LINE-ITEM VETO

JOINT HEARING

BEFORE THE

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT HOUSE OF REPRESENTATIVES

AND THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

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LINE-ITEM VETO

THURSDAY, JANUARY 12, 1995

HOUSE OF REPRESENTATIVES,
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,
SENATE,
GOVERNMENTAL AFFAIRS COMMITTEE,
Washington, DC.

The joint committees met, pursuant to notice at 10 a.m., in room 2154, Rayburn House Office Building, Hon. William F. Clinger, Jr. (chairman of the committee) presiding.

Present: Representatives Clinger, Morella, Shays, Schiff, Ros-Lehtinen, Zeliff, McHugh, Horn, Mica, Blute, Davis, McIntosh, Chrysler, Gutknecht, Souder, Martini, Shadegg, Flanagan, Bass, LaTourette, Ehrlich, Collins of Illinois, Wise, Spratt, Slaughter, Kanjorski, Condit, Peterson, Thurman, Barrett, Taylor, Norton, Moran, Green, Meek, and Mascara.

Senators present: Senators Roth, Thompson, and McCain.

Staff present: Jim Clarke, majority staff director; Monty Tripp, professional staff member; Jonathan Yates, associate counsel; Ed Amorosi, press secretary; Kevin Sabo, general counsel; Judy McCoy, chief clerk; Cheri Tillett, assistant chief clerk/calendar clerk; Bruce Gwinn, minority professional staff member; Miles Quin Romney, professional staff member; Elisabeth Campbell, clerk; Joan Woodward, Senator Roth's staff; Samuel Hyland, Senator Roth's staff; Michal Sue Prosser, clerk, Governmental Affairs Committee; Kelvin Moxley, Senator Thompson's staff; Peter Levine, Senator Levin's staff; Virginia Koops, Senator Roth's staff; and Mark Buse, Senator McCain's staff.

Mr. CLINGER. The joint hearing between the Senate Governmental Affairs Committee and the House Government Reform and Oversight Committee will come to order.

First of all, I want to note this is a rather unique hearing in that it is a joint hearing between the House and Senate committees having jurisdiction over the line-item veto.

I think it also signifies the great cooperation we are finding between the two committees to deal with some of the items that were included in the Republican contract and some of the items we want to move.

Since this is a joint hearing with a substantial number of Members and Senators who will be in attendance, in the interest of time I am going to waive any opening statement and ask unanimous consent that it be included in the record.

[The prepared Member's statements referred to follow:]

PREPARED STATEMENT OF HON. WILLIAM F. CLINGER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

As Chairman of the Government Reform and Oversight Committee, I am pleased to welcome our colleagues from the Senate to this joint hearing on the line-item veto. I look forward to working closely with each of you to ensure the speedy enactment of a strong and much-needed bill.

On January 4th, together with my colleagues Messrs. Blute, Neumann and Parker, I introduced H.R. 2, the Line-Item Veto Act of 1995. This legislation will permit the President to rescind all or part of any discretionary budget authority or any targeted tax benefit. H.R. 2 requires the President to submit a separate rescission message for each appropriations and tax bill. It provides that, unless Congress acts within 20 legislative days to disapprove the President's rescission package, the rescissions will go into effect and the cuts will automatically be made.

Because under H.R. 2, a congressional disapproval resolution is itself subject to veto, a two-thirds vote in each House will be required to overturn the President's spending cuts. This is completely the opposite of current law which prevents cuts from taking place unless both Houses of Congress vote to approve a presidential rescission bill. We are changing the tilt of the game from one which favors spending to one which favors saving.

The need for this legislation is clear. In the past fourteen years alone, our national debt has quintupled. In 1981, the total national debt—accumulated from 1789 to 1981—was one trillion dollars. Today, our debt is nearly 55 trillion dollars, and we continue to add another trillion dollars to that debt every four years.

The line item veto is one means of helping to control that run away spending and is widely supported by the majority of the American people. A CNN, USA Today and Gallup poll conducted last November shows 77 percent of the public favor legislation which grants the President a veto over individual parts of spending bills, rather than having to accept or veto the entire bill. This legislation is also supported by the Administration and has been strongly endorsed by President Clinton.

In addition to providing the President with item veto authority over spending bills, H.R. 2 permits the President to strike special tax benefits for a privileged few. Under our bill, the President will be able to line out any provision in a revenue bill which provides special benefits to five or fewer taxpayers. The reason for including this authority is that tax bills are now being used to profit a favored few at the expense of the average taxpayer. For example, the Revenue Act of 1992 was passed to create enterprise zones in the aftermath of the Los Angeles riots. This very specifically targeted bill grew and grew as it made its way through Congress. Before we finished, the bill contained over 50 special tax breaks which completely outspent the cost of the enterprize zones themselves and led to the veto of the entire bill. The special tax benefits Congress added covered such vital national interests as:

special exemptions for certain rural mail carriers,
special rules for Federal Express pilots,
deductions for operators of licensed cotton warehouses,
exemptions for some small firearms manufacturers, and
exemptions for certain ferry operators,

to give just a few examples.

These types of excesses, both taxing and spending, must be controlled, and H.R. 2 will provide us with a much-needed tool to help in that effort.

I look forward to hearing from today's witnesses and being given the chance to discuss the merits of this legislation with them. And I turn now to my Senate colleague, the distinguished Chairman of the Senate Governmental Affairs Committee, for any opening statement he might care to make.

PREPARED STATEMENT OF HON. CONSTANCE A. MORELLA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MARYLAND

Mr. Chairman, I thank you for holding this important hearing on the line-item veto.

As you know, the debate surrounding the line-item veto has been with us for many years. We have struggled with the constitutional issues it poses and have weighed them in light of the very serious fiscal problems confronting our Nation.

Mr. Chairman, I have long been a proponent of significantly enhancing the President's authority to rescind Federal spending. I have long felt that the current rescissions process—in which Congress may (and often does) choose to completely ignore Presidential requests to cut spending—is a guardian of gridlock. The current process invites inaction and makes a mockery of efforts to enact meaningful spending cuts.

In light of the very serious economic circumstances in which our Nation finds itself, it is imperative that we have a mechanism for reducing spending which is both rapid and responsible.

For this reason, in the last Congress alone, I voted on two occasions to fundamentally embolden the rescissions process. However, Mr. Chairman, as committee members know, the other body failed to take up our rescissions legislation, so we were left with the feeble process which has long frustrated so many of us.

It is for this reason, Mr. Chairman, that I have come to believe that granting the President line-item veto authority may be a prudent and responsible means of overcoming the inadequacy of the rescissions process. While I do have some concerns about the potential implications of a line-item veto on the balance that we have established in the power of the executive legislative branches, I believe that these issues can be addressed adequately. I look forward to hearing the views of our witnesses this morning on this particular subject.

I am pleased that the legislation we are considering today—H.R. 2—includes a provision which would allow the President to delete targeted, special-interest taxbreaks. These tax breaks, which often benefit one industry, one group, or even one company—are often surreptitiously inserted in voluminous legislation when no-one is looking . . . unknownst to all except the beneficiaries, paid for by every taxpayer. During the last several Congresses, I have cosponsored legislation which would forbid the enactment of these targeted tax breaks, and I am pleased that we are finally empowering the President to terminate this pernicious practice.

The will of the American people is clear, Mr. Chairman: they want their President to have the authority to cancel spending unless Congress specifically overrides his request. The modified line-item veto proposal we are examining this morning presents us with the opportunity to fulfill that wish.

PREPARED STATEMENT OF HON. PETER BLUTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, last November the American people spoke out with perfect clarity against business as usual in the United States Congress. First and foremost they demanded change in the way Congress spends their hard-earned tax dollars. On the auspicious day of January 4, 1995, Congress took a giant step toward heeding those demands. In addition to major reform of the rules governing the House, Chairman Clinger, Representatives Neumann and Parker and I introduced H.R. 2, the "Line Item Veto Act".

There are no more excuses to be made, we must act now to answer the call of November 8th and provide the President with the authority to eliminate spending provisions.

The public perceives Congress as being incapable of addressing the deficit without this kind of outside control, and they are right. In the last 25 years, federal spending has ballooned to more than 21% of GNP and has resulted in a national debt of more than $4.5 trillion. And a lot of that spending has been the result of questionable provisions tacked onto appropriations bills to help our colleagues here on the Hill get re-elected year after year.

From screwworm research to parking garages in the middle of nowhere, Congress has funded many projects over the years without giving them proper scrutiny or assessing their worth to the nation. In most cases these kinds of projects have been buried in regular appropriations bills. To stop them the President would have to veto entire bills and risk shutting down vital functions of government.

But the line-item veto would change that by allowing the President to eliminate these projects while approving the overall bill.

Our legislation reserves budget authority for Congress, but gives the President the opportunity to express opposition to specific provisions.

