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## **Line Item Veto: A Constitutional Analysis of Recent Proposals**

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# Line Item Veto: A Constitutional Analysis of Recent Proposals

## Summary

On March 6, 2006, the President announced that he was sending to Congress proposed legislation that “would provide a fast-track procedure to require the Congress to vote up-or-down on rescissions proposed by the President.” The President’s proposal, denominated the “Legislative Line Item Veto Act of 2006,” was introduced the next day in the Senate and House as S. 2381 and H.R. 4890. In comments accompanying the proposal it is asserted that “the President’s proposal is fully consistent with the Constitution. In its 1998 ruling [in *Clinton v. City of New York*] striking down the Line Item Veto Act of 1996, the Supreme Court concluded that the Act ‘g[ave] the President unilateral power to change the text of duly enacted statutes.’ The Legislative Line Item Veto Act does not raise those constitutional issues because the President’s rescission proposals must be enacted by both Houses and signed into law.”

Standing alone, the proposed expedited rescission procedure would likely pass constitutional scrutiny. Congress would simply establish a process whereby the President may propose rescission of specific types of appropriation and tax provisions, including earmarks. The fact the Congress *must* act within a limited time period to either approve or reject the proposal, and that certain procedural and deliberative processes are curtailed or eliminated, does not raise constitutional questions. The so-called fast-track process is an exercise of the constitutionally-based authority of each House to establish its own rules of internal procedure.

The expedited rescission process of these bills, however, does not stand alone. Under the proposal, the President would be given discretionary power to suspend covered spending and tax provisions for up to 180 days, and perhaps more, even if Congress rejected a proposed rescission within that period. This is unlike the current rescission process under the Impoundment Control Act, which requires the obligation of funds if Congress fails to approve the President’s rescission proposal within 45 days of continuous session after submission of a rescission proposal, or the provision in the rejected Line Veto Act of 1996 which required expenditure of canceled authorities immediately upon the enactment of a joint resolution of disapproval. In addition, while Congress must act speedily when it receives the President’s proposal, nothing in the bills specifies when the President must send up his proposal; nor do the bills appear to require that targeted spending and tax provisions in one law be sent up together; and nothing in the bills limits the suspension period to the stated 180-day suspension period or prohibits the additional utilization of the 45-day wait period for proposed rescissions under the current Impoundment Control Act, which is not to be repealed. An issue before a reviewing court, then, might be whether the bills’ suspension power could be viewed as an effective grant of presidential authority to cancel provisions of law that was proscribed by the Supreme Court in *Clinton v. City of New York*.

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# Line Item Veto: A Constitutional Analysis of Recent Proposals

## Introduction

President Bush and some in Congress advocate enactment of legislation that would provide the Chief Executive with line item veto authority, and the President has reiterated his support of a revival of such authority that would pass constitutional muster throughout his presidency in speeches, press conferences and annual budget submissions.<sup>1</sup> On March 6, 2006, the President announced that he was sending to Congress proposed legislation that “would provide a fast-track procedure to require the Congress to vote up-or-down on rescissions proposed by the President.” The President’s proposal, denominated the “Legislative Line Item Veto Act of 2006,” was introduced the next day in the Senate and House as S. 2381 and H.R. 4890. In comments accompanying the proposal it was asserted that “the President’s proposal is fully consistent with the Constitution. In its 1998 ruling [in *Clinton v. City of New York*] striking down the Line Item Veto Act of 1996, the Supreme Court concluded that the Act ‘g[ave] the President unilateral power to change the text of duly enacted statutes.’ The Legislative Line Item Veto Act does not raise those constitutional issues because the President’s rescission proposals must be enacted by both Houses and signed into law.”<sup>2</sup>

Standing alone, the proposed expedited rescission procedure would likely pass constitutional scrutiny. Congress would simply establish a process whereby the President may propose rescission of specific types of appropriation and tax provisions, including earmarks. The fact the Congress *must* act within a limited time period to either approve or reject the proposal, and that certain procedural and deliberative processes would be curtailed or eliminated, does not raise constitutional questions. The so-called fast-track process is an exercise of the constitutionally-based authority of each House to establish its own rules of internal procedure.

