# 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 Litigation. (6 pages) | 12/16/1997 | P5 1154 |
| 002. memo | For Erskine Bowles from Charles Ruff, William Marshall, and Lisa Hertzer. Subject: Line item Veto Litigation. (3 pages) | 11/03/1997 | P5 1155 |
| 003. letter | From Janet Reno to the President. Subject: Line Item Veto Act. ~~5~~ 6 pages) | 12/16/1997 | P5 1156 |
| 004. memo | For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. [incomplete copy] (2 pages) | 12/15/1997 | P5 1157 |
| 005. letter | Duplicate of 003. (5 pages) | 12/16/1997 | P5 1158 Dup 1156 |
| 006. memo | For the Attorney General from the Solicitor General. Subject: NTEU Line Item Veto Case. (4 pages) | 12/15/1997 | P5 1159 |

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

**FOLDER TITLE:**
Cancellation of Dollar Amount of Discretionary Budget Authority [binder] [3]

Van Zbinden
2007-0624-F
vz1210

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

THE WHITE HOUSE

WASHINGTON

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 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.



1154

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 <u>loss</u> of federal receipts rather than an <u>outlay</u> 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.

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.

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 <u>loss</u> of federal receipts rather than an <u>outlay</u> 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.

U. S. Department of Justice

Office of the Attorney General



Washington, D.C. 20530

DATE: December 16, 1997

TO: Bill Marshall

Telephone No. ( ) ____ - ______ Fax No. ( ) 456 - 5055

FROM: Judy Smith

Office of the Attorney General

Telephone No. (202) 514 - 2150 Fax No. (202) 514 - 1724

TRANSMISSION CONTAINS 10 SHEETS INCLUDING THIS COVERSHEET

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SPECIAL NOTE(S) John Dwyer asked me to fax the letter to you. The messenger is also bringing you a copy.

WARNING: Many fax machines produce copies on thermal paper. The image produced is highly unstable and will deteriorate significantly in a few years. It should be copied on a plain paper copier prior to filing as a record.

# 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.

<u>Overview of the Case</u>

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

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

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

## Overview of the Line Item Veto Act

The Line Item Veto Act authorizes the President to "cancel," as prescribed by the Act, "any dollar amount of discretionary budget authority," "any item of new direct spending," or "any limited tax benefit." 2 U.S.C. § 691(a). Each of those terms has a distinct meaning. The term "dollar amount of discretionary budget authority" is defined, among other things, to include "the entire dollar amount of budget authority . . . specified in an appropriation law, or the entire dollar amount of budget authority required to be allocated by a specific proviso in an appropriation law for which a specific dollar figure was not included." 2 U.S.C. § 691e(7)(A)(i).

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

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

§ 691e(4)(A). Pursuant to the Act, the caps established by the Budget Enforcement Act are reduced by the canceled dollar amount 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 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.

<u>Defense of This Lawsuit Will Jeopardize Our Defense of the Constitutionality of the Line Item Veto Act</u>

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

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

Janet Reno

Enclosure

U. S. Department of Justice

Office of the Solicitor General



The Solicitor General

Washington, D.C. 20530

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL SPW

Re: NTEU Line Item Veto Case

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

## The Theory of Defense

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

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

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U. S. Department of Justice

Office of the Solicitor General



*The Solicitor General* *Washington, D.C. 20530*

December 15, 1997

MEMORANDUM TO THE ATTORNEY GENERAL

FROM: THE SOLICITOR GENERAL SPW

Re: NTEU Line Item Veto Case

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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 <u>other</u> 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 <u>Raines</u> v. <u>Byrd</u> in defense of the Act: that the President is subject to important procedural limitations on the exercise of his cancellation authority by the requirements that he (a) make specific determinations and (b) include particular information about the cancellation in his cancellation message, both of which are lacking here with respect to the suggested alternative rationale.

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

# Withdrawal/Redaction Sheet
## Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. draft | Franklin Raines et al. v. Robert Byrd et al. 96-1671. Reply Brief for the Appellants. (23 pages) | 04/10/1997 | P5 1160 |

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

**FOLDER TITLE:**
Line Item [1]

Van Zbinden
2007-0624-F
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### RESTRICTION CODES

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

**P1 National Security Classified Information [(a)(1) of the PRA]**
**P2 Relating to the appointment to Federal office [(a)(2) of the PRA]**
**P3 Release would violate a Federal statute [(a)(3) of the PRA]**
**P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]**
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**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]**

DRAFT



No. 96-1671

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

FRANKLIN D. RAINES, ET AL., APPELLANTS

v.

ROBERT C. BYRD, ET AL.

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

REPLY BRIEF FOR THE APPELLANTS

DRAFT

WALTER DELLINGER
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**REPLY BRIEF FOR THE APPELLANTS**

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A. Appellees lack standing to bring their suit.

1. Contrary to appellees' suggestion (see Appellee Br. 31), we do not contend that an individual's status as a Member of Congress imposes special limitations on his entitlement to judicial relief.[1] A Member who establishes a cognizable personal (e.g.,

[1] Nor is there any basis for appellees' assertions (see Appellee Br. 18, 31-32) that persons other than Members of Congress would have standing to sue in analogous circumstances. In Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543-545 & n.6 (1986), this Court held that an individual school board member lacked standing to appeal from a district court judgment entered against the board. Despite the fact that the district court had declared a decision of the board to be unconstitutional, see id. at 537-539, the Court concluded that the individual member "ha[d] no personal stake in the outcome of the litigation," id. at 543-544. Bender cannot be reconciled with appellees' contention (Appellee Br. 18) that "members of any other occupation" would have standing to challenge "a statute [that] unconstitutionally altered the legal consequences of a core occupational activity." To the contrary, Bender makes clear that an individual whose "core occupational (continued...)

pecuniary) interest in the resolution of a legal issue has standing to sue, even if the opposing party is another governmental official or entity. See Gov't Br. 22 n.11; Moore v. U.S. House of Representatives, 733 F.2d 946, 960 n.2 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("There is no problem in entertaining a suit by a congressman against the Executive Branch for a tax refund, or by a congressman against the Speaker of the House for breach of a commercial contract."), cert. denied, 469 U.S. 1106 (1985). Cf. United States v. Will, 449 U.S. 200 (1980) (Court adjudicated, on the merits, suit filed by Article III judges challenging statutory provisions that affected their compensation).

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

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

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[1](...continued)
activity" is participation in a collective decision-making process typically lacks a judicially cognizable interest in vindicating the decision of the body as a whole.