Article I of the Constitution gave Congress the power to establish appropriations, the President the power to veto them, and Congress the power to override.

It seems pretty clearcut, but the reality of our modern political system is that the President has little choice but to withhold a veto of appropriations bills precisely because a veto would stop the operation of government functions which it is the President's responsibility to maintain.

Effectively, the Executive review of appropriations has been eliminated even though the framers intended a two branch review (Madison and Hamilton in the Federalist Papers).

And we have seen the emergence of this intent in the number of line-item veto proposals which have been put forth over the last one hundred years. There have

been more than 125 bills filed, and as the number of omnibus spending bills have increased, so have the number of line-item veto bills.

It used to be that the President had more control over wasteful appropriations, but since the passage of the Impoundment Control Act in 1974, Executive power has been more limited than ever.

And at the same time the President's power to control spending has narrowed, the amount of pork projects and the cost of them has spiraled. So as more and more Members of Congress pander to local concerns the President—the only person who has the interests of the entire nation in mind because he is elected by all the people—is more and more powerless to stop it.

And those who are concerned about the usurping of Legislative authority by the Executive need only look to the states, the laboratories of democracy. The 43 states that have a line-item veto have proven that it works, and that it does not cede too much power to the Executive.

With the line-item veto as outlined in H.R. 2, Congress will still control which programs are funded but Members' propensity for largesse will be checked by the Executive. And Executive power will be checked by Congress' ability to disregard its budget requests. The logical result will be better coordination between the two branches in the drafting of the annual budgets and more conservative spending without the need to use the line-item veto.

This is not a radical proposal. Giving the President the line-item veto authority would restore power to the President that has been usurped by Congress over the last two-hundred years. And at the same time we give budget discipline to the President we give fiscal responsibility to the taxpayers.

The line-item veto is not a panacea, but it will hold down discretionary spending and save billions of dollars each year. We need to help stem the tide of red ink in our budget by passing it.

PREPARED STATEMENT OF HON. MARK E. SOUDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

The line-item veto is an idea whose time has come. We are all tired of a Congress that spends billions of dollars on wasteful pork barrel projects then sticks the American taxpayers with the bill. It is time for these projects to come before public scrutiny so that they may be evaluated on their merits, rather than inserted in legislation behind the closed doors of Congress.

I commend Senator Coats for his tireless efforts in the Senate to give the President line-item veto authority. I support the Coats-McCain bill which provides the President with 20 days to veto individual line-item spending measures in appropriation bills. It further provides that, unless Congress acts within 20 legislative days to disapprove the President's rescission package, it will automatically go into effect and the cuts will be made. Should Congress vote to disapprove, it is likely the President would veto their disapproval resolution, forcing each house to muster a two-thirds vote to override.

In fact, I am a cosponsor of the House companion to the Coats-McCain bill, sponsored by Congressman John Duncan. I will fight aggressively to pass this measure in the House.

The importance of this issue transcends partisan politics. For years the Republicans were accused of supporting a line-item veto merely because the President was a member of our party. Today we are fighting just as hard to give this authority to President Clinton, regardless of his party affiliation.

Putting Congress in charge of spending is like putting Connie Chung in charge of the CIA. It is time that we forced Members of Congress to stand up and be accountable for the projects they are asking the American people to support. We must pass a line-item veto if we are to balance the federal budget. Today we have taken the first step in that direction, and I am proud to be a part of this historic event to take back Washington and give the power back to the people.

PREPARED STATEMENT OF HON. WILLIAM J. MARTINI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

I want to take this opportunity to thank Chairman Clinger and Chairman Roth for holding this joint hearing today on the line item veto. The line item veto is one of the most important legislative issues the 104th Congress will consider.

In recent years, the spending habits of Congress have become legendary. Excessive and wasteful projects, monuments to a arcane era of pork power politics, stand

all over this country as notices to the American taxpayer that the pork barrel has rolled through their town.

Until now, there was nobody there to stop these Representatives on their spending spree. The President was forced to sign appropriations bills as a whole, making law those items that were blatant in their disregard for fiscal responsibility. The recessions authority currently grated the Executive Branch by Congress is little more than a fig leaf of political cover for those pork barrelers who want to keep the gravy train rolling while claiming to be proponents of fiscal restraint.

The people are tired of this business as usual and it is here we can begin to address this vital matter by grating the President a real, credible, line item veto.

The era of spending sprees has ended, replaced by a new era of prioritization and fiscal restraint—implemented by a new breed of fiscally responsible representatives.

The Congress as an institution has proven itself to be incapable of fiscal restraint when it polices itself. We need to implement tough institutional measures to pull in the reins of a runaway budget, and the line item veto is the place to start.

We need this reform to empower the Federal Government to keep itself in check and act prudently with taxpayer money. The people demand that much from us. But this is also a reform that will show the public that they can place their trust in us again. The people deserve that much from their elected officials.

PREPARED STATEMENT OF HON. STEVEN C. LATOURETTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman: I want to thank you for allowing me this opportunity to address this joint hearing today with our Senate colleagues on the very important issue of presidential line item veto authority. I would also like to thank our distinguished panel of witnesses for appearing before us today and for sharing their collective expertise in this area.

As we know, forty-three of our nation's governors have the line-item veto authority and, contrary to popular opinion, abuses of the power are not as rampant as some would have us believe. Unlike state governments, which are required to balance their budget each year, the Congress has failed miserably at keeping its books in the black. A line-item veto, while obviously not a cure to all our deficit woes, would go a long way in addressing the root causes, primarily ruthless special interests and pork barrel spending projects attached as "riders" to legitimate and necessary appropriations legislation. How can supporters of a line-item veto be so certain it will work? We can be confident knowing it has made a difference in 43 state houses.

As early as 1876, President Ulysses Grant asked for line-item veto authority to address this troubling trend in Congressional budgeting. Now, almost 120 years later we find ourselves once again discussing the issue. The jury is no longer out on this issue. Our nation finds itself saddled with a $4 trillion-plus national debt. I believe the time has come to bring this measure to a vote in the House of Representatives and the Senate, and then let the people decide if they want to grant the president this powerful tool for combatting our national debt's primary contributor; wasteful Congressional spending.

PREPARED STATEMENT OF HON. CARDISS COLLINS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, I want to thank you for calling this hearing. The line item veto proposal, along with the unfunded mandates legislation, and the balanced budget amendment are all matters that deserve careful and thoughtful consideration before Congress acts, and all deserve public hearings.

Mr. Chairman, at the same time I want to express my own personal belief that budget gimmicks are not going to eradicate the huge debt this country has built up. It was not the lack of line item veto authority that pushed our national debt from $709 billion in 1980 to its projected level of $3.6 billion this year—it was spending way beyond our means.

Twenty-eight percent of all income tax receipts go to pay for the interest on just that debt which the Federal government has incurred between 1981 and 1993. Only about five percent of income tax receipts go to pay for the cost of providing welfare to needy Americans and all foreign aid.

It is important, therefore, to be clear about what H.R. 2 will, and will not do. For example, this legislation does nothing about many of the biggest items in the Federal budget, such as mandatory spending and interest on the debt. Mandatory

spending as a percentage of total Federal outlays has grown from 47.5% in 1985 to a projected 55% this year.

Instead, this bill goes after discretionary spending that is subject to the appropriations process. This is the one area of the Federal budget where actions the Congress has already taken seem to be working and have had a big impact. Discretionary spending as a percentage of total federal outlays has fallen from 44% in 1985 to a projected 36% this year.

I also want to say that the bill is aimed at the wrong end of Pennsylvania Avenue. The bill seems to be based on the mistaken assumption that Congress is preventing the President from cutting unnecessary federal spending by failing to act on rescissions he proposes.

Over the last 20 years that the President has had authority to rescind appropriations, Presidents have proposed a grand total of $72 billion in rescissions. During that same time, the Congress has approved and initiated rescissions that total $92 billion—that is, $20 billion more than Presidents requested.

Enhancing the President's rescission authority as H.R. 2 does, therefore, will do little to reduce the deficit. This legislation would, however, better enable the President to spend taxpayer dollars in ways he chooses rather than as Congress provides in the legislation it passes.

It is also possible that the legislative process could become hopelessly logjammed just in dealing with rescission disapproval bills, under the terms of H.R. 2. The time frames for congressional response to a Presidential rescission or veto message are extremely short. Under this bill, it is not hard to see how the President could effectively control the legislative agenda, simply by flooding the Congress with rescission proposals.

These first few days of the Congress seem to be devoted more to gimmicks and buzzwords, and less to honesty to the American people. Rules for unfunded mandates, line-item veto, and balanced budget amendments do little to tell the American people how the deficit will actually be reduced. The majority, who now control the Congress, owe the balance the budget. This is what the people are demanding, and that is what they deserve.