The expedited rescission process of these bills, however, does not stand alone. Under the proposal, the President is given discretionary power to suspend covered spending and tax provisions for up to 180 days, and perhaps more, even if Congress rejects a proposed rescission within that period. This is unlike the current rescission process under the Impoundment Control Act, which requires the obligation of funds

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<sup>1</sup> See, e.g., CRS Issue Brief IB89148, *Item Veto and Expanded Impoundment Proposals*, by Virginia A. McMurtry; OMB, Analytical Perspectives, Budget of the United States Government, Fiscal Year 2006, at 240-241; and OMB, Analytic Perspectives, Budget of the United States Government, Fiscal Year 2005, at 218-219.

<sup>2</sup> Office of the White House Press Secretary at [<http://www.whitehouse.gov/news/releases/2006/03/20060306-6.html>].

if Congress fails to approve the President's rescission proposal within 45 days of continuous session after submission of a rescission proposal, or the provision in the rejected Line Veto Act of 1996 which required expenditure of canceled authorities immediately upon the enactment of a joint resolution of disapproval.<sup>3</sup> In addition, while Congress must act speedily when it receives the President's proposal,<sup>4</sup> nothing in the bills specifies when the President must send up his proposal; nor do the bills appear to require that targeted spending and tax provisions in one law be sent up together; and nothing in the bills limits the suspension period of the stated 180 days or prohibits the additional utilization of the 45-day wait period for proposed rescissions under the current Impoundment Control Act, which is not to be repealed. An issue before a reviewing court, then, might be whether the bills' suspension power reaches far enough to be considered an effective grant of authority to cancel provisions of law that was proscribed by the Supreme Court in *Clinton v. City of New York*.<sup>5</sup>

The discussion will proceed as follows. After an examination of the nature and scope of the Supreme Court's ruling in *Clinton v. City of New York*, the bills will be described and compared with the Line Item Veto Act of 1996, and the current process for dealing with rescissions and deferrals under the Impoundment Control Act of 1974, as amended. The discussion concludes with an assessment of the legal and practical effect of the proposed suspension provision, and includes taking into account past and present legislative, executive and judicial precedents and practices with respect to impoundments, rescissions, deferrals and other efforts at budget and spending controls. That examination suggests that, in light of the *Clinton* ruling and analogous structural separation of powers decisions, a reviewing court might view the proposed suspension authority to be vested in the President as, in effect, a power to cancel appropriations akin to that proscribed in *Clinton*.

## **The Nature and Scope of the Supreme Court's Ruling in *Clinton v. City of New York***

In 1996, Congress enacted the Line Item Veto Act<sup>6</sup> which gave the President the power to "cancel in whole" three types of provisions already enacted into law: 1) any dollar amount of discretionary budget authority, 2) any item of new direct spending, or 3) any limited tax benefit. The Veto Act imposed procedures for the President to follow whenever he exercised this cancellation authority. The President had to transmit a special message to the Congress detailing the provisions to be canceled, together with factual determinations required by the law to be made and the reasons for the cancellations, within five calendar days of the enactment of the law containing

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<sup>3</sup> See 2 U.S.C. 683(b); 2 U.S.C. 691b(a).

<sup>4</sup> The bills would require an up-or-down vote be taken by both Houses on or before the 10<sup>th</sup> day of session after the introduction of the President's rescission proposal.

<sup>5</sup> 524 U.S. 417 (1998).

<sup>6</sup> P.L. 104-130, 110 Stat. 1200, *codified at* 2 U.S.C. 691-692.

such provisions.<sup>7</sup> All covered provisions of a law sought to be canceled had to be submitted together in that message.<sup>8</sup> Cancellation of the specified provisions took effect on receipt of the special message by both Houses.<sup>9</sup> If a disapproval bill was enacted, the cancellation was deemed to “be null and void” and the provisions became effective as of the original date of the law.<sup>10</sup> The President was prohibited from attempting to re-cancel items that were the subject of a previous special message for which Congress had enacted disapproval legislation.<sup>11</sup> The Veto Act also provided for expedited congressional consideration of bills introduced to disapprove cancellations. Congress provided for itself a review period of 30 calendar days of session beginning on the first calendar day of session after receipt of the President’s special message. If Congress adjourned prior to the expiration of the 30-day period, a pending disapproval bill could be brought up again in the next Congress if filed within five calendar days after the commencement of the new session.<sup>12</sup> A rescission bill had to be filed by the fifth day of the 30 calendar day period and be reported to the House floor by the seventh day after introduction without amendment. In the House, a motion to amend had to have the support of 50 Members. In the Senate, a new cancellation could be added if it was from the same original law.<sup>13</sup> Conference consideration procedures were detailed.<sup>14</sup> During the existence of the Veto Act, the President sent 11 special messages canceling a total of 82 provisions, including the two that were the subject of the *Clinton* ruling. Congress passed one bill disapproving 38 cancellations, which President Clinton vetoed. The veto was overridden and the disapprovals were enacted into law.<sup>15</sup>