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

2. Appellees do not challenge the foregoing principles directly. They deny that they are "merely attempting to force executive compliance with legislation that they voted for (in which all citizens presumably have an interest)," claiming instead to have "alleged specific injuries to themselves in the exercise of a power that is positively identified by Article I of the Constitution: the power to vote on the final passage of

[2] Section 3(a)(1) of the Line Item Veto Act expressly authorizes suits by Members of Congress challenging the constitutionality of any provision of the Act. J.S. App. 56a (2 U.S.C. 692(a)(1)). Contrary to appellees' contention (see Appellee Br. 32), Section 3(a)(1) does not reflect an affirmative congressional determination that individual Members have Article III standing to challenge the Act. Rather, that provision is properly understood as eliminating prudential barriers to Members' suits. In Bennett v. Spear, No. 95-813 (Mar. 19, 1997), this Court considered a statutory provision authorizing "any person" to bring suit to enforce the Endangered Species Act. See slip op. 5-11. In considering whether the plaintiffs in that case had standing under Article III (see id. at 11-15), the Court did not give weight to any supposed congressional determination that all persons would have standing to sue. The Court instead construed the citizen-suit provision to expand standing to the full extent permitted by Article III. See id. at 10.

legislation." Appellee Br. 31, 24. The Line Item Veto Act, however, places no constraints on the right of appellees (or any other Member of Congress) to vote on proposed legislation. Nor does the Act affect the manner in which votes are counted. Despite their efforts to gainsay the fact, appellees' suit is in every meaningful respect an attack on the manner in which future appropriations laws will be implemented after they are enacted.

That would be true, we emphasize, even if (as appellees contend) a cancellation under the Act constituted an impermissible partial "repeal" of an appropriations law. If a cancellation under the Act were properly so characterized, the President's refusal to spend the appropriated funds would violate his obligation to execute the law in accordance with its terms. The same would be true, however, if the President refused to spend a particular sum based on the mistaken belief that the underlying appropriations law was permissive rather than mandatory. See Train v. City of New York, 420 U.S. 35 (1975); Gov't Br. 6-7. In either circumstance, the President's unlawful failure to spend the appropriated funds would be subject to challenge by a plaintiff whose pecuniary interests were adversely affected (see Gov't Br. 19-20); but neither form of Executive Branch illegality would threaten appellees' right to vote or otherwise impair their ability to discharge their legislative duties.

Appellees assert that the Line Item Veto Act "changes the legal effect of Members' votes on spending and tax bills" and "deprives them of their right, as individual Members, to vote on every bill in the exact final form in which it becomes operative as law." Appellee Br. 24 (emphasis added). The precise meaning of the italicized language is left unclear. Appellees plainly do not contend, however, that cancellation under the Act causes appropriations laws to be enacted in any form other than that in which they were voted on by Congress. To the contrary, they acknowledge that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." Appellee Br. 39. In stating that the appropriations bill "becomes operative as law" in some form other than that in which it was voted on, appellees can only mean that the President's cancellation deprives the bill, after its enactment, of its intended operative effect. That contention (whatever its merits) has nothing to do with the lawmaking process; it is simply a challenge to the (anticipated) execution of (hypothetical) enacted laws.[3]

3. Appellees also contend that the Line Item Veto Act injures them even in advance of any actual cancellation. They assert that the Act "unconstitutionally increases the President's power" by enabling him to utilize the threat of cancellation "to influence Members' votes on all matters before Congress." Appellee Br. 24.

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

The Act, however, places no legal constraints on Congress's ability to require the President to spend appropriated funds on specified projects, since Congress retains the power to provide that the Act shall not apply to a particular appropriations law, or to any individual item contained therein. See Gov't Br. 30-31. Appellees (and other individual Members) may attempt to persuade their colleagues to vote to exempt particular appropriations laws, or individual budgetary items, from the cancellation authority vested in the President by the Line Item Veto Act.[4]

In combination with an actual appropriations law, the Line Item Veto Act will have real and immediate legal consequences. Taken in isolation, however, the Act has <u>no</u> operative legal effect.[5] The Act does not require or prohibit the expenditure of any federal funds; it does not authorize or forbid any action by the President or other Executive Branch officials. Standing alone, the Act is akin to a non-binding resolution or statement of congressional policy that future appropriations laws should be

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

[5] The Line Item Veto Act is similar, in this respect, to various federal statutory provisions whose sole function is to regulate the construction or implementation of <u>other</u> federal laws. See, <u>e.g.</u>, 1 U.S.C. 1-6 (Dictionary Act); 1 U.S.C. 108, 109 (effect of statutory repeals); 5 U.S.C. 302(b) (powers vested by law in agency head may be delegated to subordinate officials).

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

Appellees' claim that the Act injures them by increasing the President's power during negotiations is flawed in other respects as well. As we explain in our opening brief (see Gov't Br. 22-25), Members of Congress exercise their powers on behalf of their constituents and of the public generally, and they have no personal interest in the allocation of power between the Legislative and

[6] In pointing out that the Line Item Veto Act's provisions may be rendered inapplicable to any appropriations law or item contained therein, we do not intend to trivialize the Act's significance. Having chosen (after extensive deliberation and debate) to enact the Line Item Veto Act, Congress is unlikely to adopt a routine practice of exempting individual appropriations laws from the Act's coverage. The fact remains, however, that the Act by itself confers no powers, and places no restrictions, on any government actor. The practical effect of the Act depends entirely on Congress's continued adherence to the view that broad Executive Branch discretion over budgetary matters represents wise national policy.

Executive Branches.[7] Appellees are poorly positioned to represent the interests of the Legislative Branch, since they challenge the constitutionality of an Act of Congress that has been defended in the district court and this Court by the Senate and House of Representatives as <u>amici curiae</u>. And it is implausible to suppose that the <u>threat</u> of cancellation could inflict a judicially cognizable injury upon appellees if (as we demonstrate above, see pages **-**, <u>supra</u>) an <u>actual</u> cancellation would not.

Finally, the diminution of influence that appellees claim to suffer is not traceable to the defendants in this case. As we explain above, it is within Congress's power to exempt any appropriations law from the Act's provisions, and thus to prevent the Act from having any operative legal effect. Whatever the practical likelihood of that occurrence, appellees have made no

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

effort to explain how the named defendants -- the Director of the Office of Management and Budget, and the Secretary of the Treasury -- could be held responsible for Congress's decision not to utilize that authority. Because Article III "requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41-42 (1976), appellees' allegation of diminished influence within the legislative process would be insufficient to establish the existence of a case or controversy even if such a loss of influence could be said to constitute injury in fact.