Mr. Chairman, I share the concern of you and the other sponsors of this legislation that we must take steps to bring down the Federal deficit. However, those decisions will still rest with us, not the Executive branch. We cannot expect the Executive branch to do our work for us.

PREPARED STATEMENT OF HON. EDOLPHUS "ED" TOWNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

The question before us today is whether we should disrupt one of the cornerstones of American government: the checks and balances established between the Legislative, Executive and Judicial branches of the Federal government. The Constitution placed the "power of the purse" with the Congress. Yet, there are those who argue that we are incapable of carrying out our budgetary responsibilities. Recent history, however, disputes that argument. In 11 of the past 18 budgets, Congress has appropriated less money than the President asked for. Additionally, giving away our constitutional powers will not result in any real savings. Discretionary spending programs account for less than 40 per cent of the national budget. Entitlement programs which comprise the lion's share of the budget would not be affected by a Presidential line-item veto.

In addition to having a limited budgetary impact, a line-item veto would significantly shift the balance of power between the President and Congress. Such a proposal would advance Presidential spending initiatives at the expense of Congressional spending initiatives. We have already seen this shift in power in States where the Governor has line-item veto power. In those States, it has become a mechanism for governors to advance their legislative priorities and partisan priorities over and above those of the legislature's. We could soon face a situation in the United States Congress where a President pressures House and Senate Conferees to accede to executive requests to present their own items from being deleted by a line-item veto.

Let us not forget that the President already has the power to propose line-item rescissions. When this mechanism was used by Presidents Reagan and Bush, Congress generally rescinded even more than they requested. I have always believed that it is Congress' responsibility to make the tough funding decisions. While the popular sentiment suggests that a line-item veto would bring more fiscal responsibility to our governing process, it is certainly not justifiable to disrupt our Constitution when there is little or no impact on the budget deficit.

PREPARED STATEMENT OF HON. GARY A. CONDIT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman, let me commend you for holding a hearing on an issue that I believe is desperately needed—that being the line item veto.

In the past fourteen years, our national debt has quintupled. Despite efforts to constrain the budget deficit, the national debt expands by one trillion dollars every four years. If we do not take decisive and dramatic action to reduce and eliminate our wasteful spending habits, we will condemn our children and grandchildren to pay for our excesses.

Since coming to Congress in 1989, I have consistently supported and voted for granting the President the line item veto so that wasteful and undeserving spending can be challenged and eliminated.

The current budget process is woefully inadequate and in need of reform is this area. Title X of the Congressional Budget Act authorizes the President to submit rescission proposals to Congress to permanently cancel previously appropriated funds. The Congressional Budget Act goes on to further specify that the President's rescission proposals must also be approved by the Congress within 45 days of submission in order for them to take effect. The unfortunate result of this process is that the Congress can thwart the will of the President, and allow proposed rescissions to be spent, by simply ignoring the President's rescission proposals. This process must be changed.

This Congress, I have cosponsored several measures which will grant the President the authority to veto individual spending items and force the Congress to finally consider these proposals. I am a cosponsor of H.R. 2, introduced by Chairman Clinger and Representatives Parker, Blute, and Neumann. This reasonable measure permits the President to veto all or part of any discretionary budget authority or any targeted tax benefit if the President determines the action: 1) will help reduce the federal budget deficit; 2) would not harm any essential government function; and 3) would not harm the national interest. Under H.R. 2, the President's proposed vetoes would go into effect, unless the Congress specifically votes to disapprove the vetoes within 20 legislative days of submission. Should the Congress vote to disapprove, it is likely the President would veto the disapproval resolution, forcing each house to muster a two-thirds vote to override.

In addition to H.R. 2, I have coauthored measures that would amend the Constitution to give the President the line item veto. Because the line item veto is such an effective budget reduction tool, it should be permanently granted to the President. Thus, it deserves to be enshrined in the Constitution.

Mr. Chairman, I commend you for holding this hearing. I look forward to hearing the testimony. But most importantly, I look forward to finally giving our Chief Executive the authority to veto wasteful and unneeded spending items.

PREPARED STATEMENT OF HON. CAROLYN B. MALONEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman.

It is appropriate that the very first hearing of the Government Reform and Oversight Committee is devoted to the issues surrounding the line item veto and expedited rescission process. If my memory serves me well, one of the first hearings of this Committee during the last Congress was also devoted to these issues.

I believe that each member of Congress has a responsibility to ensure that the federal government spends every tax dollar wisely and efficiently. That is, after all, one of the main reasons I am a member of this Committee.

The Line Item Veto is viewed by many as a way to help curb Congressional spending and cut some of the pork out of the budget. For that reason I find myself favorably disposed to these proposals. However, as we discuss the line item veto we must also be very aware of the constitutional limitations placed upon us.

This proposal has implications which go to the very heart of the federal government's system of checks and balances and deserves a very close examination, which hopefully it will receive here today. I am glad that we are not proceeding on this issue in the roughshod manner which we witnessed earlier this week.

Thank you Mr. Chairman.

PREPARED STATEMENT OF HON. GENE GREEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. Chairman, I would like to thank you for calling this joint hearing today on H.R. 2, the Line-Item Veto Act. I support the call for the line-item veto, the congressional branch has included far too many questionable items in appropriation bills over the years and steps need to be taken to remedy the problem.

Today, the notion that Congress can control itself is doubted by the public and, therefore, this is a popular idea. Congress also defines itself with the little things that it does as well as the big things. It is my sense that the line-item veto may help put an end to the foolish things Congress sticks in appropriations bills; but I do not believe the idea is being presented to the public that way.

The public's support of this measure stems in large part from the size of the deficit and many are under the impression that the line-item veto will have a noticeable fiscal effect. But what effect will it really have on the deficit?

The discretionary budget is roughly 40% of the federal budget. The discretionary budget has grown little in recent years. Because the appropriations bills define the discretionary budget, what fiscal impact will the line-item veto have?

I plan to support this measure because I believe it is progress, albeit small. However, the line-item veto will not control non-discretionary, big ticket items like health care costs or interest on the national debt. I believe that point needs to be made clear to the public.

PREPARED STATEMENT OF HON. FRANK MASCARA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. Chairman, it is a privilege to be involved in this hearing today on the line item veto act, the second major piece of legislation the Committee has considered this week that is aimed at restoring some order and accountability to the Federal budgeting process.

Serving as the chairman of the Board of County Commissioners of Washington, Pennsylvania for the past 15 years, I struggled daily to find the money needed, now not later, to pay for the services being delivered to the citizens. And let me tell you it was not an easy task and often forced my fellow commissioners and I to juggle priorities and seriously debate what spending was imperative and going to meet the needs of the most citizens.

Coming from this background, and also being a certified public accountant, I am sympathetic to the notion of adopting a measure, like the line item veto, which allows the country's chief executive officer to note spending the Administration does not agree with and requires Congress to act if the funds are to be spent.

The people of the 20th District of Pennsylvania have told me loud and clear they think Federal spending is out of control and that enactment of a line item veto measure would be a good step in the process of restoring their faith in the ability of Congress to better steward our nation's purse strings.

Over the past five years, Congress has made strides in beginning to bring Federal Government spending under control by enacting two major deficit reduction packages and a series of bills rescinding Federal spending, a fact many citizens sadly do not recognize. It is my hope that our debate and consideration of the line item veto measure, as well as the unfunded mandates bill we marked up earlier this week, may make them realize were are putting our shoulders to the grind stone and are very serious about the task of controlling spending of their hard earned tax dollars.

While I generally support the notion of a line item veto, I must join with my colleagues on the Democratic side of the aisle in expressing disappointment that the Republican leadership of the Committee has, for the second time this week, decided to ignore Committee rules and not provide us with proper notice or documents needed to adequately prepare for this hearing. I would have appreciated having copies of testimony before hand to better focus and sharpen the questions I plan to ask today. I certainly hope this practice is not becoming the rule of the day. I would insist that it end.

Beyond that, I am also troubled by several provisions of H.R. 2 as it is presently drafted. I see no need to block all alternative debate on a line item veto and not allow the Members of our Appropriation Committee the opportunity to develop some alternative method of dealing with the spending in question. I also question the wisdom of allowing a line item veto message to carry over from one Congress to the next and attempting to tell the Senate how to run its floor procedures.

This is an important piece of legislation that should be dealt with in a serious, thoughtful and fair manner. If that were the case, today's hearing I am sure would prove to be more productive and worthwhile.

Mr. CLINGER. We want to permit other committee members to submit their statements for the record. I ask unanimous consent that all Members' statements be included in the record.

Finally, it is my understanding that in agreement with the Senate, all witnesses have been asked to limit their oral statements to no more than 10 minutes. To keep the hearing moving along, we are going to be enforcing that limit as well as adhering to the 5-minute rule for Members' questioning.

