



# Line Item Veto: A Constitutional Analysis of Recent Proposals

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## 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*. Subsequent modifications of the Administration proposal in the House and Senate may be seen to continue to raise significant constitutional concerns.

## Contents

Introduction: The Administration’s Line Item Veto Proposal .....	1
The Nature and Scope of the Supreme Court’s Ruling in <i>Clinton v. City of New York</i> .....	2
The Line Veto Act of 1996 .....	2
The Supreme Courts Invalidation of the Line Item Veto Act .....	3
Implications of the Breadth of the Clinton Ruling.....	4
A Constitutional Analysis of S. 2381 and H.R. 4890 As Introduced .....	6
Constitutional Issues That May Be Raised By the Administration Proposals .....	6
Considerations That May Be Taken Into Account By A Reviewing Court .....	7
Departures From Past Norms of Protections of Legislative Prerogatives .....	7
Applying the Implications of Clinton: The Relevance of the <i>Metropolitan</i> <i>Airports</i> Litigation .....	9
Observations .....	12
A Constitutional Assessment of House and Senate Modifications of the Administration’s Proposal .....	12
House and Senate Actions .....	12
H.R. 4890, As Amended.....	13
Title of the SOS Act .....	17
Conclusion.....	19

## Contacts

Author Contact Information .....	19
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## Introduction: The Administration's Line Item Veto Proposal

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 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

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<sup>1</sup> See, e.g., CRS Report RL33635, *Item Veto and Expanded Impoundment Proposals: History and Current Status*, by (name redacted) (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>.

<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.

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 continues 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 discussion concludes with a review and assessment of subsequent modifications of the Administration's proposal in the House and Senate that indicates that constitutional issues may still remain unresolved.

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

### **The Line Veto Act of 1996**

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 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>

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<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.

<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).

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>

## The Supreme Courts Invalidation of the Line Item Veto Act

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 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

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<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 McMurtry, *supra*, footnote 1.

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

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

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

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

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

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>

## **Implications of the Breadth of the Clinton Ruling**

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 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

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<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.

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

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

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*:

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

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<sup>26</sup> *Id.*, 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).

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



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>

## **A Constitutional Analysis of S. 2381 and H.R. 4890 As Introduced**

### **Constitutional Issues That May Be Raised By the Administration Proposals**

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

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

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

<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.

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 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>

## **Considerations That May Be Taken Into Account By A Reviewing Court**

### **Departures From Past Norms of Protections of Legislative Prerogatives**

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>

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<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. See also, Hearing, “The Constitution and the Line Item Veto,” before the House Judiciary Subcommittee on the Constitution, 109<sup>th</sup> Cong., 2d Sec. (April 27, 2006) (testimony of Cristina M. Firvida).

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

<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, e.g., 54 Comp. Gen. 453, 462 (1974) (GAO will construe a deferral as a *de facto* rescission if the timing of the proposed deferral is such that “funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence.”). See CRS Archived Report 87-173, *Presidential Impoundment Authority After City of New Haven v.* (continued...)

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 “programmatically” 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 *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 ‘programmatically’ 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 “programmatically” impoundments by characterizing it as dealing with “routine”,<sup>41</sup> and “trivial”

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(...continued)

*United States*, by Richard Ehrlke and (name redacted), (recounting the practice and congressional and GAO reactions: available from authors).

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

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

<sup>39</sup> *Id.*, at 909 (emphasis in original).

<sup>40</sup> *Id.*, at 901 (emphasis in original; footnote omitted).

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

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 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>

### **Applying the Implications of Clinton: The Relevance of the *Metropolitan Airports* Litigation**

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*

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<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 (name redacted), discussing the statutory and legal development of the policy/programmatic dichotomy: available from authors.

<sup>44</sup> P.L. 100-119, sec. 206(a), 101 Stat. 785. Section 684(b) provides that “Deferrals shall be permissible only—(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operation; or (3) as specifically provided by law. No officer or employee of the United States may defer any budget authority for any other purpose.” These requirements are repeated in the Anti-Deficiency Act, 31 U.S.C. 1512(c).

<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).

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 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.

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 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

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

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

<sup>53</sup> *Id.*, at 276.

<sup>54</sup> *Id.*, at 276-77.

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 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.

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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.