B. Appellees' constitutional challenge to the Line Item Veto Act is without merit.

1. In our opening brief, we surveyed the history of federal appropriations laws from 1789 to the present. For appellees, however, the history of Executive Branch spending discretion begins not in 1789 but in 1974, with the enactment of the Impoundment Control Act (ICA). See Appellee Br. 4-6. Appellees' apparent view is that the provisions of the ICA reflect and embody the limits that the Constitution places on Executive Branch spending discretion. The Line Item Veto Act, in this account, represents a fall from constitutional grace because (and to the extent that) it departs from the limitations of the ICA. See, e.g., Appellee Br. 4, 41.

Appellees' focus on the ICA as a constitutional baseline is profoundly ahistorical. As we explain in our opening brief, the legislative practice of giving the President substantial discretion over the expenditure of appropriated funds has a two-hundred year pedigree. See Gov't Br. 2-6; see also Senate/House Amicus Br. 5-12. On those occasions when Congress has acted to tighten controls on Executive Branch discretion, the controls have typically been aimed at preventing overspending, not underspending. See, e.g., Act of July 12, 1870, ch. 251, § 7, 16 Stat. 251 (Anti-Deficiency Act) (codified as amended at 31 U.S.C. 1341).[8]

When seen in its proper historical context, the Line Item Veto Act is noteworthy less for the discretion it grants the President than for the limits it imposes on that discretion. The Act gives the President less control over federal spending than, for example, the First Congress conferred when it used lump-sum appropriations to fund the general operations of the federal government. See Gov't Br. 2-3; Senate/House Amicus Br. 5-6. The Act gives the President no authority to revise current levels of entitlement spending, which account for the lion's share of all federal outlays. ICA § 1026(8) (2 U.S.C. 691e(8)); J.S. App. 51a; see

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

Gov't Br. 9 n.4, 45. With respect to spending items covered by the Act, the President has only two choices: to spend the full appropriated amount on the specified item or to use the whole amount to reduce the federal deficit. ICA §§ 1023(b), 1024 (2 U.S.C. 691b(b), 691c); J.S. App. 36a-39a; see Gov't Br. 44. The President must consider a number of statutory criteria in making that choice, ICA §§ 1021(a)(A), 1021(b), 1022(b) (2 U.S.C. 691(a)(A), 691(b), 691a(b)); J.S. App. 33a-34a; he must act within a limited time, ICA § 1021(a)(B) (2 U.S.C. 691(a)(B)); J.S. App. 33a; and he may not reverse course once he has made his decision. Because the Act leaves the President with significantly less discretion than Congress has chosen to confer in prior spending laws, the historical record weighs heavily in favor of its constitutionality.

Ironically, appellees treat some of the Act's restrictions on presidential authority as a source of constitutional concern. For example, appellees regard it as problematic that the President must exercise his cancellation authority within 5 days (see Appellee Br. 38 n.22) and that he may not unilaterally undo a cancellation (see id. at 40). Yet if the President were free to cancel spending items at any time, and/or to restore cancelled spending, he would enjoy far greater "leverage over the lawmaking process" (id. at 30) than he enjoys under the Act in its existing form.

2. In our opening brief, we explain that the Act does not conflict with the lawmaking procedures of the Presentment Clause because the Act does not come into play until after those

procedures have been satisfied. See Gov't Br. 34-35. When the President is presented with a spending bill, he must "sign" or "return" (Art. I, § 7, Cl. 2) the bill in its entirety. When he signs the bill, the bill becomes a law, and the "finely wrought" lawmaking procedures of the Presentment Clause (INS v. Chadha, 462 U.S. 919, 951 (1983)) are complete.

Appellees acknowledge that "the whole appropriation, tax, or spending bill becomes law the instant the President signs it." Appellee Br. 39. That concession confirms that the power conferred on the President by the Act cannot be exercised until after the lawmaking process is complete. Appellees' repeated assertions (see Appellee Br. 6, 20, 37, 43, 45) that cancellation occurs "in conjunction with" signing cannot obscure the fact, critical to analysis under the Presentment Clause, that the President's cancellation authority arises only after the President has complied with the requirements of the Clause by signing the bill into law.

Appellees nevertheless contend that the Line Item Veto Act "deliberately contravenes the spirit and purposes of the in toto requirement of the Presentment Clause" (Appellee Br. 38) because it is functionally indistinguishable from "a statute authorizing the President to veto some items in any future appropriation, spending, or tax bill at the same time he signs the remainder" (id. at 37-38).[9] That argument is flawed in two respects. First and

[9] As we explain in our opening brief, when the President exercises his cancellation authority, the Act's "lockbox" provision permanently reduces the amounts of budgetary resources that Congress can thereafter appropriate in any one fiscal year without (continued...)

foremost, the Presentment Clause prescribes the "procedure[s]," Chadha, 462 U.S. at 951, by which bills are enacted into law. The difference between the Act and appellees' hypothetical statute is the difference between a law that honors those procedures and a law that does not. It is no objection to a law that conforms to the Constitution's procedural requirements that the same results could be achieved by a law that does not do so.[10]

Second, the purpose of the in toto requirement is not to ensure that the range of the President's discretion in administering a law is narrow rather than broad, measured against some abstract baseline. To the contrary, some lawmaking practices that vest extremely broad discretion in the President are unquestionably consistent with the requirement that the President

[9](...continued) triggering a sequester under the Budget Enforcement Act of 1990 (BEA). See Gov't Br. 10 n.6. Under a statute that permitted the President to remove spending items from bills before signing them into law, in contrast, the cancelled items would never become law, and the BEA's caps and "paygo" limits would therefore remain unchanged. Appellees are thus incorrect in stating (Appellee Br. 38) that "postponement of cancellation until after signing has no real-world consequence whatsoever." With respect to the scope of the President's discretion to choose between budgetary items identified by Congress, however, we agree that the Line Item Veto Act is functionally comparable to the statute posited by appellees.