It has been pointed out to me if we had a full attendance at the hearing this morning and every Member asked questions, we would be here for 18 hours.

I will close by simply stating how very much I appreciate our witnesses participation. I look forward to hearing each one of them.

I now turn to my distinguished colleague, the chairman of the Senate Governmental Affairs Committee, Senator Roth, for any remarks he may wish to make.

Mr. ROTH. Thank you, Mr. Chairman.

I am delighted to sit this morning next to my good friend and House counterpart, Chairman Clinger. This is indeed a historic joint hearing between the Senate Governmental Affairs Committee and the House Government Reform and Oversight Committee.

The issue that we are considering today, the legislative line-item veto, is an important tool that will help Congress and the President to hold down spending.

I would say, Bill, that back in 1974, I led the fight in the Senate against reducing the power of the President to maintain impoundments. Unfortunately, Congress moved ahead and restricted that right, and as I predicted then, it would have to be a matter that we would have to come back and consider further, which is exactly what we are doing today.

The message that voters sent to the Congress this fall is that they want a smarter, smaller, more responsive Federal Government. They feel they are not getting their money's worth from their Government. And while the line-item veto will not solve our deficit problem by itself, I do believe it is an essential tool, which coupled with the constitutional balanced budget amendment, will help restore fiscal integrity to our Government.

Mr. Chairman, we are trying to expedite the hearings today, and in keeping with your leadership, rather than read my full statement, I would ask that it be included as if read.

Mr. CLINGER. Without objection, so ordered.

[The prepared statement of Senator William V. Roth, Jr. follows:]

PREPARED STATEMENT OF HON. WILLIAM V. ROTH, JR., A SENATOR IN CONGRESS FROM THE STATE OF DELAWARE

I am delighted this morning to sit next to my friend and House counterpart, Chairman Clinger. This is a historic joint hearing between the Senate Governmental Affairs Committee and the House Government Reform and Oversight Committee. The issue we are considering today—the legislative line item veto—is an important tool that will help Congress and the President to hold down spending.

The message that voters sent to the Congress this fall is that they want a smarter, smaller, more responsive federal government. They feel that they are not getting their money's worth from their government. While the line item veto will not solve

our deficit problem by itself, I believe it is an essential tool coupled with the Constitutional Balanced Budget Amendment to help restore fiscal integrity to our government.

Several versions of the line item veto have been introduced in the 104th Congress. H.R. 2 in the House includes enhanced rescission of appropriations and select tax expenditures. Last year the House passed two bills giving the President expedited rescission powers. S. 4 in the Senate also provides enhanced rescission powers to the President for appropriations bills and supplemental appropriations only. S. 14 would create expedited procedures for considering rescission of so-called budget items, including proposed appropriations rescissions, repeals of targeted tax benefits, or repeals of amounts of direct spending, or entitlements.

While these three bills encompass differing aspects of a line item veto, clearly with the President's support for this legislative priority, the Congress will enact some form of legislative line item veto this spring. Our job, and the purpose for this hearing today is to develop the best possible legislation which would ensure that the outcome would produce a smaller, smarter federal government. The American taxpayers have demanded it, and in this Senator's opinion they are entitled to it.

Mr. CLINGER. Thank you very much, Senator Roth.

Now I am pleased to recognize the gentlelady from Illinois, the ranking member of the Government Reform and Oversight Committee, Mrs. Collins.

Mrs. COLLINS OF ILLINOIS. Thank you, Mr. Chairman. I thank you for calling this hearing.

The line-item veto proposal, along with the unfunded mandates legislation and the balanced budget amendment, are all matters that deserve careful and thoughtful consideration before Congress acts, and all deserve public hearings.

At the same time I want to express my own personal belief that budget gimmicks are not going to eradicate the huge debt this country has built up. It was not lack of line-item veto authority that pushed our national debt from $709 billion in 1980 to its projected level of $3.6 trillion this year. It was spending way beyond our means.

Twenty-eight percent of all income tax receipts go to pay for the interest on just that debt which the Federal Government has incurred between about 1981 and 1993. Only about 5 percent of income tax receipts go to pay for the welfare costs of needy Americans and all foreign aid. It is important, therefore, to be clear about what H.R. 2 will and will not do.

For example, this legislation does nothing about many of the biggest items in the Federal budget, such as mandatory spending and interest on the debt. Mandatory spending as a percentage of total Federal outlays has grown from 47.5 percent in 1985 to a projected 55 percent this year.

Instead, this bill goes at the discretionary spending that is subject to the appropriations process. This is the one area of the Federal budget where actions that the Congress has already taken seem to be working and have had a big impact. Discretionary spending as a percentage of total Federal outlays has fallen from 44 percent in 1985 to a projected 36 percent this year.

I also want to say that the bill is aimed at the wrong end of Pennsylvania Avenue. The bill seems to be based on the mistaken assumption that Congress is preventing the President from cutting unnecessary Federal spending by failing to act on rescissions he proposes.

Over the last 20 years the President has had authority to rescind appropriations. Presidents have proposed a grand total of $72 bil-

lion in rescissions. During that same time, the Congress has approved and initiated rescissions that total $892 billion. That is $20 billion more than Presidents have requested.

Enhancing the President's rescission authority as H.R. 2 does therefore will do little to reduce the deficit. This legislation will better enable the President to spend taxpayers' dollars in ways he chooses rather than as Congress provides and the legislation passes.

It is also possible that the legislative process could become hopelessly logjammed just in dealing with rescission disapproval bills under the terms of H.R. 2.

The timeframe for congressional response of Presidential rescission or veto messages are extremely short. Under this bill, it is not hard to see how the President could effectively control the legislative agenda simply by flooding the Congress with rescission promotion. These days of the Congress seem to be given more to buzz words and gimmicks than honesty with the American people. We do little to tell the American people how the deficit will actually be reduced.

The majority who now control the Congress owe the people an honest appraisal of how they intend to balance the budget. This is what the people are demanding and that is what they deserve.

Mr. Chairman, I share the concerns of you and the other sponsors of this legislation that we must take steps to bring down the deficit. However, these decisions will rest with us, not the executive branch. We can't expect the executive branch to do our work for us.

Mr. CLINGER. I thank the gentlelady for her comments.

At this time I am pleased to welcome two of our former colleagues of the House, now in the other body, who have been leaders in the effort to bring sanity to the fiscal affairs of the Government.

I would at this time recognize Senator McCain of Arizona.

STATEMENT OF HON. JOHN McCAIN, A SENATOR IN CONGRESS FROM THE STATE OF ARIZONA

Senator MCCAIN. I thank you, Mr. Chairman.

If it would be acceptable to you and Senator Roth, perhaps both Senator Coats and I could give our statements. We have been partners in this endeavor for many years. If that would be agreeable to you, sir.

Mr. CLINGER. Let me ask unanimous consent that all Members be given 10 days for statements for the record.

Without objection, so ordered.

Senator MCCAIN. I want to thank you, Chairman Clinger and Chairman Roth.

Chairman Clinger I had the opportunity to be neighbors with for 4 years quite a long time ago.

First of all, let me say that I am pleased to note and I hope the ranking member understands that the President of the United States campaigned in support of the line-item veto, had it when he was Governor of the State of Arkansas, and has now, frankly, as a result of the November 8 elections, reaffirmed his support for the line-item veto. I have already met with members of the administration and they have assured me of the President's support of line-

item veto and we look forward to working with the President to achieve that.

Mr. Chairman, during the years that Senator Coats and I have supported the line-item veto, many times we were asked if we would support this if a Member of the other party were President of the United States. I think the answer to that is clear. It matters not to us from which party the President of the United States comes. What matters to us is if we are to go to the American people and say we are serious about balancing the budget and if at some time we may have to address the issue of entitlements in this country, because as we note, they are a very large part of the budget and a large contributor to the deficit.

We should go to the American people, Mr. Chairman, with clean hands. And those clean hands can only be obtained if we do away with the obscene and outrageous process which has become endemic in both Houses of Congress, with both parties, of larding on to appropriations bills particularly items which have nothing to do with the national interest and have nothing to do, generally speaking, with those issues at hand.

Mr. Chairman, as you know, I have been involved in defense issues for a long time. I would just like to give you a few examples—and I will be brief—of the kind of thing that has gone on which has given us a situation in the military where our men and women are not properly equipped or trained. There is an enormous problem with readiness in the military today.

In the 1991 defense appropriations bill, we appropriated $886,000 to be available for the Killeen, TX independent school district; $912,000 shall be available only for transfer to the Library of Congress.

In 1992, $300,000 available for the reinternment and reburial of ancestral remains in Hawaii; $3 million shall be available for the new parent support program.

In 1993, $10 million shall be available for a National Guard outreach program in the Los Angeles school district.

Mr. Chairman, the Congressional Research Service last year identified for me over $50 billion in appropriations over the last 6 years that had nothing to do with national defense.

