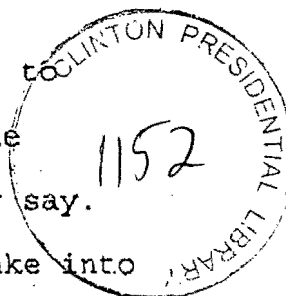
These cases demonstrate that some palpable event, and not merely a legislator's subjective fear about, or taking into account the consequences of, a particular law, is necessary to constitute cognizable injury under Article III. As the District of Columbia Circuit explained in Harrington v. Bush, supra,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

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

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

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



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

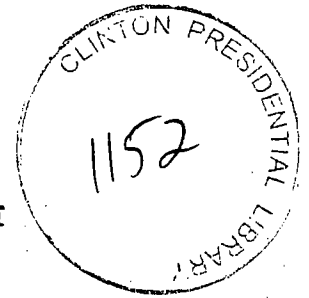
C. The President Has Not Nullified Plaintiffs' Votes

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

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

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



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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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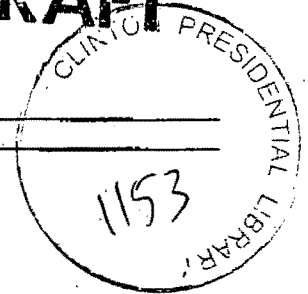
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No. 96-1671

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

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

BRIEF FOR THE APPELLANTS

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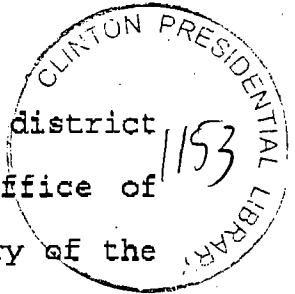
QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDINGS

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



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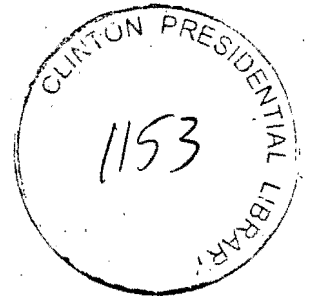
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OPINION BELOW

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

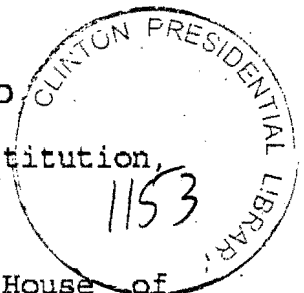
JURISDICTION

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



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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED



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

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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

STATEMENT

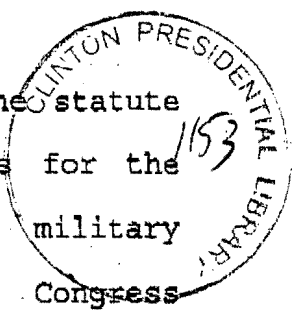
1. The Line Item Veto Act gives the President conditional authority to cancel certain spending and revenue items within five days after a bill containing such items has been enacted into law. The Act is the latest in a series of statutes, dating from 1789 to the present, in which Congress has given the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

a. The first statute appropriating funds for the general operation of the federal government was passed by the First Congress and signed by President Washington in September 1789. See

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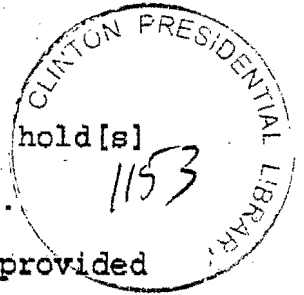
Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95. The statute appropriated "sum[s] not exceeding" specified amounts for the expenses of the War Department, government salaries, military pensions, and outstanding debt. Ibid. The First Congress subsequently enacted two additional general appropriations statutes,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

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



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



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

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

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authority "to direct * * * that a portion of the monies appropriated for a particular branch of expenditure in [a] department be applied to another branch of expenditure in the same department." Act of Mar. 3, 1809, ch. 28, § 1, 2 Stat. 535-536.

That transfer authority remained in effect, with various modifications, for nearly 60 years. See Louis Fisher, Presidential Spending Discretion and Congressional Controls, 37 Law & Contemp. Prob. 135, 148 & nn. 71-72 (1972). In addition, Congress continued to resort to lump-sum appropriations, rather than itemized appropriations, when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic and military crisis. Id. at 136 (citing major lump-sum appropriations during Civil War, First World War, and Depression).