[10] The Court in Chadha, while holding that legislative veto provisions are inconsistent with the lawmaking procedures of the Presentment Clause, observed that "[t]he Constitution provides Congress with abundant means to oversee and control its administrative creatures." 462 U.S. at 955 n.19. The Court did not suggest that the propriety of those alternative measures would depend upon a showing that they would be less efficacious than -- i.e., functionally distinguishable from -- the legislative veto.

sign or return a bill in toto.[11] Rather, the purpose of the in toto requirement is to ensure that the President's discretion will be no broader than Congress intends it to be.[12]

Once that point is understood, the fallacy of appellees' argument becomes apparent. An Act of Congress cannot coherently be attacked on the ground that it disserves congressional intent -- particularly where (as here) Congress retains the power to control the Act's application in any particular instance. Because the in toto requirement serves to ensure that the President remains within the bounds established by Congress -- rather than to restrict Congress in its determination of what those bounds should be -- a decision by Congress itself to expand the President's discretion

[11] Lump-sum appropriations laws, for example, are clearly consistent with the requirement that the President must sign or return a bill in its entirety. Alternatively, Congress might adopt the practice of enacting each line item as a separate bill, which the President could "sign" or "return." Such a practice would clearly be constitutional, yet it would vest the President with discretion functionally comparable to that which he possesses under the Line Item Veto Act.

[12] If the President were vested with partial veto power by the Constitution, he would indeed have the power to "reshape legislation to produce results that would never have passed Congress." Appellee Br. 12. The exercise of that power would result in laws whose terms had not been approved, and might well have been rejected, by the legislature. As this Court observed in Bengzon v. Secretary of Justice, 299 U.S. 410, 414 (1937), the exercise of partial veto power can "result in the enactment of a general law in an emasculated form not intended by the Legislature and against the will, perhaps, of a majority of each house."

Because Congress retains the power to render the Line Item Veto Act inapplicable to any particular appropriations bill, however, the Act creates no risk of a law whose contents are "against the will" of Congress. Rather, Congress's passage of an appropriations bill that does not alter the "default rule" (see Gov't Br. 30-31) established by the Act manifests an intent that the President be permitted to spend, or to impound, each item contained therein. See pages **-**, infra; Gov't Br. 50.

cannot possibly be contrary to the "spirit" or "purpose" of that requirement.

3. As we explain above, the requirement that the President must sign or return a bill in toto places no limitations on Congress's power to vest the Executive Branch with discretion in the execution of federal laws. Rather, Congress's authority to confer discretion upon the Executive Branch is limited only by the principle that Congress may not delegate legislative power to other officials. See Gov't Br. 40 42. In our opening brief, we showed that the restrictions that the Act places on the President's cancellation authority easily satisfy this Court's nondelegation precedents. See Gov't Br. 44-46.[13]

Appellees make virtually no effort to show that the Act fails to provide "intelligible principle[s]," Mistretta v. United States, 488 U.S. 361, 372 (1989), to guide and cabin the President's discretion. Instead, they assert (see Appellee Br. 46-49) that Congress may give the Executive Branch discretion over the

[13] Appellees substantially overstate the scope of the President's authority when they assert (Appellee Br. 43-44) that the Act "enables the President to select * * * the activities in which the Federal Government will and will not engage." As noted above, the Act gives the President no authority over current levels of entitlement spending, which account for the bulk of the federal budget. See page **, supra. Moreover, Congress can readily place any other spending "off limits," either formally (by including a proviso exempting the spending from the operation of the Act) or informally (by combining the spending in a single "item" with other spending that the President wishes to preserve). See H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 34 (1996). And because the President must determine that any cancellation will "reduce the Federal budget deficit," ICA § 1021(a)(A)(i) (2 U.S.C. 691(a)(A)(i)); J.S. App. 33a, the President may not cancel spending items or limited tax benefits beyond the point at which the budget is brought to balance.

operation of federal laws in only two situations: "to 'fill up the details' of a legislative scheme" or "to adapt a statutory program to [changing] circumstances." Id. at 49. Because the Act does not fit into either of those categories, appellees assert that it represents an unconstitutional "abdication" (id. at 45) of lawmaking power by Congress.[14]

This Court's precedents offer no support for the contention that Congress may give the Executive Branch discretion only to fill statutory gaps or to deal with changed circumstances. To the contrary, this Court has recognized that Executive Branch officials may permissibly be vested with "policymaking responsibilities" when Congress itself is "unable to forge a coalition on either side of the question, and those on each side decide[] to take their chances with the scheme devised by the agency." Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984). So long as Congress "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority," Mistretta, 488 U.S. at 372-373 (internal quotation marks omitted), it has discharged its lawmaking responsibilities under Article I. As the Court explained in Bowles v. Willingham,

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

321 U.S. 503, 515 (1944), "Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority."[15]

As we explain above, see note **, supra, the President's cancellation authority under the Act is functionally comparable to the power that he would possess if Congress adopted the (unquestionably constitutional) practice of enacting each line item as a separate bill. The Act places far greater constraints on the President's discretion than did the lump-sum appropriations bills favored by early Congresses. See Cincinnati Soap Co. v. United States, 301 U.S. 308, 322 (1937) (constitutionality of lump-sum appropriations "has never been seriously questioned"). In light of the availability of alternative mechanisms by which the President could be vested with equal or greater authority over the

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[15] In arguing that Executive Branch discretion is constitutionally confined to filling gaps and dealing with changed circumstances, appellees implicitly contend that Congress may confer discretionary authority only when, and to the extent that, such discretion is somehow "necessary" to achieve Congress's goals. This Court has squarely held, however, that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." Yakus v. United States, 321 U.S. 414, 425-426 (1944). And the Court has sustained grants of authority that cannot be justified by any notion of legislative necessity. In Loving v. United States, 116 S. Ct. 1737 (1996), for example, the Court held that the nondelegation doctrine does not preclude Congress from giving the President the authority to select the aggravating factors to be used in capital sentencing under the Uniform Code of Military Justice. See id. at 1743-1748. Selecting "the factors that warrant the death penalty" (id. at 1742) is hardly a task that requires the Executive Branch's "expertise and flexibility" (Appellee Br. 46). To the contrary, that very task has been performed by Congress itself. See 18 U.S.C. 3592(b)-(d) (setting aggravating circumstances for capital sentencing in federal homicide, espionage, treason, and drug cases).

expenditure of federal funds, the Line Item Veto Act cannot be said to effect an impermissible shift in the balance of power between the Legislative and Executive Branches.[16]

4. Appellees' principal contention is that the President's exercise of cancellation authority under the Act constitutes a statutory "repeal" that must itself conform to the lawmaking requirements of Article I. As we explain in our opening brief, however, Congress has frequently vested the President with the authority to suspend, limit, or otherwise modify the operation of federal laws. See Gov't Br. 46-49. As long as Congress provides intelligible standards for the exercise of that authority, the President is not exercising the Article I power of statutory repeal, but rather his Article II power to "faithfully execute" the laws. See, e.g., Intermountain Rate Cases, 234 U.S. 476 (1914); Field v. Clark, 143 U.S. 649 (1892).