In *Clinton v. City of New York*<sup>16</sup> the Supreme Court dealt with two presidential cancellations under the Veto Act, an item of direct spending in the Balanced Budget Act of 1997 and a limited tax benefit in the Taxpayer Relief Act of 1997. After finding that the plaintiffs had suffered the requisite injury for Article III standing, the Court addressed the merits of the case, holding, by a 6-3 vote, that allowing the President to cancel provisions of enacted law violated the Constitution’s Presentment Clause.<sup>17</sup> “In both legal and *practical* effect, the President has amended two Acts of Congress by repealing a portion of each. “[R]epeal of statutes, no less than

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<sup>7</sup> 2 U.S.C. 691a(c); 691e(6).

<sup>8</sup> *Id.*, sec. 691a(a): “For each law from which a cancellation has been made under this subchapter the President shall transmit a single special message to the Congress.”

<sup>9</sup> *Id.*, sec. 691b(a).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, sec. 691a(c).

<sup>12</sup> *Id.*, sec. 691d(b).

<sup>13</sup> *Id.*, sec. 691d(d), (e).

<sup>14</sup> *Id.*, sec. 691d(f).

<sup>15</sup> P.L. 105-159. See CRS Issue Brief IB89148, *Item Veto and Expanded Impoundment Proposals*, by Virginia A. McMurtry.

<sup>16</sup> 524 U.S. 417 (1998).

<sup>17</sup> U.S. Const., Art. I, sec.7, cl. 2.

enactment, must conform with Art. I.’ *INS v. Chadha*, 462 U.S. 919, 954 (1983).”<sup>18</sup> Such statutory repeals, the Court emphasized, must conform to the Presentment Clause’s “single, finely wrought and exhaustively considered, procedure” for enacting a law, i.e., passage of a bill by both Houses, presentment of the measure for the President’s signature or veto, and a veto override if necessary, again citing *Chadha*.<sup>19</sup> The Court then determined that the cancellation procedures of the Veto Act did not so conform, because nothing in the Constitution authorized the President to amend or repeal a statute, or parts of a statute, unilaterally, and because historical writings and practice provided “powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.”<sup>20</sup> The Court’s majority opinion pointedly rejected the notion that Congress and the President could agree by law to authorize “the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, sec.7. The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, sec.7, without amending the Constitution.”<sup>21</sup>

The broad, unequivocal nature of the majority opinion is underlined by Justice Kennedy’s concurring opinion, responding to Justice Breyer’s suggestion in dissent that the Court’s role in a case such as this “is lessened here because the two political branches are adjusting their own powers between themselves.”<sup>22</sup> Justice Kennedy’s rebuttal emphasizes that this case raises important structural separation of powers concerns respecting the Framers’ fear that the “concentration of power in the hands of a single branch is a threat to liberty.”<sup>23</sup> He stated:

To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution’s structure requires a stability which transcends the convenience of the moment. See *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-277 (1991); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986); *INS v. Chadha*, 462 U.S. 919, 944-945, 958-959 (1983); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 73-74 (1982). The latter premise, too, is flawed. Liberty is always

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<sup>18</sup> 524 U.S. at 438 (emphasis supplied.).

<sup>19</sup> *Id.*, at 439-40.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, at 445-46. See also 524 U.S. at 449: “If there is to be a new procedure in which the President will play a different role in determining the final text of what may ‘become a law’, such a change must come not by legislation but through amendment procedures set forth in Article V of the Constitution.”

<sup>22</sup> *Id.*, at 449.