Now, I use defense as an example. The examples are myriad. The reason why I use defense obviously is because our Nation has no greater obligation than that to defend our national security.

And one of the reasons why we have the difficulties we have today in maintaining a ready capable military force is because we have raided defense appropriations bill in such an outrageous fashion.

Mr. Chairman, what this is going to boil down to is whether the onus is going to lay on the Congress or the President. What I mean by that is, if we are going to have a true line-item veto, the Congress is going to have to act to override the actions of the President.

As it exists now, time after time the President sends over rescissions, some $70 or $80 billion over the last few years, and Congress either doesn't act or changes them so dramatically that it has no relevance to the original rescission proposals.

Let me also point out, Mr. Chairman, I am sure one of the reasons why the President so strongly supports line-item veto is because 43 Governors in America out of 50 have the line-item veto. Every single one of those Governors, if called to testify before this committee, would tell you it is a vital tool in balancing their budgets.

As we all know, the difference between the Federal and State Governments is that States are required to balance their State budgets; we are not.

Finally, Mr. Chairman, I look forward to working with you and Senator Roth. There are many people in the Congress who want to do business as usual, who want to basically be able to return to their States or districts with various pieces of pork. And I think the message of November 8 is lost on those individuals.

The American people have figured out that the money they send to Washington, DC doesn't come back. Some of it may, but all of it does not come back. They are sick and tired of seeing their tax dollars go to Washington and disappear or even come back in the form of sometimes unnecessary and unwanted projects, certainly not in the priority of their State governments, who I think are best equipped to decide what is best for their State and local governments.

So I want to thank both you and Senator Roth, on whose committee I serve, for addressing this issue. I don't believe we can ever achieve a balanced budget without this.

Will this, as the ranking member said, balance the budget? No. But I don't want to go back to the people of Arizona and say we are going to have to look at the entitlement programs and have this kind of endemic pork-barrel spending going on, because I can't do it with a straight face.

I thank you, Mr. Chairman, and I thank you for holding this hearing.

Mr. CLINGER. Thank you.

Now I am pleased to recognize the Senator from Indiana, Mr. Dan Coats.

STATEMENT OF HON. DAN COATS, A SENATOR IN CONGRESS FROM THE STATE OF INDIANA

Senator COATS. Mr. Chairman, thank you very much. And, Senator Roth, I appreciate the opportunity to appear before both of you in the committee to add my voice to that of Senator McCain in urging that this Congress finally pass a line-item veto.

Senator McCain and I have been toiling now since 1989 to achieve that accomplishment in the U.S. Senate. We have been short of the necessary votes to accomplish that. And we have been hampered by, frankly, procedural rules which require not 50 but 60 votes to accomplish that.

With the very clear message sent on November 8 by the American people that they are ready now to endorse and support dramatic changes in the way this Congress does its business and the way this Government relates to its people, I believe this is the year that we have the best opportunity ever to achieve dramatic reform in the way we handle the taxpayers' dollars.

One of the thoughts necessary to accomplish that, in my opinion, is enactment of a line-item veto.

In 1974, probably in necessary reaction to an imbalance in the way that the executive branch and the Congress operated in terms of spending money, Congress enacted the Budget Impoundment Act.

However, what that did is create an imbalance in the other direction. And to those who say that this is giving the executive branch unnecessary and unneeded authority and power over Congress, I would simply say that is restores a necessary balance between the two branches in how the taxpayers' money is spent.

As it currently stands, the Congress literally holds the President in a mode of blackmail by attaching to otherwise necessary and appropriate legislation, items that, as Senator McCain has detailed, simply have no relevance or relationship to the appropriation that is being made.

There are currently 4,000 American families that dedicate their entire Federal tax burden to pay for research on the screwworm, a pest that has been totally eradicated from the United States. And yet those 4,000 families every year contribute their entire Federal tax burden to an unnecessary process because a single Member or a few Members want to perpetuate a mode of spending. And the only way they can do it is to attach it to an otherwise necessary and supported appropriations bill.

Were that individual item subjected to the light of public debate, were it subjected to an up-or-down, yea-or-nay vote by Members of Congress, it would never come to the floor for a vote because it would be a total embarrassment to the author of that provision.

But in a sense, Members of Congress have the opportunity to wait for a vehicle with which to attach their pet project. And as we know, many of those are attached in a significant amount.

One study showed that in a 5-year period during the 1980's, $70 billion could have been saved had Congress supported rescissions sent to the Congress by the President of the United States—$70 billion, not an insignificant amount.

In a sense, what we are doing here with line-item veto is saving ourselves from ourselves. It is a human tendency to want to please that constituent service, constituent back home, to want to add that piece of pork back home, to want to go back home and call a press conference and say, look what I have brought to this area.

Most of those items do not serve the national interest. Most of those items are not necessary at any time, but particularly in times of Federal deficits.

And so by this I believe we are restoring a proper balance, check and balance system to our spending process. Senator McCain and I are committed, along with Senator Dole and Republicans in the Senate, to bring this legislation before the Senate in this session of Congress. In fact, it has been introduced by the majority leader as Senate bill No. 4, showing the importance to which we attach to it.

We would trust that the House would also move forward with us so that we can move together in bringing about this very, very necessary restoration of balance between the two branches and eliminating us once and for all the embarrassment that all of us go

through when we discover to our horror that a thousand-page bill contains item after item after item of embarrassing public expenditures, embarrassing pork.

The news media today, has on their calendar, so many days and weeks after passage of an appropriations bill, 20/20 or Prime Time or Readers Digest or USA Today lists the "annual pork parade." And I think that is embarrassing to all of us. I think it is time we stop that.

We have the opportunity to do it here. I really appreciate the fact that we have a giant committee established that can move us forward. And we look forward to working with you.

Thank you for this opportunity to testify.

Mr. CLINGER. Let me thank both of you for your helpful testimony and for coming over and sharing with us your views on this very important legislation.

I now would recognize Senator Roth.

Mr. ROTH. First of all, I would like to recognize the leadership role that both Senator McCain and Senator Coats have provided in this most important matter. And the purpose of the joint hearings today is to expedite consideration of this legislation. It is my intent on the Senate side, and I know my good friend Bill Clinger intends to move expeditiously on the House side, to report out the bill as rapidly as possible so the matter can be before the Senate and the House in the very near future.

Let me ask you a couple of questions, if I may. One charge that is made against this kind of legislation is that rather than reduce spending, it can in fact result in increased spending, because what the legislative body will do in the future is that they will agree to add matters, to recognize the fact that the President, the chief executive, may cut back through use of the rescission power, so that the legislative body is free to go on a wild ride.

What would be your comments on that matter? Senator McCain?

Senator MCCAIN. My response, Senator Roth, would be that I have had the opportunity to talk to about 10 Governors who have the line-item veto. They have stated unequivocally that it is a vital tool in keeping their budgets in balance, which I mentioned earlier, they are required to do, and we are not.

Second of all, I don't think there is any doubt that there will be a potential for abuse. There is the potential that a President of the United States would call over a legislator and say, look, I am going to line-item veto out the central Arizona project for Arizona unless you support my nominee for Secretary of State or whatever it is.

And yet we don't hear of those abuses taking place in the States. In fact, what we hear is that the Governors are saying that the very threat of a line-item veto, because of the exposure that would give—and I wish that we had gotten more exposure over the years of the things that we have done—is sufficient to bring about a fiscal sanity and restraint that they otherwise would not have.

So they find over time in the States, which I believe is the laboratory for this, that there is not the requirement to use the line-item veto, because it imposes a discipline.

I would also suggest, again, Senator Roth, that we look at the history of this country—and I will just end with this because I think Senator Coats may have a comment—up until 1974, for all

intents and purposes, the President of the United States did have a line-item veto until the Budget Impoundment Act, which you fought so courageously but unfortunately on the losing side.

And I didn't hear of these problems that the detractors of this legislation and doomsayers predict will happen in the eventuality that—and I hope certain eventuality that we pass a line-item veto.

So both practice in the States and history shows us this country, in the executive-legislative branch relationship, that is not what is going to take place.

Mr. ROTH. Senator Coats, I would like to hear your answer, but I would like to ask you a slightly different question. Do you see this legislation enabling the Chief Executive to use it for partisan advantage? In other words, he can threaten to line-item veto something if the Senator or Congressman doesn't vote right on another issue. How great a problem do you see that?

Senator COATS. I don't see that as a significant problem. While the President could use it for that purpose, I think certainly it would not be good policy, nor would it be good politics for a President to do that.

He might do it once, but I think it would quickly erode the President's credibility in terms of the value of the power that we have given him, and he realizes he can quickly lose it if it is abused.