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>

## Observations

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 Administration's proposed Legislative Item Veto Act of 2006, or a variant thereof, 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*. It is also useful in assessing modifications to the Administration's proposal that have emerged in the House and Senate subsequent to its introduction.

## A Constitutional Assessment of House and Senate Modifications of the Administration's Proposal

### House and Senate Actions

Hearings on H.R. 4890 were held by the House Rules Subcommittee on the Legislative and Budget Process on March 15, 2006; the House Judiciary Subcommittee on the Constitution on April 27, 2006; and the House Budget Committee on May 25 (perspectives on applications and effects) and June 8, 2006 (constitutional issues).<sup>62</sup> On June 14, 2006, the House Budget Committee voted 24-9 to report H.R. 4890, as amended, favorably.<sup>63</sup> The following day the House Rules Committee voted 8 -4 to report an amended version of the bill in essentially the

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

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

<sup>62</sup> McMurtry, *supra* footnote 1, at 19-20

<sup>63</sup> H.Rept. 109-505, Part I.

same form as that approved by the House Budget Committee.<sup>64</sup> On June 22, 2006, the House approved H.R. 4890, as amended, by a vote of 247-172,<sup>65</sup> and received in the Senate.

On May 2, 2006, the Senate Budget Committee held hearings on S. 2381. “As a result of the hearing and concerns that were voiced at that time,”<sup>66</sup> S. 2381 was substantially revised by the Committee and was included as Title I of a comprehensive budget reform bill introduced as S. 3521, the Stop Over Spending Act of 2006 (SOS Act). The Committee voted 12-10 to report its bill, and the report was filed on July 10, 2006. No Senate floor action has taken place on either S. 3521 or H.R. 4890.

### **H.R. 4890, As Amended**

Under the amended version of H.R. 4890, the President must send up special messages proposing cancellations within 45 calendar days of the enactment of the law containing targetable items.<sup>67</sup> At that time he may defer obligating discretionary budget authority or suspend implementation of items of direct spending or targeted tax benefits for 45 calendar days. Such deferrals and suspensions maybe extended for an additional 45 days upon proper notification to the Congress.<sup>68</sup> The period may also be extended if a *sine die* adjournment occurs before the end of the 45 day calendar period.<sup>69</sup> Finally, it would appear that the practice established under the current Impoundment Control Act, which allows deferral of discretionary funding obligations for the period prior to the 45 day period of congressional consideration of a presidential rescission proposal,<sup>70</sup> would be statutorily recognized. Under revised H.R. 4890, current Parts B (dealing with proposed rescissions and deferrals) and C (the 1996 Line Item Veto Act) are repealed and replaced by a new Part B. Two provisions of old Part B, however, are retained: Section 1016 authorizing suits by the Comptroller General to compel compliance with the Act would be retained in its entirety as new Section 1019; and Section 1013, which limits presidential deferrals of discretionary budget authority for a period not to extend beyond the end of a fiscal year and only for programmatic purposes, is to be modified. Section 1013(c) currently provides an exception for “any budget authority proposed to be rescinded or that is to be reserved as set forth in a special message to be transmitted under Section 1012 [ 2 U.S.C. 683] of this title.” New section 1020(c) would be amended to read: “The provisions of this section do not apply to budget authority proposed to be canceled as set forth in a special message required to be transmitted under section 1011.” Thus, in the absence of any express prohibition on deferral before submission of a presidential message, it is possible that deferral of obligations under the amended bill could be *at least* 135 days.

Moreover, amended H.R. 4890 does not contain an express statutory direction that the obligation of funding is to resume upon congressional action rejecting the cancellation proposal as is the case under current law.<sup>71</sup> Rather, the House Report accompanying the bill states that “Once

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<sup>64</sup> H.Rept. 109-505, Part 2 (House Rules Committee Report).

<sup>65</sup> 150 Cong. Rec. H 4433-41, H 4467-93 (daily ed. June 22, 2006).

<sup>66</sup> S.Rept. 109-283 on the Stop Over Spending Act of 2006, 109<sup>th</sup> Cong. 2d Sess., 9 (2006) (SOS Act Report).

<sup>67</sup> Proposed Section 1011(a).

<sup>68</sup> Proposed Section 1013(a)-(d).

<sup>69</sup> Proposed Section 1011(a).

<sup>70</sup> See discussion of the practice *supra* at 8-9 and footnote 36.