<sup>23</sup> *Id.*, at 450.

at stake when one or more of the branches seek to transgress the separation of powers.<sup>24</sup>

The Supreme Court has developed two lines of separation of powers jurisprudence. The first reflects the Court's concerns over "encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power'."<sup>25</sup> In such structural cases, the Court has articulated interpretations of constitutional directions that are rigid and which may not be altered and are not subject to "balancing." Justice Blackmun speaking for the Court in *Mistretta* delineated the cases that have been subject to such formalist analysis:

... Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or the Executive Branch. *Bowsher v. Synar*, 478 U.S. 714 (1986) (Congress may not exercise removal power over officer performing executive functions); *INS v. Chadha, supra* (Congress may not control execution of laws except through Art. I procedures); *Northern Pipeline Construction Co. v. Marathon Pipe Line co.*, 458 U.S. 50 (1982) (Congress may not confer Art. III power on Art. I judge).<sup>26</sup>

To his list may be added the Court's subsequent 1991 ruling in *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc. (Washington Airports)*.<sup>27</sup>

In contrast, Justice Blackmun juxtaposed a second line of cases, in which aggrandizement or encroachment were not apparent and what was involved was the establishment by Congress of the arrangements within and between the agencies, the President, Congress and the Judiciary, under its broad Article I authority to create agencies and vest them with the necessary tools to carry out their assigned tasks. The key question in disputes over agency arrangements is whether so much has been taken from the functioning of one constitutional actor as to impair that actor's core constitutional functions. The Court sees its task in these cases as assuring that the essential lines of authority from the constitutional actors remain intact by utilizing a balancing test, a functionalist approach. As Justice Blackman explained in *Mistretta*:

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<sup>24</sup> *Id.*, at 449-50.

<sup>25</sup> *Mistretta v. United States*, 488 U.S. 361, 382 (1989).

<sup>26</sup> 448 U.S. at 382.

<sup>27</sup> 501 U.S. 252 (1991) (Congress may not maintain control of the decisionmaking of an executive entity by means of a review entity whose members it has appointed).



By the same token, we have upheld statutory provisions that to some degree commingle the functions of the Branches, but that pose no danger of either aggrandizement or encroachment. *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims).

In *Nixon v. Administrator of General Services*, *supra*, upholding, against a separation-of-powers challenge, legislation providing for the General Services Administration to control Presidential papers after resignation, we described our separation-of-powers inquiry as focusing “on the extent to which [a provision of law] prevents the Executive Branch from accomplishing its constitutionally assigned function.” 433 U.S., at 443 (citing *United States v. Nixon*, 418 U.S. at 711-712). In cases specifically involving the Judicial Branch, we have expressed our vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed “tasks that are more properly accomplished by [other] branches,” *Morrison v. Olson*, 487 U.S., at 680-681, and, second, that no provision of law “impermissibly threatens the institutional integrity of the Judicial Branch.” *Commodity Futures Trading Comm'n v. Schor*, 478 U.S., at 851.<sup>28</sup>

Justice Kennedy viewed the Court's Item Veto decision as falling within the first, or formalist, line of cases just described, or as he characterizes them, the “vertical” separation of powers line of authority.

Separation of powers helps to ensure the ability of each branch to be vigorous in asserting its proper authority. In this respect the device operates on a horizontal axis to secure a proper balance of legislative, executive and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised. The citizen has vital interest in the regularity of the exercise of governmental power. If this point was not clear before *Chadha*, it should have been so afterwards. Though *Chadha* involved the deportation of a person, while the case before us involves the expenditure of money or the grant of a tax exemption, this circumstance does not mean that the vertical operation of the separation of powers is irrelevant here. By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.<sup>29</sup>

Justice Kennedy succinctly encapsulated in his conclusion: “That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow.... Abdication of responsibility is not part of the constitutional design.”<sup>30</sup>

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<sup>28</sup> 448 U.S. at 382-83.

<sup>29</sup> *Clinton v. City of New York*, 524 U.S. at 452.

<sup>30</sup> *Id.*

## Discussion and Analysis

The bills' line item veto provision presents no apparent constitutional problem with respect to the expedited rescission process it establishes. The President is not vested with direct authority to cancel covered spending or tax benefit provisions. He must send up to Congress proposals to rescind such provisions which must be acted upon either by passage of a law approving the cancellations, or by a vote not to approve the proposal. No constitutional issue appears raised by Congress imposing on itself a requirement that it must take legislative actions within a limited period of time or that certain procedural and deliberative processes are curtailed or eliminated. The so-called fast-track process is an exercise of the constitutionally-based authority of each House to establish its own rules of internal procedure, which has been broadly construed by the courts.<sup>31</sup>