To reflect on what Senator McCain said in your earlier question, I believe just the opposite would happen. I believe that exposure of the method by which Congress has traditionally used to slip in embarrassing expenditures and unnecessary expenditures, knowledge that this could now be disclosed to the public in a more open way by the President's line-item veto would inhibit the adding of frivolous spending to legislation.

Members would now run the risk, under a line-item veto power of the President, of having their line item exposed. I think the public has come to the point where they are insisting that a Congress that frivolously spends while also bemoaning fiscal crisis demeans itself and undermines its very credibility.

There is a lot more exposure today of what we do, and the line-item veto would add to that. I think it would inhibit adding frivolous spending to appropriations.

Mr. ROTH. Mr. Chairman, I have one final question. That is, your legislation, as I understand, it does not include tax expenditures. Why not? Does it bother you to add tax expenditures which means a President can veto or take negative action with respect to a tax cut, but can he not do the same with respect to a tax increase? Does that make sense?

Senator McCain?

Senator MCCAIN. Mr. Chairman, I don't think it makes sense, No. 1.

No. 2 is, the reason why Senator Coats and I left the line-item veto sort of as a very clean, very specific piece of legislation, was because in all candor we didn't expect to win. We knew what the numbers were. We could count as well as anybody else.

But we felt that it was an issue that the American people wanted ventilated, and that they wanted brought before the Congress of the United States, and that sooner or later, because our cause was just, we would arrive at the position we are in today.

I know Chairman Clinger, and I meant to mention this in my opening remarks, has included the tax aspect of it. I have no problem with that, Chairman Roth, but I would suggest that we should look for the easiest way to gain immediate passage before the appropriations process begins.

And so whatever is most acceptable to the majority of both bodies would certainly be acceptable to me.

Senator COATS. I would add my second to that. Senator McCain and I did join with Senator Bradley in an effort in the last Congress which included the tax side of the equation. We did so to try to gain his support for a line-item veto, and hopefully other votes that would come along with it.

So at least I am open—I speak for myself—I am open to that possibility and I think that is clearly something we ought to look at. But I agree with Senator McCain. I believe it is important to enact in this first session of the Congress line-item veto authority, and we should pursue whatever avenue will allow to us do that successfully.

Mr. ROTH. Thank you, gentlemen. Thank you.

Mr. CLINGER. Thank you, Senator McCain.

I think we include that, because, as you point out, there are some very bad examples of pork in appropriations bills, but there are also equally egregious examples of overreaching in terms of taxes, which I want to get at as well.

I am pleased to recognize Mrs. Collins.

Mrs. COLLINS OF ILLINOIS. Thank you.

Doesn't this bill actually nullify the rescission provisions?

Senator MCCAIN. This legislation basically changes the procedure, or you may want to view it as nullifying it. What it does is it places the onus on the Congress to override what the President decides.

The practice that exists today—and I have seen it under both Republican and Democrat administrations—is that a rescission is set for the executive branch, and then the Congress has to act, but if the Congress chooses just to remain passive, there is no action.

So I guess my answer to you is yes, but I think it is dramatically improved.

Mrs. COLLINS OF ILLINOIS. Senator Coats, the Congress presents appropriations bills to the President and the President rescinds or vetoes a provision. Then what is created is a new law. Is that not the case?

If Congress does not enact a rescission or receives a disapproval bill, the bill created by the President's veto becomes law and Congress would never have the opportunity to vote for the new legislation. Don't we establish a dangerous precedent when we allow a bill to become law without an affirmative vote by Congress?

Senator COATS. The procedure that we outline in our bill is somewhat different than that. When an appropriation bill is passed, the President has a limited amount of time after that appropriation, and also time at the beginning of each new session of Congress, to review that appropriation bill and line item out or send back to Congress his suggestions for eliminating certain spending that he does not feel is necessary.

At that point, Congress has, I believe, 20 days with which to act to overturn the President's decision. The difference between the bill that Senator McCain and I, and Senator Clinger, Congressman Clinger and Congressman Duncan and others, as well as Senator Roth, have endorsed is that we reverse the presumption.

Senator McCain has stated the current presumption that exists under the impoundment act is that unless Congress affirms what the President has done, it doesn't become effective. And what happens is—we all know what happens. It gets sent back to committee, buried, it never sees the light of day in many instances.

Ours means it goes automatically into effect unless Congress chooses to overturn it. And Congress can do that. And so we think there is a fair division of responsibility and power and ability to check each branch.

Congress does not have to accept what the—it doesn't automatically become law if the President chooses something. Only if the Congress chooses not to come back into the process and override what the President has done.

Mrs. COLLINS OF ILLINOIS. I am concerned that the opportunity for Congress to disapprove this action that was taken on the line-item veto would have been somehow buried in the rush of the day or the rush of the week or the activity that is going on. How can that be prevented?

Senator COATS. Our legislation provides expedited procedures for Congress to avoid that very problem. We would be happy to produce the bill.

Mrs. COLLINS OF ILLINOIS. Does H.R. 2 do that? Can you tell me where H.R. 2 does that?

Senator COATS. I think I would have to turn to Chairman Clinger for that answer. I can describe the bill we have introduced in the Senate, S. 4, but I don't know if H.R. 2 does that or not.

Mrs. COLLINS OF ILLINOIS. Mr. Chairman, does H.R. 2 do that?

Mr. CLINGER. I am sorry, I didn't hear the gentlelady's question.

Mrs. COLLINS OF ILLINOIS. The procedures under H.R. 2 that would be affected in this case.

Mr. CLINGER. Well, the procedures under H.R. 2 is that the President submits a rescission. The House has 20 days in which it must act affirmatively to——

Mrs. COLLINS OF ILLINOIS. Is there an expedited procedure involved in H.R. 2?

Mr. CLINGER. In what way?

Mrs. COLLINS OF ILLINOIS. So that the possible disapproval of this by Congress would not get buried in some of this time business here, and in the committees. That would be my concern.

Mr. CLINGER. It has 20 days. It is a 20-day provision. In other words, the Congress must act within the 20 days. So I don't think there is——

Mrs. COLLINS OF ILLINOIS. If the Congress doesn't act in 20 days, what happens?

Mr. CLINGER. The veto stands.

Mrs. COLLINS OF ILLINOIS. Thank you.

So there is really no consideration, if that is the case.

Senator MCCAIN. If I may say, Mr. Chairman, Congresswoman Collins, you have put your finger on the whole idea here, and that

is that Congress would have to act proactively to override the President of the United States, within 20 days. That is what we feel is the crucial business between the business as usual today and what we are opposing.

I would thank you for your excellent questions.

Mrs. COLLINS OF ILLINOIS. I didn't get the answer I wanted.

I yield back the balance of my time.

Mr. CLINGER. May I ask if there are any other Members who seek recognition. Let's try and limit the questions, if we can.

The gentleman from New Mexico.

Mr. SCHIFF. Understanding your message, Mr. Chairman, I will ask one question, and that is, I favor the line-item veto. It is in existence in nearly every State. I would even like to see procedures in the House which allow a small group of Members to force individual votes on particular items that might be in appropriations bills.

But I would like to address the issue of potential abuse. And Senator McCain particularly touched upon the most often given issue, which is a President could use coercion in misusing this power, which is not the reputation of Governors.

There is another issue I would like to at least raise. In the line-item veto, could a President veto out restrictive language that prohibited the President from taking action?

In other words, let us suppose that the Congress passed an appropriations bill that contained language that said in the Department of Defense budget, no funds can be used in this appropriation to pay for U.S. troops to remain in Haiti, as an example.

Do our witnesses think that a President of the United States could veto out that particular language, and therefore give the President more authority than the Congress intended?

I yield to the witnesses.

Senator MCCAIN. I thank my friend from New Mexico. He brings up two excellent points.

No. 1, about the potential of abuse, let me just say to start with, as we know, the Congress has enormous powers, enormous powers, and if any President of the United States began bringing people down to the White House and threatening in that fashion, one, the word would spread very quickly; and two, the repercussions I think would be very severe, both from the view of the American people and the ability of Congress to react in many, many ways.

So we have just not seen this abuse in the case of the Governors' relationships with the legislatures. Of all the 43 States, I have never heard of a case in point.

I have heard of cases in point, very honestly, like in Wisconsin, where the Governor can write in, not only write out but write into legislation, which I think is really extraordinary and something we are not proposing here.

As far as the ability to line item an appropriation where it says no funds will be expended, I think the President has that ability. But I would also point out that the Congress has the ability to pass a resolution, a binding resolution on the President of the United States that he may not do such a thing.

So that would be the authorizing. The President is not authorized to invade Haiti. The President is not authorized to expend

funds for thus and such. We are talking about a line-item veto applying to appropriations bills.

And most of us here who are not on the Appropriations Committee obviously resent legislating on appropriations bills anyway, which is supposedly against the rules but unfortunately that is violated with great frequency. So if it were an issue along the lines where you are talking about, Congress does have the ability to pass a binding resolution preventing the President of the United States taking action.