<sup>71</sup> See 2 U.S.C. 683(b).



Congress acts on an approval bill, this deferral authority must be discontinued by the President, *even though it is not legally or constitutionally required* and must not extend it for the renewal period.”<sup>72</sup> Nor is there any express statutory relation between the deferral and suspension periods and the 15 session day expedited congressional consideration period.<sup>73</sup> The accompanying House Rules Committee Report explains that

“[o]ut of constitutional concerns, the Committee has not directly tied the suspension or deferral period to a failed vote or on approval. It does, though, indicate its intent that such vote should have that effect. The President must immediately suspend the deferral of all budgetary provisions included in an approval bill of proposed cancellation that, after floor consideration of the bill, has not received the requisite votes to pass in a House of Congress.”<sup>74</sup>

The House Report does not explain the nature of its “constitutional concerns” but it appears to reflect objections voiced at hearings on the President’s proposals and by the Office of Management and Budget (OMB) that it would be constitutionally questionable under the Supreme Court’s ruling in *INS v. Chadha*<sup>75</sup> for Congress to give the President deferral or suspension power and then withdraw it based on Congress’s non-legislative action in failing to approve a rescission proposal. It is suggested that to accomplish that result Congress must either pass a new law directing such action, or that such decisions might be left to the discretion of the President to determine if and when to release funds or to implement direct spending or limited tax benefits. This idea reflects an apparent misunderstanding of the constitutional authority of each House to establish its own rules of proceedings and the nature, scope and rationale of the *Chadha* ruling.

Article I, section 5, clause 2 of the Constitution authorizes “each House [to] determine the rules of its proceedings . . . .” This power has been construed broadly by the courts. The Supreme Court has held that where neither express constitutional restraints nor fundamental rights are ignored, “all matters of method are open to the determination of the house. . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal.”<sup>76</sup>

The Supreme Court’s landmark ruling in *INS v. Chadha* is not to the contrary, and, indeed, appears supportive of the type of action objected to by OMB. The constitutional defect of the legislative veto disclosed by the *Chadha* Court was that Congress sought to exercise its legislative power without complying with the constitutionally mandated requirements for lawmaking: bicameral passage and presentation to the President for his signature or veto. There, and in two

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<sup>72</sup> House Rules Committee Report at 19 (emphasis supplied).

<sup>73</sup> The House Rules Committee Report concedes that while the deferral and suspension authority of the President “is independent of legislative actions taken by Congress, it is the intent of the Committee that if a vote is taken on an approval bill by either House, and an approval bill is not agreed to by that House, then the suspension of any provision of law must be revoked and that provision put into effect as if it had always been effective under the terms of the public law in which it was originally included.” House Rules Committee Report at 20.

<sup>74</sup> House Rules Committee Report at 20.

<sup>75</sup> 462 U.S. 919 (1983).

<sup>76</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892). See also, *Nixon v. United States*, 506 U.S. 224 (1993)(challenge to Senate impeachment rule allowing appointment of a committee of Senators to receive evidence and take testimony and report to the body held to be nonjusticiable since there was a demonstrable textual commitment of the issue to the Senate and no judicially discoverable and manageable standards for resolution the issue).

subsequent cases,<sup>77</sup> the Court found unlawful legislative actions which sought to accomplish the reversal of exercises of executive actions taken pursuant to lawfully delegated authority without presentation to the President. But the Court also noted several provisions of the Constitution allowing legislative actions which do not have to comply with the Presentation Clause,<sup>78</sup> and in addition identified “another ‘exception’ to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clause. Each House has the power to act alone in determining specified internal matters. Art 1, sec. 7, cls. 2, 3 and sec. 5, cl. 2.”<sup>79</sup> The noted section 5, of course, provides in pertinent part that “[e]ach House may determine the rules of its proceedings. . . .” The Court therefore recognized that the exercise of the rulemaking power may have an *incidental* impact outside the legislative branch. However, as long as its predominant focus is internal, it is a constitutional exercise of that authority.

Moreover, the *Chadha* Court carefully noted that it was not casting doubt on so-called “report and wait” provisions which it previously approved in *Sibbach v. Wilson*.<sup>80</sup> Under such provisions a proposed executive action does not become effective unless a specified contingency occurs, i.e., a set period of time passes without congressional action preventing it from going into effect or Congress takes affirmative legislative action approving or disapproving its effectiveness.