But, this proposal also vests the President with discretionary authority that may raise a constitutional question under *Clinton*. The bills set no time- frame within which the President must send up a rescission proposal after a law is enacted. When he does send up a proposal he may suspend the covered provision(s) designated for up to 180 calendar days. The suspension may be terminated at any earlier time if he determines that continuation of the suspension "would not further serve the purposes of this Act." The bills do not require that targeted spending and tax provisions contained in one law must be sent up at the same time. Further, nothing in the bills expressly limits the suspension period to the stated 180 day deferral period nor is there a prohibition against using the rescission authority of the Impoundment Control Act<sup>32</sup> in conjunction with the proposed Item Veto Act, either before or after a message is sent to Congress triggering the process of the latter Act. Finally, the 180 day deferral of discretionary budget authority or direct spending would not automatically end with early congressional rejection of a rescission proposal unless the President so ordered the termination.

Critics have suggested that use of the 180-day deferral period "could effectively kill various items by withholding funding until the end of the fiscal year on September 30, even if Congress had acted swiftly to reject his proposed cancellations."<sup>33</sup> It has also been suggested that "the fast-track rescission process could be paired with the old rescission process to grant the White House 45 extra days of budget impoundment authority by seeking a second vote under the old rescission process for cuts that had been initially rejected under the new proposal."<sup>34</sup>

A spokesperson for the Office of Management and Budget (OMB) reportedly has responded that such concerns are exaggerated: "The 180 days provision allows items for the which the President will seek a rescission to be set aside while rescission is considered by Congress. If Congress rejects a rescission request then the

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<sup>31</sup> See Art. I, sec. 5, cl. 2; *United States v. Ballin*, 144 U.S. 1, 5 (1892).

<sup>32</sup> 2 U.S.C. 683.

<sup>33</sup> Jonathan Nicholson, "Six-Month Budget Impoundment Time With 'Veto' Seen Raising Issues In Congress," BNA Daily Report for Executives, March 24, 2006.

<sup>34</sup> *Id.*

President has the authority to terminate the deferral and let the funds be spent or the tax benefits be provided. The Administration's intention would be to do so immediately." The spokesperson explained that the 180-day deferral period was designed for those periods when Congress takes long recesses "and as a way to prod action. For example, for 2006, Congress has set an early October target date for adjournment. While many observers believe that means a post-election session is likely, it is possible the Congress could stay out of session until February, a period of about five months."<sup>35</sup>

It is likely that a reviewing court acting on a legal challenge to the Line Item Veto Act, in attempting to assess whether the proposed suspension authority is effectively a proscribed cancellation power, would look to past congressional actions to discern the degree of departure from past norms of protections of legislative prerogatives. For example, under the current Impoundment Control Act, the rescission and deferral processes are tightly controlled. Rescissions may be proposed by the President at any time. Congress has 45 days of continuous session to approve a rescission bill, but it is not required to take any action during that period, i.e., neither House has to vote on the proposal. During the 45-day period budget authority is suspended. When the 45 day period ends without a congressional rescission action, the budget authority must be made available for obligation immediately and the rescission procedure under the act cannot be used again for those funds.<sup>36</sup>

The current Impoundment Control Act also has a provision that allows for deferrals up to the end of the fiscal year in which a special message is transmitted to Congress. Such deferrals are limited to "programmatic" deferrals and exclude "policy" deferrals.<sup>37</sup> It has been very rarely used in recent times. But the 180-day suspension period proposal now under consideration could significantly alter that deferral limitation and even revive the practice of presidential policy deferrals. It therefore may be instructive to briefly review the history of that provision and its significance in Congress' past efforts to control executive impoundments. The original Impoundment Control Act of 1974 allowed deferrals of budget authority not to extend beyond the end of the fiscal year in which the message reporting the deferral was transmitted. The act also provided that a deferral could be terminated by the passage of a resolution of disapproval by either House of Congress. The 1983

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<sup>35</sup> *Id.*

<sup>36</sup> 2 U.S.C. 683. In the past, OMB has been found to have expanded the 45-day period during which funds are "frozen" by starting the deferral before the submission of the President's rescission message on the ground that there needs to be time to decide whether to ask for rescission and then time for preparation of the message, arguing that it would be wasteful to obligate funds for a program that might be canceled by Congress. All of this often took 30 or more days, extending the statutory 45 days suspension period. In one instance (in 1986), five and half months elapsed between the effective date of a particular appropriation and the submission of the required report under the act. The Comptroller General issued several opinions critical of the practice. See CRS Archived Report 87-173, *Presidential Impoundment Authority After City of New Haven v. United States*, by Richard Ehlke and Morton Rosenberg, (recounting the practice and congressional and GAO reactions: available from authors).