There is, in particular, no basis for appellees' assertion (Appellee Br. 50) that the Line Item Veto permits the President to

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[16] Appellees suggest (Appellee Br. 42) that the Line Item Veto Act is constitutionally indistinguishable from a law giving the President plenary power to strike "unnecessary" provisions from civil rights laws or other federal legislation. The government argued in the district court, and we continue to believe, that such a law would raise no Presentment Clause concerns. Rather, the relevant question would be whether the law provided "intelligible principles" to guide and cabin the President's discretion. Because the Line Item Veto Act imposes substantial constraints on the President's power, and because the Act operates in an area where the President has historically been accorded particularly broad authority, its constitutionality can readily be sustained without giving Congress carte blanche to let the President roam through the United States Code, discarding whatever provisions strike him as unnecessary.

"undo part of what Congress has just done," or to "decid[e] that a part of a law that he has just signed shall not be executed." As we explain above (see pages **-**, supra) and in our opening brief (see Gov't Br. 30-31), Congress retains the power to determine, with respect to each appropriations bill, whether and to extent the provisions of the Line Item Veto Act will apply. Read against the backdrop of the Line Item Veto Act, 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. See Gov't Br. 50.

Thus, an "A-B-C bill" (Appellee Br. 25) will be construed, absent express contrary language, to mean that "the President may either spend, or cancel, each of the items A, B, and C." The President's cancellation of an item therefore does not "undo" any portion of the appropriations law, nor does it reflect a decision that part of the law "shall not be executed." Rather, the possibility of cancellation is an integral feature of the appropriations law from the moment it is enacted. Cancellation of budgetary items pursuant to the Act is therefore a faithful execution of the laws, not a repeal or abrogation thereof.[17]

[17] The fact that the President is authorized to "cancel" (rather than simply to "decline to spend") covered budgetary items does not alter the constitutional analysis. A statutory provision that says, "The President may decide within five days whether to devote $5 million to Project X or to deficit reduction" is constitutionally indistinguishable from a provision that says, "The sum of $5 million is appropriated for Project X, but the President may cancel that expenditure within five days and devote the money to deficit reduction." The Controlled Substances Act, for example, permits the Attorney General to add and remove substances from the (continued...)

The fact that the President's cancellation of spending items is irrevocable does not transform cancellation authority into a power of statutory repeal. There is nothing novel about federal laws whose provisions may be rendered permanently inoperative by presidential action. For example, the Defense Production Act of 1950, 50 U.S.C. App. 2061 et seq., provides that the President "by proclamation may terminate this Act." 50 U.S.C. App. 2166(b)(1). Similarly, the Agricultural Adjustment Act, 7 U.S.C. 601 et seq., provides that it "shall cease to be in effect" if the President "finds and proclaims" that a national agricultural emergency "has been ended." 7 U.S.C. 613. See also, e.g., 22 U.S.C. 1965 (joint resolution authorizing economic and military aid to Middle Eastern nations "shall expire" when President determines that peace and security in Middle East is adequately assured); Act of June 10, 1933, ch. 55, s 1, 48 Stat. 119 (law authorizing Reconstruction Finance Corporation to engage in specified loan and stock transactions may be "declared no longer operative" by President). As explained above, the fact that the President cannot revoke a cancellation limits, rather than expands, his power under the Act.

5. Contrary to appellees' contention (see Appellee Br. 41 n.26, 42), the cancellation of limited tax benefits (see ICA

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

§ 1021(a)(3) (2 U.S.C. 691(a)(3)); J.S. App. 33a) is also a form of discretionary administrative authority, not a form of statutory repeal. This Court has squarely held that "the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that [the Court] ha[s] applied to other nondelegation challenges." Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 223 (1989). The President's authority to cancel limited tax benefits is governed by "intelligible principles." And because the provisions subject to cancellation will affect very small numbers of taxpayers, see ICA § 1026(9)(A) (2 U.S.C. 691e(9)(A)); J.S. App. 52a, the President has no wide-ranging authority to reshape the basic corpus of federal tax law.[18]

Even if the Act's provisions regarding limited tax benefits were found to be constitutionally deficient, that result would not affect the validity of the rest of the Act. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as

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[18] For the reasons stated in text, we believe that the provisions of the Act authorizing cancellation of limited tax benefits should ultimately be upheld. We acknowledge, however, that the President has historically been given far greater discretion in the expenditure of federal funds than in the collection of federal taxes. Because we believe that historical practice carries great weight in resolving the constitutional questions presented here (see Gov't Br. 38-40), we agree with appellees that the analysis applicable to the cancellation of spending items cannot be mechanically applied to the cancellation of limited tax benefits. In our view, however, that difference simply reinforces the conclusion that the constitutionality of each of the Act's provisions should ultimately be resolved in litigation involving a party whose interests are concretely affected by a particular cancellation.

a law." Bucklev v. Valeo, 424 U.S. 1, 108 (1976) (per curiam) (internal quotation marks omitted). The Line Item Veto Act manifestly would remain "fully operative as a law" if the President's authority over limited tax benefits was stricken, for the Act's provisions would continue to operate in their intended fashion with respect to discretionary budget authority and new direct spending. Contrary to appellees' suggestion (Appellee Br. 41 n.26), the absence of a severability provision hardly makes it "evident" (Bucklev, 424 U.S. at 108) that Congress would not have enacted the remaining provisions of the Act without the limited tax benefit provisions. See Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 686 (1987) ("the absence of a severability clause * * * does not raise a presumption against severability").

* * * * *

For the reasons stated above, and in the opening Brief for the Appellants, the judgment of the district court should be vacated and the case remanded with instructions to dismiss for lack of jurisdiction. Alternatively, the judgment of the district court should be reversed.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997

# Withdrawal/Redaction Sheet
## Clinton Library

| DOCUMENT NO. AND TYPE | SUBJECT/TITLE | DATE | RESTRICTION |
|---|---|---|---|
| 001. draft | Robert Byrd et al. v. Franklin Raines et al. 97-0001. Reply to Plantiffs' Opposition to Defendant's Alternative Motion for Summary Judgement. (17 pages) | 03/14/1997 | P5 1161 |

**COLLECTION:**

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

**FOLDER TITLE:**

Line Item [3]

Van Zbinden
2007-0624-F
vz1212

**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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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | |
|---|---|
| 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' ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

The principal argument we made in our opening summary judgment brief was that the Line Item Veto Act effectively 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 future spending and tax laws. The Act delegates authority to the President to determine, within that five-day period, whether to spend, grant, or cancel those funds and benefits. As we discussed, because the spending and tax laws to which the Act applies are enacted in full compliance with the Presentment Clause, because the President's exercise of the authority delegated to him under the Act is guided by intelligible principles, and because the President's determination to spend, grant, or cancel designated funds and benefits merely executes an option specifically conferred by Congress, the Act is constitutional.