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

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

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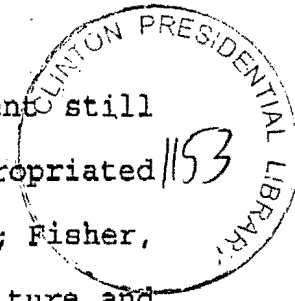
abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1518 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415). All appropriations "unexpended by reason of" the President's exercise of his reorganization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

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

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

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



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

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

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

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

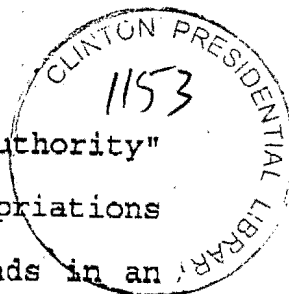
2. The Line Item Veto Act was enacted in April 1996 as an amendment to the ICA. See Pub. L. No. 104-130, 110 Stat. 1200 (1996) (J.S. App. 32a-59a) (to be codified at 2 U.S.C. 691 et seq.). The Act expires on January 1, 2005. Pub. L. No. 104-130, § 5, 110 Stat. 1212 (J.S. App. 59a). It authorizes the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

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

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

² Section 2 of the Line Item Veto Act adds a new Part C to the ICA. The citations in the text to "ICA §" are to Sections contained in the new Part C.

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

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

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

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

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

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

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

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

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

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

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

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

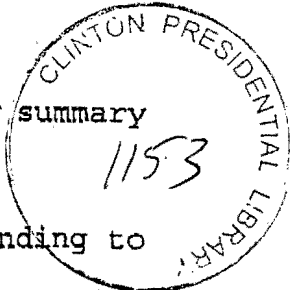
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memorandum order denying the motion to dismiss and granting summary judgment to appellees. J.S. App. 1a-29a.

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

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



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

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

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

Id. at 21a-22a.

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

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

SUMMARY OF ARGUMENT

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

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

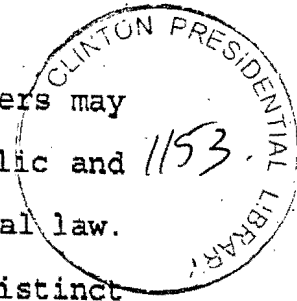
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than the Legislative Branch, neither Congress nor its Members may initiate litigation designed to vindicate the general public and governmental interest in the proper administration of federal law.

Even if the Line Item Veto Act could be said to impair a distinct institutional interest of Congress itself, moreover, a suit brought by an individual Member cannot properly be characterized as one filed on behalf of Congress, at least in the absence of some affirmative congressional action authorizing the Member to sue on its behalf. That is particularly true where (as here) the individual Members have attacked the constitutionality of a federal statute rather than seeking to vindicate the legal and policy judgments of Congress as a whole.

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

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

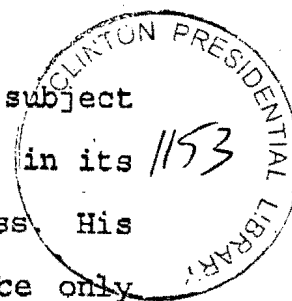


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other provisions from becoming law. The President remains subject to the constitutional obligation to approve or disapprove, in its entirety, an appropriations bill presented to him by Congress. His cancellation authority under the Act comes into existence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

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

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



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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

The complaint in this case alleges that

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

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

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

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

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

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

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

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

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

1. This Court has

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

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

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

⁹ (...continued)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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B. Because The President Has Not Yet Exercised His
Cancellation Authority Under The Line Item Veto Act,
Appellees Can Identify No Actual Or Imminent Injury 1153

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

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

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

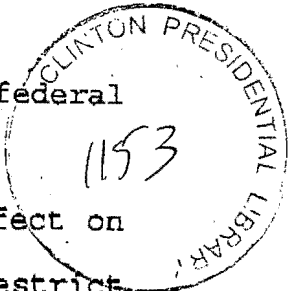
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claim is too speculative to provide a basis for federal jurisdiction.