<sup>37</sup> 2 U.S.C. 684.

*Chadha* decision, declaring all one and two-House legislative vetoes unconstitutional, effectively nullified the deferral legislative veto provision. The question that remained was whether the invalid veto provision was severable from the statute, leaving the President with an unfettered deferral power, or whether it was inseverable, leaving no deferral power at all. At the time, the President acted on the presumption he had unfettered deferral authority in the wake of *Chadha*.

The issue was resolved by the D.C. Circuit's ruling in *City of New Haven v. United States*,<sup>38</sup> which held that Congress would have preferred no statute to one without the one-House veto provision because it was so essential in controlling presidential deferrals:

Section 1013 was designed specifically to provide Congress with a means for controlling presidential deferrals. As a consequence of the Supreme Court's decision in *Chadha*, however, that section has been transformed into a license to impound funds for policy reasons. This result is completely contrary to the will of Congress, which in amending the Anti-Deficiency Act sought to *remove* any colorable statutory basis for unchecked policy deferrals. We cannot imagine that Congress would have acted in complete contravention of its intended purposes by enacting section 1013 without a legislative veto provision. Accordingly, we hold that the unconstitutional legislative veto provision contained in section 1013 is inseverable from the remainder of the section, and we affirm the judgement of the District Court invalidating section 1013 in its entirety.<sup>39</sup>

The Court emphasized the important substantive difference it saw between policy and programmatic deferrals: "The critical distinction between 'programmatic' and 'policy' deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by enactment of budget legislation."<sup>40</sup> Throughout the opinion the appeals court further noted its view of the limited scope of the Executive's remaining authority to implement "programmatic" impoundments by characterizing it as dealing with "routine",<sup>41</sup> and "trivial" matters,<sup>42</sup> and referring to them as "these 'trivial' impoundments relating to the 'normal and orderly operation of the government' that Congress expected to present little controversy."<sup>43</sup> Nine months later Congress codified the appeals court's distinction between policy and programmatic deferrals

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<sup>38</sup> 809 F. 2d 900 (D.C.Cir. 1987).

<sup>39</sup> 809 F. 2d at 909 (emphasis in original).

<sup>40</sup> 809 F. 2d at 901 (emphasis in original; footnote omitted).

<sup>41</sup> *Id.*, at 906 note 18.

<sup>42</sup> *Id.*, at 908.

<sup>43</sup> See CRS Archived Report 87-173, *Presidential Impoundment Authority After City of New Haven v. United States*, by Richard Ehlke and Morton Rosenberg, discussing the statutory and legal development of the policy/programmatic dichotomy: available from authors.

which now appears at 2 U.S.C. 684.<sup>44</sup> In that same legislation Congress prohibited the then prevalent practice of Presidents of submitting a new rescission proposal concerning identical or very similar matter when Congress failed to act on a rescission proposal within the allotted 45 days. By using such submissions, the President sought to continue to tie up funds even though Congress, by its inaction, had already rejected the same proposal. The enacted prohibition against such seriatim rescission proposals applies for the duration of the appropriation, so it may remain in effect for two or more fiscal years.<sup>45</sup>

Even under the 1996 Veto Act that was declared unconstitutional, Congress included a number of provisions to constrain presidential authority. For example, the President had to bundle all canceled items in a single message to the Congress;<sup>46</sup> the President's special message had to be transmitted within five calendar days after enactment of the law to which the cancellation applied;<sup>47</sup> cancellation took effect on receipt by both Houses but if a disapproval was enacted, the cancellation was deemed never to have occurred and the funds had to be utilized;<sup>48</sup> congressional review was for 30 calendar days of session after receipt of the message, but if Congress adjourned prior to the expiration of the 30-day period, it could be brought up again in the next Congress if it was filed within five days of the commencement of the new session;<sup>49</sup> and a rescission bill had to be filed by the fifth day of the 30 calendar day period, reported to the floor by the seventh day after introduction without amendment, could be amended in the House if supported by 50 Members, and new cancellation items could be added in the Senate if the items were from the same law.<sup>50</sup>