In rebuttal, plaintiffs only briefly address our argument that the Act makes permissive, and not mandatory, the expenditure of designated funds and the grant of designated tax benefits in future spending and tax laws. They also concede, once again, that the spending and tax laws to which the Act applies will comply, literally and formally, with the Presentment Clause. However, they argue that the President's subsequent cancellation of designated dollar amounts, items, and tax benefits contained in those laws operates, in effect, as a retroactive violation of the Presentment Clause. They also contend that the Act is unconstitutional because it allegedly cedes to the President the power to make and repeal laws and, even if viewed as a delegation of authority, is not bounded by meaningful legislative guidelines. Plaintiffs' Opposition to Defendants' Alternative Motion for Summary Judgment and Reply Memorandum in Support of Their Own Motion for Summary Judgment ["Pl. Opp."], pp. 6-24.

Plaintiffs' rebuttal arguments are not persuasive. The Presentment Clause requires no more and no less than that bills passed by both Houses of Congress be presented to and approved or returned, <u>in toto</u>, by the President. The intent of the Framers, that the President consider and accept or reject the "whole" bill, is fully satisfied by the President's act of signing or not signing the bill. There is no occasion for the courts to look behind those facts and create some subjective test for when a bill becomes laws. The Line Item Veto Act, which applies only to laws that have been presented to and approved by the President, is fully consistent with the Presentment Clause.

The Line Item Veto Act also does not enable the President to make or repeal laws. As we have said, the Act presumptively makes discretionary, for a brief period, the expenditure or grant of designated funds and tax benefits contained in future spending and tax laws, and delegates to the President the final decision to spend or grant benefits under articulated, meaningful guidelines. Should it wish, Congress may avoid this presumption by exempting some or all portions of future spending and tax laws from the Act. The President's cancellation of designated funds or benefits in future spending and tax laws simply implements the laws written by Congress; it does not make or repeal them.

Finally, the President's exercise of delegated authority under the Line Item Veto Act is constrained by intelligible principles legislated by Congress. These principles are at least as meaningful and concrete as the guidelines in a host of other delegation statutes uniformly upheld by the Supreme Court over the last 60 years.

## ARGUMENT

### I. THE LINE ITEM VETO ACT DOES NOT AUTHORIZE A FUTURE VIOLATION OF THE PRESENTMENT CLAUSE

The Presentment Clause prescribes the "steps" that Congress and the President must take to enact laws. INS v. Chadha, 462 U.S. 919, 958 n. 23. To be sure, these steps -- passage of a bill by both Houses of Congress; presentment of the bill to the President; approval or return of the bill by the President -- are not "empty formalities." Id. They were "designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority" and to provide "an opportunity for deliberation and debate." Id. Nonetheless, the Supreme Court has described the requirements of the Presentment Clause as a "procedure" (emphasis added) for the enactment of legislation. Id., at 951. As important as they may be, these requirements are fully satisfied if Congress and the President have strictly complied with the mandated procedure. There is no occasion for the courts to create some new subjective test to determine when a bill becomes law.

The Line Item Veto Act does not authorize any departure from or violation of the procedure prescribed by the Presentment Clause for the enactment of future spending and tax laws. On the contrary, the Act explicitly provides that the authority it confers on the President applies only "with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States (emphasis added)." 2 U.S.C. 691(a).

In support of their argument that the Line Item Veto Act violates the Presentment Clause, plaintiffs say the Act gives the President "a general power to carve up each bill into 'approved' parts and 'returned' parts in conjunction with signing it," and "excuses the President from making a substantive decision that he approves or rejects the bill as a whole." Pl. Opp., pp. 2, 5.

Contrary to the plaintiffs' arguments, Lauren the Line Item Veto Act does not give the President power to "carve up" bills when they are presented to him. Nothing in the Act alters the procedural requirement of the Presentment Clause that future spending and tax bills passed by Congress be presented in whole to the President for approval or return, and nothing in the Act excuses the President from making a substantive decision that he approves or rejects each bill as a whole. The cancellation authority conferred on the President by the Act may be exercised only after a spending or tax bill has been enacted into law. At that point, the requirements of the Presentment Clause have been fully satisfied.

In effect, plaintiffs are arguing that the post-enactment actions of the President, exercising authority conferred by the Line Item Veto Act, retroactively establish a violation of the Presentment Clause. But there is no authority for the proposition that the President may commit an ex post facto violation of the Presentment Clause. The requirements of that Clause can be satisfied or violated only by the process in which a bill is enacted into law.

The Line Item Veto Act does not alter the process by which bills are enacted into law. Consequently, the Act does not implicate, much less authorize a future violation of ~~,~~ the Presentment Clause.

## II. THE LINE ITEM VETO ACT DOES NOT AUTHORIZE THE PRESIDENT TO REPEAL LAWS AND DOES NOT CEDE TO THE PRESIDENT THE POWER TO MAKE LAW

As we explained in our opening summary judgment brief (Memorandum of Points and Authorities in Support of Defendants' Alternative Motion for Summary Judgment and in Opposition to

Plaintiffs' Motion for Summary Judgment ["Def. Memo"], p. 14), the key to understanding the Line Item Veto Act is its effect in making permissive, and not mandatory, future laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits, at least for a period of five days. Plaintiffs do not take issue with this reading of the Act. To be sure, plaintiffs characterize the Act as being "very different from any previous grant of discretionary power over items of spending." Pl. Opp., p. 9. They also contend that the Act improperly delegates lawmaking power and unfettered discretion to the President. Id., pp. 11-24.[1] But plaintiffs apparently concede that the legal effect of the Act is to make future spending and tax laws presumptively permissive.

This apparent concession by plaintiffs is fatal to their argument that the Line Item Veto Act authorizes the President to "repeal" future spending and tax laws (Pl. Opp., pp. 6-9), and unconstitutionally cedes to the President the power to "make" laws (Pl. Opp., pp. 11-13). The premise of plaintiffs' argument is that, "[b]ecause an appropriation, spending, or tax measure becomes law immediately upon signature," the cancellation authority conferred on the President by the Act enables the President to "kill" the underlying law and "make" a new one in its place. Pl. Opp., pp. 6-7, 9. But, as we maintain and as plaintiffs have apparently acknowledged, the appropriation,

[1] We rebut those points later on in this brief. See infra, pp. 8-15.

spending, or tax measures to which the Act applies will not mandate expenditures and tax benefits. Rather, read in light of the Line Item Veto Act, these provisions will only permit such expenditures or benefits to be made or granted.