Senator COATS. I agree with that. Our bill is intended to go to, and I believe it does go to, appropriate amounts as specified in the appropriations bill, not legislative authority.

Mr. SCHIFF. Thank you. I yield back.

Mr. CLINGER. The gentleman from South Carolina, Mr. Spratt.

Mr. SPRATT. I am not sure this is constitutional. In light of that——

Senator MCCAIN. We are basically going back to what was the law before the Budget Impoundment Act of 1974. So I would hope that would clear up that problem in your mind.

Mr. SPRATT. In light of that, I sponsored and we passed in the House, twice, I think, last year, enhanced or expedited rescission. Suppose we coupled that with your bill and passed it as well so that in the event that yours is challenged on its constitutional grounds, there is at least some standing authority for the President to reach for and use in order to get expedited rescission and to zero out those things or reduce those things he disagrees with and requires a second vote, be guaranteed a second vote in the House. Why not give him that extra arrow in his quiver in case yours is not constitutional?

Senator COATS. First of all, Congressman, ours is not a pure line-item veto. Our bill, as is Congressman Clinger's legislation, is an expedited rescission fees of legislation.

The difference is that it reverses the presumption. The President's decision takes effect unless Congress overrides, whereas under the current procedure, the President's decision does not take effect unless Congress affirms. We think that is the substantial difference.

Mr. SPRATT. Would you allow the President to repeal substantive parts of the bill? Ordinarily a repeal is implemented by the passage of a law which requires both Houses to pass it by a majority vote and the President to sign it. You are allowing the President unilaterally to repeal selected parts of a bill without an act of Congress being required to implement it. That may not be constitutional.

Senator COATS. It seems that for almost every piece of legislation that comes before the Senate—I don't know about the House, someone rises to say this may not be constitutional and therefore we shouldn't vote for it. We have done a great deal of research on it. We have had legal scholars look at it, constitutional experts, and we have some very solid body of opinion that indicates that it would be constitutional.

I would be happy to provide that to you. But beyond that, it seems that the Founding Fathers, at least in my opinion, intended for us to legislate and the courts to adjudicate. We can't sit here as legislators and make final opinions—and determinative opin-

ions—as to what the Supreme Court might ultimately do. I think that what we are charged to do is do the very best we can in enacting legislation that we believe advances the people's interest, to attempt to make it conform to the Constitution, but realizing that ultimately it will be probably subject to a court test, and we will get the final determination.

But again, if we fail to move on legislation because someone raises the possibility that it might not be constitutional, we might as well fold up an go home.

Mr. SPRATT. It is not that we fail to move upon it or vote upon it, but could we couple it with something that is clearly constitutional that enhances the President's authority to rescind items that are unwarrant or unnecessary in his opinion in appropriations bills, which he can reach for.

Senator COATS. As Senator McCain has said, prior to 1974 there was an even more stringent line-item veto provision in effect, and it was constitutional. Ours is not that stringent. So we assume that it will meet the constitutional test.

Senator MCCAIN. Let me just add, we are talking about a veto. Veto is in the Constitution of the United States, not repeal. I don't believe that vetoing a line item could be construed as repeal.

Second of all, it is basically what 43 out of 50 Governors have in America, and I have never heard of them being declared unconstitutional, nor have I heard of what the President had prior to 1974 being declared unconstitutional. It was just an additional act of Congress that shifted that balance of power rather dramatically.

But I appreciate your concerns about that, Congressman Spratt.

Mr. SPRATT. Thank you both.

Mr. CLINGER. I would point out we do have an opinion from the American Law Division of the Congressional Research Service with regard to our bill, that it indeed does pass constitutional muster. So I think that is helpful, at least. I would ask that that be accepted in the record at this point.

[The information referred to appears on pages 127–166.]

Mr. CLINGER. I would recognize the gentlelady from Maryland.

Mrs. MORELLA. Thank you.

I want to thank the gentlemen from the other body for being here and for being such leaders on this issue.

As the chairman has mentioned and you have mentioned, 43 States have it, it is working very effectively.

I have traditionally been concerned about the constitutionality of it, as many of my colleagues have. But I think we have reached the point with that kind of opinion is that we have, even if it had to go to the courts, the American public and those of us in Congress feel that we do need to do more to make sure that some of these items are not included.

I guess my question is what is not included in terms of what the President wouldn't be able to send back in the way of rescissions. I think we are talking in this piece of legislation about discretionary spending only. Yet I am pleased it is going to include some of the tax items that would affect the special group.

But does this then mean that with regard to entitlements, if there was a move in Congress to increase an entitlement in some way, that the President would have no authority to then utilize the

line-item veto? I am wondering what you have included and what you have excluded.

Senator MCCAIN. Congressman Morella, you have raised I think a very important point, because it is the prevailing view now that sooner or later we are going to have to look at entitlement programs. From a practical standpoint, if we had included entitlement programs in our proposal, it would have gone nowhere. And that is something that might have to be addressed in the future, because clearly that debate will take place sometime in the fear future, I believe.

As of this moment, we do not have this line-item veto affecting entitlement programs in any way.

Mrs. MORELLA. So it would eliminate the parochial additions that come with the appropriations? But you are still talking about a very small part of the budget, and you recognize that, but I guess you are saying to me, the reason you didn't include it is you want this to pass, because the discretionary gets smaller and smaller all the time?

Senator COATS. It does, but it is not obviously the total picture. But it is symbolically very large. It portrays a Congress that cannot discipline itself. It portrays a Congress that is selfish and greedy and out of touch with the American people, that cannot put the national interest ahead of parochial interests or special interests.

I think that is very damaging to the credibility of this Constitution. And so while it may not total up to very large amounts, I think it is symbolically very, very important to our commitment to be responsive to handling the taxpayers' dollars in the way they would like to us handle them.

Senator MCCAIN. Let me just add to that, if I could, I don't know what we call a small amount of money. I know we are dealing with a $1.3 trillion budget. When the Congressional Research Service can identify for me over $50 billion in 6 years just in defense appropriations that had nothing to do with defense, that would have been line-item vetoed out, in my view, we are talking about significant amounts of money.

Last year we were able to identify $300 million that was stuffed into the VA appropriations bill in conference. Neither bill, neither appropriations bill, but stuffed in in conference.

So, you know, the old Dirksen line about "sooner or later it turns into real money" certainly applies here in my view.

Finally, again, what you and I know, and I hate to be so repetitious, people are very angry, they are very angry when they find out that we spend $2.5 million of their money to study the effect on the ozone layer of the flatulence of cows. Maybe it is only $2.5 million. But how do you explain that? Perhaps there is someone here from a more agricultural State than mine that can.

But the fact is these kinds of things enrage people. They are fodder for the talk shows. And they are very, very legitimate reasons why the American people lose confidence in their Congress and in their legislative branch.

Mrs. MORELLA. I would hope it would get us some inequities such as beneficial tax benefits on oil in one State versus another State, where you would find discrepancies. I would hope it would

reveal that kind of thing too, and a President exerting that would have another courage to put that under rescission.

Thank you, Mr. Chairman.

Mr. CLINGER. I thank the gentlelady.

I would remind the Members that we do have a long schedule of witnesses today and we are only on our first two witnesses, and I would urge them to be judicious in their use of time.

I will recognize the gentleman from Mississippi who asked for recognition first.

Mr. TAYLOR. Thank you, Mr. Chairman.

I want to welcome the Senators for being here, Senator McCain in particular because of your distinguished military career.

Senator MCCAIN. Thank you.

Mr. TAYLOR. I do not want to disagree with your goal of seeing to it that the defense budget is spent for defense purposes. But I would like to throw a scenario at you that possibly you had not considered. And we will start with today's President.

Would you consider President Clinton to be liberal or conservative?

Senator COATS. I think he has been all things to all people.

Senator MCCAIN. I think honestly, Congressman Taylor, I think it would depend on the issue. For example, I am very pleased that the President of the United States is in support of the line-item veto. He campaigned on that issue. And I would basically portray that as a conservative position.

Mr. TAYLOR. Would you consider his actions to date to have been pro-defense or anti-defense?

Senator MCCAIN. I think that—I believe that defense has been cut enough, and I am very concerned about future cuts that the administration may contemplate. And I would say that—I can't portray the President as anti-defense because I don't think that is fair. And I am not trying to waffle here. But I think the President is committed to a strong national defense, as you and I are. We just have different views as to how you achieve that goal.

So I think it would not be fair for me to call him anti-defense. I would say we have very sharply contrasting views, particularly as regards to the readiness of the armed forces.

Mr. TAYLOR. The third question would be, if President Clinton was given $1, where do you think he would prefer to spend that $1? On defense programs, or, say, on expanding health care for senior citizens?