All the expedited consideration provisions in pending line item veto proposals are variant examples of the legislative employment of this method of contingent legislation. None of the President’s rescission recommendations become effective unless approved by a bill that must be first considered by the House of Representatives and the Senate within a specified number of legislative days of its introduction in each House. If it passes one House it goes to the other House for a vote. But if both Houses do not pass the rescission bill within the statutorily prescribed consideration period, the exercise ends and the suspension or obligation is lifted. It is arguable that a proper view of this mechanism is that it is a contingency scheme in which the President has not been delegated any legislative authority at all. Rather, he simply has been authorized to *recommend* rescissions and the proposal submitted has no legal effect unless and until Congress gives it such effect through further legislation. In the exercise of its constitutional rulemaking power it has established, as a matter of internal procedure, that if passage by both Houses fails within the prescribed period, the process is over. Language in a bill authorizing the President “to suspend” or “to defer” certain budget items can be read as incidental to the internal expedited consideration process. Deferral of obligation authority is incidental, albeit necessary, to this process since any agency use of obligation authority during the consideration process is subject to nullification and thus may raise the potential of unnecessary disruption of the obligation process.

Indeed, as the example of the current rescission process under the Impoundment Control Act demonstrates, even the statutory silence there with respect to deferral of obligation authority during the 45 day wait period under Section 683 has been consistently construed by both OMB and the Government Accountability Office to implicitly allow the Executive to defer spending

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<sup>77</sup> *Process Gas Group v. Consumer Energy Council*, 463 U.S. 1216 (1983)(one-House veto of rules invalid); *United States v. FTC*, 463 U.S. 1216 (1983)(two-House veto of rules invalid).

<sup>78</sup> The initiation of impeachments by the House alone; Senate conduct of impeachment trials; Senate disapproval of nominations; and Senate ratification of treaties. 462 U.S. at 955. The Court also noted a Court-made exception in *Hollingsworth v. Virginia*, 3 Dall. 378 (1798) allowing congressional proposals of constitutional amendments without presidential approval.

<sup>79</sup> *Chadha*, 462 U.S. at 955 note 21.

<sup>80</sup> 312 U.S. 1 (1941).

during that period and, indeed, for a period of 30 or more days prior to the President's transmission of his rescission message to Congress.<sup>81</sup> The implication of an allowable deferral is a result of the language of Section 683 (b) which requires obligation of budget authority "reserved" by the President's message at the end of the 45 day period. That inference is further supported by 2 U.S.C. 684 (b) which permits "programmatic" (as opposed to "policy") deferrals "to provide for contingencies."

We are aware of no instance in the past in which the Executive has raised a *Chadha* objection to the Section 683 direction to obligate. As an exercise of caution, however, Congress might consider either eliminating any "suspension" or "deferral" language in a line item veto bill and leave only the direction for obligation after the Congress defeats the rescission request, or separately stating that the President may "defer" obligating or putting into effect targeted items only until Congress fails to approve the President's proposal under the Act's expedited procedures. Arguably, either method would accomplish the result without raising a constitutional question.

Finally, the suggestion that a separate bill would be required to end a deferral or suspension appears to find no supportable basis in the *Chadha* ruling or its rationale. Indeed, such a requirement could arguably be seen as running afoul of the Supreme Court's ruling in *Clinton v. New York City*, the Item Veto Case, in that in giving the President a "second bite at the apple," the period of deferral could be indefinitely extended while Congress debates reaffirming by law, through normal legislative processes, and subject to presidential veto, that which it had already determined not to do.<sup>82</sup> The alternative suggestion, that the lifting of a deferral or suspension be discretionary in the President similarly raises *Clinton* issues in that it would vest in President the power to determine whether a provision of law would become operative or not, an effective line item veto.<sup>83</sup>