Thus, at least for a period of five days, the expenditures or tax benefits contained in future spending and tax laws will be discretionary. If, within that five day period, the President determines that the expenditures should not be made, or that the tax benefits should not be granted -- if, in other words, the Presidents "cancels" these expenditures or benefits -- he will not "kill" any laws or "make" new ones. He will simply exercise an option effectively built-in to those laws at their inception by Congress, by using authority that Congress granted him in the Line Item Veto Act.[2] In so acting, the President implements the law as written.

In sum, the Line Item Veto Act does not establish a new and unconstitutional system of lawmaking. Rather, as we showed in our opening summary judgment brief, the Act is a congressional response to the serious national problem of the federal budget deficit. The Act is the logical outgrowth of prior executive action, congressional legislation, and court rulings, and it fully meets all constitutional requirements.

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[2] The United States Code is replete with grants of discretionary authority to the Executive Branch. We note that the plaintiffs do not dispute that Congress has the constitutional authority to enact discretionary spending and revenue laws.

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## III. THE LINE ITEM VETO ACT DOES NOT IMPERMISSIBLY DELEGATE UNFETTERED DISCRETION TO THE PRESIDENT

Plaintiffs attempt to distinguish the Line Item Veto Act from other statutes which the Supreme Court has upheld against excessive delegation challenges. Pl. Opp., pp. 14-20. However, it is plain that, as in previous statutes sustained by the Supreme Court, Congress, in the Line Item Veto Act, has simply conferred authority upon the Executive Branch to carry out its legislative policy. In doing so, Congress has provided the President with broad discretion, but has also laid down intelligible principles to guide the exercise of that discretion.

The Constitution permits one of the three branches of government to "invoke the action of [another]," but it does not permit "an assumption of the constitutional field of action of another branch." J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928). When deciding whether Congress has crossed the line between permissible delegation and unconstitutional assumption, the courts must consider "common sense and the inherent necessities of the governmental co-ordination." Id. Thus, the Supreme Court has recognized that effective government requires that Congress have leeway to "delegate power under broad general directives." Mistretta v. United States, 488 U.S. 361, 372 (1989). A delegation is not improper unless it fails to provide "intelligible principles" to guide the exercise of the delegated authority. Id. (quoting J.W. Hampton, Jr. & Co. v. United States, supra, 276 U.S. at 409).

As we have shown in our opening summary judgment brief (Def. Memo, pp. 23-28), the Line Item Veto Act provides more than ample standards to satisfy the "intelligible principles" test. Plaintiffs argue, however, that the Act should be analyzed differently because, they contend, its purpose is to permit the President to override other laws passed by Congress. Pl. Opp., pp. 15-16. ~~On the contrary,~~ the Act makes clear that Congress has determined only ~~first~~ that, for the purpose of reducing the federal budget deficit, the expenditure of designated funds or the grant of designated tax benefits contained in duly enacted spending and tax laws should be permissive, rather than mandatory, for a limited period after enactment, and 2) ~~second~~, that the President should determine, within guidelines laid down by Congress, whether those expenditures or benefits should be made or granted.

Congress on previous occasions has conferred authority upon the Executive Branch to determine how statutory provisions will be effective. In Field v. Clark, 143 U.S. 649 (1892), the Supreme Court upheld a statute which authorized the President to suspend its provisions relating to free trade if he determined that any country imposed unfair duties on certain commodities. Similarly, in Yakus v. United States, 321 U.S. 414 (1944), the Supreme Court upheld the Emergency Price Control Act of 1942, as amended by the Inflation Control Act of 1942, which authorized a presidential appointee, the Price Administrator, to fix wartime commodity prices and left it to the Administrator to determine whether to fix prices and what those prices should be. See also J.W. Hampton, Jr. & Co. v. United States, supra (upholding statute authorizing the President to change statutorily fixed customs rates). More recently, in Touby v. United States, 500 U.S. 160 (1991), the Supreme Court upheld a delegation of authority to the Attorney General under the Controlled Substances Act to define criminal conduct by temporarily adding a substance to each of the schedules of controlled substances identified by Congress. See generally Synar v. United States, 626 F. Supp. 1374, 1387 (D.D.C. 1986)("The Supreme Court * * * has upheld delegations which permit officials to determine when, if ever, a law should take effect."), aff'd on other grounds sub. nom. Bowsher v. Synar, 478 U.S. 714 (1986).

By authorizing the President to determine whether permissive spending or tax benefits should be made or granted, Congress does not delegate lawmaking power to the Executive Branch. In Field v. Clark, supra, the Supreme Court reasoned that the Tariff Act did not "in any real sense, invest the President with the power of legislation" because "[l]egislative power was exercised when Congress declared that the suspension [of the statute] should take effect upon a named contingency." 143 U.S. at 692-693. Delegating to the President the responsibility to ascertain and declare whether the conditions established by Congress existed was entirely consistent with the President's responsibility to execute the law. Id., at 693-694.

Here too, Congress has made a policy choice: necessitated by continuing federal budget deficits, for the next eight years all laws containing dollar amounts of discretionary budget authority, items of new direct spending, and limited tax benefits should be subject to cancellation.[3] As in other cases, Congress has made contingent the exercise of the cancellation authority conferred by the Line Item Veto Act, and has authorized the Executive Branch to "ascertain the conditions which Congress has made prerequisite to the operation of its legislative command." Yakus v. United States, supra, 321 U.S. at 425. In order to cancel a provision, the President must ascertain that the cancellation will reduce the federal budget deficit, not impair any essential Government function, and not harm the national interest. 2 U.S.C. 691(a).[4]

The fact that the Act requires the President to make policy choices when determining whether to cancel a provision does not, as plaintiffs contend, render the Act unconstitutional. A proper delegation may require the Executive "to exercise judgment on matters of policy." Mistretta v. United States, supra, 488 U.S. at 378. In Mistretta, the Supreme Court upheld the Sentencing Reform Act of 1984, which provided the Sentencing Commission with

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[3] The Line Item Veto Act expires on January 1, 2005. 2 U.S.C. 691 note.

[4] Plaintiffs contend that the Act supplies no real guidance to the President's cancellation determinations under the Act. However, the Act provides very real constraints on both when and how the President may exercise the cancellation authority. See Def. Memo, pp. 23-28.