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

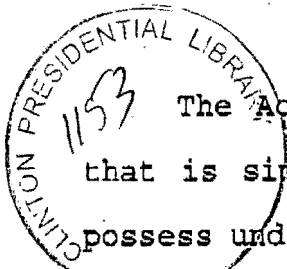
¹⁹ There is no constitutional significance to the fact that the President must exercise his cancellation authority, if at all, within five days after the bill has become law. A prompt decision is necessary to assure orderly implementation of appropriations acts and to avoid the potential disruption of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

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

²⁰ The significance of this distinction is highlighted by a comparison of the Line Item Veto Act with statutory and state constitutional provisions that confer true "item veto" (*i.e.*, partial "return") authority. The Organic Act, which formerly governed the Philippine Islands, stated that "[t]he Governor General shall have the power to veto any particular item or items of an appropriation bill, but the veto shall not affect the item or items to which he does not object. The item or items objected to shall not take effect except in the manner heretofore provided in this section as to bills and joint resolutions returned to the legislature without his approval." Organic Act of August 29, 1916, § 19, 39 Stat. 551; see Rengzon v. Secretary of Justice, 299 U.S. 410 (1937). See also Calif. Const. Art. 4, § 10(b) ("The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. * * * Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.").

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The Act does, we acknowledge, give the President authority that is similar in practical effect to the power that he would possess under a true item veto (i.e., partial "return") provision.

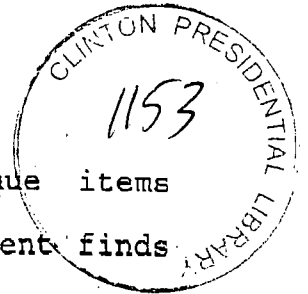
That does not mean, however, that the Act is an effort to "evade" (Resp. to J.S. at 5) the requirements of the Presentment Clause.

The President's cancellation authority under the Act might equally well be analogized to the power that he would possess if Congress chose to enact each item of spending as a separate bill, which the President could "approve" or "return." The difference between that (unquestionably constitutional) practice and a partial "return" provision is not that the latter confers greater practical authority upon the President; it is that one is consistent with the formal requirements of the Presentment Clause and the other is not.

In light of the practical infeasibility of passing separate legislation governing each budgetary item, Congress sought in the Line Item Veto Act to devise an alternative mechanism for accomplishing the same end. In so doing, Congress was of course required to comply scrupulously with the terms of the Presentment Clause; but there is nothing remotely suspect about the underlying objective.

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

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

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

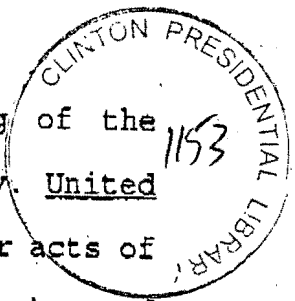
"Long settled and established practice is a consideration of great weight" in the adjudication of constitutional questions. The Pocket Veto Case, 279 U.S. 655, 689 (1929); see also Mistretta v. United States, 488 U.S. 361, 401 (1989) ("traditional ways of conducting government * * * give meaning' to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

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

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

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



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

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

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

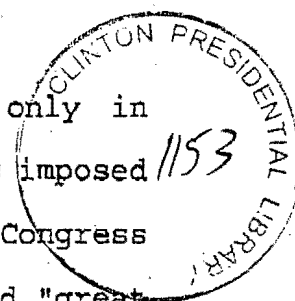
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appropriated funds, discretion that may be exercised only in accordance with the procedural and substantive limitations imposed by Congress. In sum, the settled historical practices of Congress and the Executive Branch regarding spending discretion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

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

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

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



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statute that created it -- a statute duly enacted pursuant to Art. I, §§ 1, 7." Ibid.

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

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

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

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

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

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

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

²³ (...continued)

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

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inference arises that it does not intend to impose legally binding restrictions." Id. at 192 (internal quotation marks omitted). 1153
Lump-sum appropriations have been used throughout the Nation's history, and their constitutionality "has never been seriously questioned." Cincinnati Soap Co., 301 U.S. at 322. So long as the activities on which appropriated funds are spent are themselves authorized by statute, and so long as the Executive Branch adheres to the constitutional directive that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," Art. I, § 9, Cl. 7; see OPM v. Richmond, 496 U.S. 414, 424-425 (1990), we believe that no constitutional infirmity would exist even if an appropriations statute placed no further constraints on Executive Branch discretion. Even if the "intelligible principle" standard articulated in Mistretta is assumed to apply in this context, however, the Line Item Veto Act places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.

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

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

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

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

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President articulate his assessment of the pertinent criteria provides an additional safeguard against arbitrary action. Cf. 1153

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co., 463

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

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

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

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

24 (...continued)

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

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

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

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

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

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

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

25 (...continued)

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted.

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