Constitutional concerns with respect other aspects of H.R. 4890, as amended, raise more difficult questions. The potential period of deferral or suspension of targetable items is *at least* 135 calendar days and it is conceded in the House Rules Committee report that there is no relation between the deferral or suspension periods and the period of expedited congressional consideration, which appears to be 15 legislative days. Moreover, the House Rules Committee report acknowledges that there is no express requirement in the legislation that funds be obligated immediately upon the defeat of a cancellation proposal, but states that it is its expectation that "[t]he President must immediately suspend the deferral of all budgetary provisions included in an approval bill of proposed cancellations that, after floor consideration of the bill, has not received the requisite vote to pass in a House of Congress."<sup>84</sup> Thus a presidential deferral or suspension could potentially extend well beyond the date of a definitive congressional rejection of a cancellation proposal. The possible consequence of such delays, as pointed out by the dissent to the House Rules Committee Report, is that "If the President can withhold funds regardless of Congressional action for up to three months,<sup>85</sup> then he can effectively starve programs to death,

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<sup>81</sup> See discussion *supra* at 8-9.

<sup>82</sup> See discussion *supra* at 7-11.

<sup>83</sup> See discussion *supra* at 3-5, 11-12.

<sup>84</sup> House Rules Committee Report at 20.

<sup>85</sup> The dissent did not take into account that the President appears not to be precluded from ordering deferrals during the 45 day period after date of enactment of the funding legislation when he is considering whether to send up a cancellation proposal.

denying them the funds needed to hire and pay staff as well as conduct routine business. A major appropriation such as Amtrak, could be forced to slash routes and fire staff (a long standing Administration goal) as long as the President retains this effective power of the purse. It is also not clearly stated in the legislation that the President must release funds immediately if a rescission is defeated.”<sup>86</sup>

We are aware that the plain meaning rule, which purports to bar courts from relying on legislative history when statutory language is plain, is often more honored in the reach than the observance,<sup>87</sup> and arguably could be waived by a reviewing court. But it is not likely that the Committee’s statement of intent would be held persuasive. The Committee admits that it purposely omitted an express direction to the President because it believed it did not have the constitutional or legal authority to do so. The report language is effectively a hortatory request that the President do “the right thing.” It is unlikely that a reviewing court would fill the statutory void and find an enforceable right against presidential inaction. Rather, it is more likely that a court will apply the principles enunciated by the *Clinton* ruling and find the scheme proposed by H.R. 4890, as amended, is no more than a structural variant of the unsuccessful attempt to reassign the power of cancellation to the President in that case. The “potential” of the scheme proposed by H.R. 4890, as revised, to achieve the result found illegitimate in *Clinton* may appear to a reviewing court, in substance and effect, no different from the Administration’s original proposal discussed above.

### **Title of the SOS Act**

The Senate Budget Committee identified six concerns with S. 2381, the Administration proposal: the short period given for congressional consideration of presidential rescission proposals; the authority of the President to withhold funds from obligation for up to 180 days even if Congress had defeated a rescission proposal; the ability of the President to re-propose rescissions an unlimited number of times (and to defer funds 180 days each time); the ability of the President to send up an unlimited number of rescission proposals; allowing the President to modify new direct spending programs; and the lack of a sunset provision for the legislation.<sup>88</sup> Those concerns are addressed in Title I of S. 3521, a comprehensive budget reform proposal.

Under Title I, which displaces Part C of the Impoundment Control, containing the 1996 Line Item Veto Act, the President is permitted to send up no more than four special messages per calendar year proposing to rescind discretionary budget authority, items of direct spending, and targeted tax benefits. Such messages containing targeted items must be sent within one calendar year of the date of enactment of the law in which they appear. There can be no resubmittals of items that have been rejected by the failure of Congress to pass approval legislation, except if Congress adjourns *sine die* before completing action on a message. In that event, the President may resubmit one or more of the targeted items either under New Part C or under Part B, which is retained. A resubmission counts as one of the four allowable messages within one calendar year. The President may not defer obligation of dollar amounts of discretionary budget authority, or suspend the execution of any item of direct spending or targeted tax benefit until he sends up a cancellation message. Such deferrals or suspensions can only be for 45 calendar days and may be lifted before the end of the period at the President’s discretion. With regard to deferrals of

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<sup>86</sup> House Rules Committee Report at 58.

<sup>87</sup> See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by Yule Kim, 39-41, March 30, 2006.

<sup>88</sup> S.O.S. Act Report at 15-16.

discretionary budget authority, withholding may “not exceed 45 calendar days from the date of receipt by Congress.” Special rules apply to suspensions of direct spending and targeted tax benefits. If the President’s message is sent up on or before the effective date of the provision, the suspension may be for the full 45 days. But if the President submits his message after the effective date of the targeted provision, the allowable suspension period decreases day by day for each day beyond the effective date of the provision. Expedited consideration procedures are provided in both Houses and an up or down vote must be taken on or before the 10<sup>th</sup> day of session after the introduction of the bill in each House.