The foregoing review of the President's proposal for a revived item veto, the provisions of the current Impoundment Control Act and the judicially nullified Item Veto Act of 1996, and past executive challenges to legislative spending controls and congressional responses, provide background to the analysis of how a court might view the current item veto proposal. The issue is whether the proposed Legislative Line Item Veto Act in its present form would have the *potential* of allowing the President, through the utilization of the 180 day rescission authority, together with piecemeal submissions of rescission requests, to effectively cancel spending items. The question that remains is whether the *Clinton* ruling (and prior separation of powers cases) would be applied to reach such *potential* constitutional consequences.

The *Clinton* case is properly categorized as one of a line of structural separation of powers decisions, that has included *Chadha* and *Bowsher*, in which the Supreme Court has invalidated provisions that either "accrete to a single branch powers more

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<sup>44</sup> P.L. 100-119, sec. 206(a), 101 Stat. 785.

<sup>45</sup> P.L. 100-119, sec. 207, 101 Stat. 786.

<sup>46</sup> 2 U.S.C. 691a(a).

<sup>47</sup> *Id.*, sec. 691a(c).

<sup>48</sup> *Id.*, sec. 691b(a).

<sup>49</sup> *Id.*, sec. 691d(b).

<sup>50</sup> *Id.*, sec. 691d(d), (e).

appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.”<sup>51</sup> The salient characteristic of those rulings is that they admit of no exception and allow no balancing of interests of need, necessity, or convenience. They expressly reject the validity of an agreement on such reassignments by the political branches that is embodied in a law. In at least one instance a federal appeals court has enforced such a structural ruling, finding that Congress had attempted to evade a High Court’s ruling by indirection. Those cases are illuminating on the subject issue.

## The *Metropolitan Airports* Litigation

In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise (Metropolitan Airports Case)*,<sup>52</sup> the Supreme Court confronted an attempt by Congress to vest managing authority over Washington National and Dulles International Airports in a regional authority while at the same time seeking to maintain control over key policy and management decisions of the Airports Authority’s Board of Directors (Directors). It did this by requiring the Directors to establish a Board of Review (Board) consisting of nine Members of Congress to which the Directors had to submit for the Board’s consideration and possible veto operative decisions such as the adoption of the annual budget, the authorization for the issuance of bonds, and the adoption, amendment or repeal of regulations. Congress also retained substantial authority over the appointment and removal of the members of the Board. The Court found that as a result of those provisions the Board was an agent of the Congress and that the scheme of congressional control violated separation of powers principles. “If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, sec. 7. In short, when Congress [takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons... outside the Legislative Branch, it must take that action by the procedures authorized in the Constitution. See *Chadha*, 462 U.S., at 952-955.”<sup>53</sup> The Court rejected the argument that the Board was a “kind of practical accommodation between the Legislative and the Executive ... that might prove innocuous,” stating that “the statutory scheme challenged today provides the blueprint for extensive expansion of the legislative power beyond its constitutionally confined role” and could not be countenanced. It then quoted Madison’s warning that “the legislature can with greater facility mask under complicated and indirect measures the encroachments which it makes on the co-ordinate departments’.”<sup>54</sup>

Within six months after the Supreme Court’s ruling, Congress passed new legislation. The new statute did not require that Members of Congress be members of the new Review Board but their selection had to be from lists submitted by the

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<sup>51</sup> *Mistretta*, 448 U.S. at 382.

<sup>52</sup> 501 U.S. 252 (1991).

<sup>53</sup> 501 U.S. at 276.

<sup>54</sup> 501 U.S. at 276-77.

Speaker of the House and the President *pro tempore* at the Senate. The Board's veto power was taken away but its power was expanded in other ways. The catalogue of actions the Board could review was expanded, and members of the Board could participate, but not vote, at meetings of the Directors. Also, though its veto power was removed, the Board had authority to make recommendations regarding actions submitted for its review by the Directors. If those recommendations were not accepted by the Directors, the Directors had to submit the matter to Congress for a reviewing period of 60 legislative days, during which time the Directors could take no action on the matter. If Congress did not pass a joint resolution of disapproval within that period, the Directors' proposed action could take effect.