"significant discretion" in formulating sentencing policy by formulating sentencing guidelines. Id., at 377-378. See Yakus v. United States, supra (upholding Act conferring significant authority on the Price Administrator to fix commodity prices).

The discretion delegated to the President under the Line Item Veto Act is consistent with the purposes of the Act. The President's authority is limited to the cancellation of dollar amounts, items, and limited tax benefits specifically designated in the Act to achieve a budget reduction, and does not include the ability to revise any law. Congress retains the sole authority to determine the substantive details of any program or tax benefit, including the amount to be spent on the program or the amount of the benefit.[5] Moreover, Congress can exempt from cancellation any dollar amounts, items, and limited tax benefits specifically designated in the Act, either by specific legislation, or, in the case of limited tax benefits, by also declining to identify provisions as such. See 2 U.S.C. 691f. Thus, the President cannot legislate the details of any program, provision or tax benefit, but can only cancel provisions pursuant to the Act as Congress intended.

[5] Plaintiffs claim that, under the Act, the President has discretion to "'cancel' the current funding for, and thereby terminate, any program or activity of the Federal Government, large or small, that depends on one or more items of appropriation," unless Congress enacts a disapproval bill. Pl. Opp., p. 11. But the Act applies only to new dollar amounts of discretionary budget authority and items of new direct spending. Existing programs or activities for which appropriations have already been made, or which do not require annual appropriations (such as "entitlement" programs) are not subject to cancellation under the Act.

Plaintiffs argue that the Line Item Veto Act is unique because the President's cancellation decisions are reversible only by enactment of a disapproval bill. Pl. Opp., pp. 17-18. It is true that other delegation statutes have provided the Executive Branch with continuing discretion to change its own decisions. See, e.g., J.W. Hampton, Jr. & Co. v. United States, supra; Yakus v. United States, supra. Plaintiffs cite no authority to support their argument that this purported difference has any constitutional significance. In no case has any court determined that Congress may delegate such discretion only on a continuing basis, and may not delegate the responsibility for making one-time, final determinations. ~~On the contrary, the courts have upheld such~~ statutory delegations. See, e.g., Nat'l Fed. of Federal Employees v. United States, 905 F.2d 400 (D.C. Cir. 1990) (authorizing an independent commission to recommend military base closures for approval or disapproval by the Secretary of Defense).[6]

Moreover, in the case of the Line Item Veto Act, Congress apparently determined that continuing discretion over the existence of cancelled programs is both unnecessary ~~and~~ contrary to the purposes of the Act. Congress made certain expenditures or tax benefits conditional in order to reduce the federal budget

[6] The statute at issue in the base closures case provided that Congress could override the Secretary's decision by enacting a joint resolution within 45 days. Base Closure and Realignment Act, Pub. L. No. 100-526, § 202(b), 102 Stat. 2623 (1988) There is no substantive difference between this provision and the provision in the Line Item Veto Act requiring a disapproval bill to override a presidential cancellation.

deficit. Congress apparently decided that it was not consistent with this purpose to authorize the President to revive cancelled provisions. Contrary to the plaintiffs' argument that the delegation here is excessively broad, discretion which may be exercised once and in a limited time period is narrower than discretion which may be exercised continuously.[7]

Finally, there is no merit to plaintiffs' claim that the Line Item Veto Act lacks meaningful guidelines to constrain the President's exercise of delegated authority. Pl. Opp., pp. 21-24. As we demonstrated in our opening summary judgment brief (Def. Memo, pp. 23-28), Congress has provided the President with intelligible principles to which he must conform in exercising the authority delegated to him under the Act.

Thus, the President has only five days within which to exercise his cancellation authority, and he may exercise it only if he determines that a cancellation will (1) reduce the federal budget deficit, (2) not impair essential government functions, and (3) not harm the national interest. 2 U.S.C. 691(a).[8] The

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[7] If the Act had authorized the President to revive cancelled programs, plaintiffs probably would have claimed that it improperly granted the President continuing discretion with regard to the operation of such programs.

[8] The President must also consider the legislative history, construction, and purposes of the underlying spending and tax laws, and any specific sources of information in those laws. 2 U.S.C. 691(b). Although plaintiffs contend that the requirement to "'consider'" these materials "is neither a limitation nor a guide as to whether or what to cut" (Pl. Opp., pp. 23-24), the Supreme Court in Touby v. United States, supra, 500 U.S. at 166, held that a requirement to "consider" relevant factors is a meaningful constraint on delegated authority.

President must transmit a special message to Congress for each cancellation, and the message must include relevant supporting documentation, including, to the maximum extent practicable, the estimated fiscal, economic, and budgetary impact of the cancellation. 2 U.S.C. 691a(b). The President may only "cancel in whole" dollar amounts, items, and limited tax benefits to which the Act applies; he may not simply reduce the level of expenditure for a particular account or program, nor may he change, alter, or modify the substantive provisions of underlying spending or tax laws. Id. Under the "lockbox" provision of the Act, any credit for funds not spend or tax benefits not granted as a result of a cancellation must be dedicated to deficit reduction, and may not be used to increase spending in other areas. 2 U.S.C. 691c(a-b). Finally, the Act directs the congressional Joint Committee on Taxation to identify limited tax benefits, and stipulates that the President may be prohibited from exercising his cancellation authority with respect to any provisions not specifically identified as limited tax benefits by that committee. 2 U.S.C. 691f(a-c).

These principles and guidelines are at least as concrete and detailed as those contained in other delegation statutes upheld by the courts. See, e.g., Touby v. United States, supra, 500 U.S. at 165-166; Def. Memo, pp. 26-27. Therefore, plaintiffs' claim that the Line Item Veto Act confers boundless discretion upon the President is without foundation.[9]

## CONCLUSION

For the foregoing reasons, and the reasons given in our opening summary judgment brief, if the Court does not grant defendants' motion to dismiss, the Court should grant defendants' alternative motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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[9] In support of their claim that the Line Item Veto Act delegates limitless discretion to the President, plaintiffs suggest that the Act cannot be distinguished from a hypothetical statute appropriating a "lump sum" to the Executive Branch and authorizing it "'to spend any amount up to that ceiling.'" Pl. Opp., p. 23. But in fact, as the amici have shown, since 1789 Congress has funded the government under flexible appropriations "not exceeding" specified amounts. Memorandum of the United States Senate and the Bipartisan Legal Advisory Group of the United States House of Representatives as Amici Curiae in Support of the Constitutionality of the Line Item Veto Act, pp. 8-12.

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