The Line Item Veto scheme of Title I of the SOS Act appears to avoid most of the potential constitutional difficulties that have been identified in the Administration’s proposal and with H.R. 4890, as amended. Although the President has a calendar year to send up a cancellation message, there are incentives to act more quickly. There can be no deferrals or suspensions of targeted provisions until the message is sent and received by Congress. Deferrals are limited to 45 calendar days and the language of the deferral provision, together with the Senate Committee’s report explanation, appears to make it certain that obligation must occur after the 45<sup>th</sup> day even if Congress has not taken final disapproval action.

The proposal, however does not require obligation should disapproval occur before the end of the 45 day period. In other words, the periods of withholding and congressional consideration do not coincide. By itself this disparity arguably may not be constitutionally fatal. A question could arise, however, from the failure to repeal Part B of the Impoundment Control Act. Under Part B, a proposal for rescission of discretionary funding may be submitted by the President at any time and, as we have described above, deferrals of obligational authority may occur not only for the 45 day consideration period but also for 30 or more days before the President’s rescission message is sent to Congress. The procedure established by Part C is not exclusive or preemptive of Part B: Proposed Section 1021 states that “The President *may* send a special message, at that time and in the manner provided in subsection (b), that proposes to rescind dollar amounts of discretionary budget authority, items of direct spending, and targeted tax benefits.” (emphasis supplied). The referenced subsection (b) makes it clear that the rescission provision of 2 U.S.C. 683 is a viable option. It can be utilized as an alternative if the consideration period is cut short by a *sine die* adjournment; but it can not be used if there is a rejection of an approval bill. Nothing in the SOS bill limits using Section 683 before presidential use of proposed Section 1021. Such a use of Section 683, which could more than double the length of the possible deferral period, to perhaps more than 100 days, may raise the same *Clinton* issues of potential illegitimate manipulation that appear in the Administration’s proposal and in H.R. 4890, as amended. This problem does not appear to affect the suspensions of direct spending and targeted tax benefits since the Part B mechanism cannot be utilized to rescind such provisions and the automatic reduction of the 45 day suspension periods for delaying submissions to Congress seems to insulate them from constitutional question. The foregoing problem could be avoided by repealing Part B or by limiting the President to utilization of either Part B or Part C for any particular targeted item.

## Conclusion

The Supreme Court's ruling in *Clinton v. New York City* presents a formidable but not insurmountable legal obstacles to vesting the President with a form of line item veto authority.<sup>89</sup> While the Court's opinion does not appear to limit providing the President with some form of line item veto influence by any means other than constitutional amendment, its rationale seems to require that the statutory vesting of such effective influence must be carefully circumscribed to prevent even the potential vesting in the Executive a cancellation power. Structural separation of powers jurisprudence indicates that the courts will exercise heightened scrutiny of line item veto schemes. As a matter of caution and prudence a scheme that provides authority for the President to submit proposals for cancellation of targetable items within a very short time after enactment of the law that contains them and that provides for automatic deferrals or suspensions that coincide and end with the conclusion of the period of expedited congressional consideration, is most likely to pass constitutional muster. The validity of vestment in the Executive of any further indicia of authority or control is uncertain.

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<sup>89</sup> One prominent scholar argues that the *Clinton* ruling should be viewed as a nondelegation decision: "My view of *Clinton v. City of New York* is that it is in reality a nondelegation doctrine case masquerading as a bicameralism and presentment case. I think it is the hidden separation of powers blockbuster of the Rehnquist years, as important to separations of power case law as *Lopez* is to the Court's federalism case law. In saying this, I must immediately acknowledge that the Court denied in *Clinton v. City of New York* that it was deciding that case on a nondelegation rationale. The Court's mere denial however cannot avoid the fact that Clinton really was a nondelegation decision. Saying that it wasn't is not enough to make that so." Steven G. Calabresi, "Separation of Powers and the Rehnquist Court: The Contrability of *Clinton v. City of New York*," 99 *Northwestern U.L. Rev.* 77 (2006).

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