On review, the Court of Appeals for the District of Columbia Circuit held that "the provisions of the revised Act, taken together, indicate that the Board of Review remains a congressional agent and that it exercises power in violation of the separation of powers."<sup>55</sup>

At the outset of its opinion the appeals court announced that it would look beyond the "explicit terms" of the revised statute to ascertain its "practical effect and design."<sup>56</sup> Thus, with respect to whether the change in the nature of the appointment process for Review Board members made a difference, the court held that "because the Directors may never go outside the lists furnished by the Speaker and the President *pro tempore*, we conclude that Congress retains control over the appointments. This control, together with the provisions that in practice ensure that the Board will be dominated by Members of Congress, persuades us that Congress intended the Board to serve, and we hold that it does serve, as its agent."<sup>57</sup>

Turning to the separation of powers issue, the court declared it would look to the "practical consequences" of the Board's ability to delay actions by the Directors.<sup>58</sup> It rejected the claim that when the Board had been stripped of its direct veto and now could only recommend, it had only advisory duties, noting that "the Board's loss of its veto power does not necessarily mean that it has lost effective control over the Authority that the Supreme Court found to be an unconstitutional exercise of federal power... We must therefore examine the potential impact of the Board's remaining authority on the Directors' decisionmaking. To this end, we examine the various ways in which the Board is able to affect the substance of the Authority's actions."<sup>59</sup> The court focused on the powers of the Review Board to influence, through its ability to delay action by the Directors:

"[T]he Board of Review has been vested with a range of powers whose cumulative effect is to enable it to interfere impermissibly with the Directors' performance of their independent responsibilities. In the place of the veto

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<sup>55</sup> *Hechinger v. Metropolitan Washington Airports Authority (Hechinger)* 36 F. 3d 97, 105 (D.C.Cir.1994), *cert. denied* 513 U.S. 1126 (1995).

<sup>56</sup> *Id.*, at 101.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, at 102.

provision, the amended Transfer Act empowers the Board to choose, in its sole discretion, which of the Authority's decisions may be implemented immediately and which will be subjected to the risks and delays of congressional review. In the place of mandatory congressional membership on the Board it sets forth requirements that both in principle and in practice continue to ensure congressional domination of the Board. In redefining the powers of the board, it actually expands the scope of its review. Moreover, the amended statute retains provisions permitting the Board to compel the Authority to consider particular issues and conditioning the Authority's ability to take vital actions on the Board's own continuing ability to exercise its powers under the act.

What tips the balance, in our judgement, is the Board's power to delay and perhaps overturn critical decisions by requiring their referral to Congress. The delays it can impose are hardly trivial. The 60-legislative-day congressional review period will extend for at least three months and, depending on the congressional cycle, can last as long as six. ... The mere existence of this power to delay provides the Directors with an enormous incentive to avoid confrontations by tailoring their decisions to suit the Board's pleasure; it also gives the Board the power to hold an important decision hostage in order to secure the Director's agreement to an unrelated matter.<sup>60</sup>

Quoting the Supreme Court's words in *Metropolitan Airports* that the original statutory scheme was a "blueprint for extensive expansion of the legislative power beyond its constitutionally-confirmed role," the appeals court stated the "we do not suggest that the Board has or would abuse its authority in such a manner. But the potential for abuse is there."<sup>61</sup>

## Conclusion

The *Metropolitan Airports* and *Hechinger* decisions seem to confirm the teachings of *Clinton* and its structural separation of powers predecessors that the courts will take a rigid approach when aggrandizement or encroachment of core constitutional prerogatives are involved. The *Airports* cases are particularly pertinent to the proposed item veto revival. The *Clinton* Court spoke to the constitutional delicacy of attempting to reassign the power of cancellation to the President, just as the *Metropolitan Airports* Court rejected Congress' original scheme to retain control of the Washington airports. Congress' attempt to address the Court's concerns in *Metropolitan Washington* by enacting a structural variant was struck down in *Hechinger* on the basis of a facial review of what might be the "potential" of the revised scheme to achieve the result found to be illegitimate in the earlier case. Challengers to the proposed Item Veto Act of 2006 might point to this series of cases as raising questions about the expanded suspension provisions and their "potential" to undermine the holding in *Clinton v. City of New York*

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<sup>60</sup> *Id.*, at 104-05.

<sup>61</sup> *Id.*, at 105.