Senator MCCAIN. I think the President signaled when he requested—is coming back with a request in his budget with an $25 billion additional over the next 5 years, that he is aware there are significant problems in the military. So it is hard for me to guess where the President would place that priority. But I do say that it was significant that following the November 8 elections, he said that they would seek an additional $25 billion over the next 5 years in defense spending.

And I can't put myself in the place of the President. But I am trying to think how he would answer that question. I think the President would answer it in the following way. If there is a compelling need, then I will put that dollar in that direction. And most

likely what I would do is take a certain amount of that dollar and give it one way, and one the other.

But I do believe there is an increasing awareness on the part of the President of the United States, when he, for example, last year said, don't cut defense anymore at his State of the Union speech, and then this additional $25 billion that he is aware of.

I am sorry I can't give you a straight answer.

Mr. TAYLOR. Senator, the point I am trying to make is, people are elected to govern often-times because they are populist. In the State adjoining my State, Huey Long immediately comes to mind, "every man a king." I am going to take the money from the oil companies and give it to the little folks.

Senator MCCAIN. A great American.

Mr. TAYLOR. The point I am trying to make and I wish you would consider, each DDD–51 costs $800 million. Each carrier in the neighborhood of $4 billion. Seawolf submarine, $1.3 billion. I am sorry, 688 was 1.8. The Seawolf is 2.3. The B–2, something dear to your heart, is now on the average of $1.2 billion apiece.

What if you had a populist President, Senator McCain, who has, you know what, for cutting out one B–2, or for cutting out one LHD, I can expand health care for x number of senior citizens? You and I both know they are the best organized lobbies in Washington, DC. You and I both know the tremendous pressure being placed on all the Members. And it is going to come down to, Heck, I don't have any Marine bases in my district, that ship isn't built in my district, we build LHD's in one place, we build submarines in only one place, we build destroyers in only two congressional districts.

I have a tremendous fear that if a populist President chose to do so, he could decimate the defense budget with that scenario, and then suddenly, rather than having a coalition of pro-defense people saying, This is our bill, he picks it apart using that line-item veto that you are so much in favor of.

How would you respond to that?

Senator MCCAIN. Let me begin by saying I think you ask a very important question, and it has been sort of referred to about this problem of abuse or the possibility of abuse by the President of the United States in any area.

But on this particular issue, I have an abiding faith in the people of this country that they are going to elect as Commander in Chief the best person for the job, certainly at the time. That is why when, at the beginning of President Clinton's term, there was some question about whether he should go to the Vietnam War Memorial or not because he had not served in the military. I wrote him a letter and said, You are the elected Commander in Chief, I will go with you to the Vietnam War Memorial if that is what it takes, because you deserve the respect of the American people because you are the elected Commander in Chief.

So based on that premise, I believe that any President of the United States that the majority of the American people elect is not going to behave in that fashion, No. 1.

No. 2 is, we do have the ability to override his veto. That is not a final act. When he vetoes the DDG or the B–2 or whatever it is, with a two-thirds majority we can override his veto.

I also believe if any President of the United States is going to be a successful President of the United States, he is going to reflect the majority of the will of the American people, which I don't think would be of such a mind set that they would see our national defense and national security decimated.

Mr. CLINGER. The time of the gentleman has expired.

Senator MCCAIN. Could I say, Mr. Chairman, I think it is a very interesting exchange, and I think you bring up some very legitimate points here.

Mr. CLINGER. At this time I would recognize the gentleman from Connecticut, and again I would——

Mr. SHAYS. Mr. Chairman, you don't even have to. I just want to thank the Senators for being here. I will be asking other witnesses so we can move along.

Mr. CLINGER. The gentleman from Texas.

Mr. GREEN. Thank you, Mr. Chairman.

I will be very brief. I spent 20 years in the legislature in Texas and I had the honor of having both Democrat and Republican Governors use their line-item veto on programs I supported.

And I don't have the feeling that you have that it is not used for political purposes. I support the line-item veto, because I have lived with it and I don't see the fear from it. In fact, if we have a constitutional democracy, I think we need to provide more authority to the President.

But I just don't think what we see in the laboratory of the States is as much as you say, that it is not used for political purposes. We are a political system and I think that is what it would be used for. If you go to your legislators and find out if that prison was vetoed or that project was vetoed, it was probably not necessarily for reducing the budget. It was really to get the attention of that Member of the legislature.

Like I said, I was proud to have items vetoed by both Democrats and Republicans and most of the time it was to get my attention, and they did.

Senator COATS. We are all human beings, and I assume that the human process works at the State level as well as it does at the Federal level. And I have no doubt that a President could, if he chose, use that authority for that purpose.

What we are attempting to achieve here is a reasonable balance, a check and balance. We think that the abuses that have been committed by the Congress since 1974 have unbalanced that process. And we are trying now to restore that balance.

We believe by expedited procedures to bring the item to the floor, and by allowing Congress the ability to overturn what the President has done, that any really egregious abuses, once exposed, the Congress would want to protect itself shall want to protect its own as an Constitution. And would overturn what the President did or at least have the authority to do that.

Mr. GREEN. Thank you, Senator.

Thank you, Mr. Chairman.

Mr. CLINGER. The gentleman from Michigan, Mr. Chrysler, seeks recognition. I am sorry, Mr. Shadegg from Arizona. Forgive me.

Mr. SHADEGG. Thank you, Mr. Chairman.

In light of the Chair's admonition, I will be brief. First let me state that the American people are fed up with a Government that taxes and spends too much. I would be remiss if I didn't thank Senator McCain and Senator Coats for being here. My colleague from New Mexico, Representative Schiff, raised the issue of a potential abuse, and that is, could the President strike restrictive language? His example was regarding the use of troops in Somalia, and the President using his power in that fashion.

It is my understanding in the line-item veto at the State level, certainly in the State of Arizona, that the only way a Governor could go after such language would be to strike the appropriation itself and thereby strike the language. But both would fall. And you couldn't get rid of just the language restricting the appropriation without throwing out the appropriation as well.

So at least my understanding of the process in Arizona, and I understand that process, would not allow the abuse that the Congressman from New Mexico was concerned about. And I would like you to clarify if that isn't also the case with your legislation.

Senator COATS. That is our clear understanding and our clear intent. If that needs to be clarified to make sure that is the case, and it is not so stated in the language or understood in the language, we will certainly be willing to do that.

Mr. SHADEGG. Good. I appreciate that.

Thank you very much for bringing this matter forward.

Mr. CLINGER. I recognize the gentlelady from Florida, Ms. Meek.

Mrs. MEEK. Thank you, Mr. Chairman.

My question is for Senator Coats.

Senator, in your explanation of what the bill does, I am concerned about the separation of powers in terms of the judiciary and that of the executive branch. Ostensibly, the President could veto some items in the appropriations act that would seriously impair the judiciary.

So I want to know from you, are you going to exclude these items from your bill? Will you allow the President to have this enormous onerous power, in my opinion, over the judiciary?

Senator COATS. That is a good question. Obviously in the bill the President would have the authority to line item—to go back to the previous question partly—the President can line-item veto numbers, money, appropriations. He can't line-item veto words unless it is directly related—states the appropriation. So I think it goes to the earlier question in terms of can a President veto legislative authority.

Clearly the President, under this legislation, would have the ability to look at appropriations for the judicial branch. But again, clearly, the President has the ability to check the Congress. The Congress has the ability to override that check of the President.

Mrs. MEEK. Senator, could we go back then to the Ranking Minority Member's question which, in my opinion, sort of impacts on this one. According to your answer and Senator McCain's answer, if some minorities—not some minorities, my mind is on minority—but if some minority of the Congress does not do what you think it will do, Senator McCain, in terms of checking the President, he may—this bill or this appropriation may pass, this new thing, without the Congress having the chance to act upon it? That is what

I have heard here this morning. That further impacts on my question in terms of what can or cannot happen.

Senator MCCAIN. Let me try and clarify for you, Congresswoman. This simply allows the President of the United States to veto an appropriation. This does not effect any authorization bill. With regards to the judiciary or any other major legislative initiative, that should be in the authorizing—the hands of the authorizing committees and not the appropriating committees.

The way that Congress is supposed to work is the authorizing committees say that you decide on legislative policy and on national policy and the Appropriations Committee decides the funding level.

I will admit to you that it doesn't work that way, tragically, in my view, in many cases. But it may help us return to what the business of legislating and appropriating was supposed to be all about.

One of the abuses that I pointed out earlier in my statement comes not from the authorizing committees but from the appropriating committees, who legislate on appropriations bills, which is not in keeping with the rules of either body.

So I think that if you are concerned about line iteming——

Mrs. MEEK. What about the judiciary?

Senator MCCAIN. If the President of the United States lined out all of the money that allowed our Federal courts to function, I think it would take about a New York minute before he or she would be overridden. The Congress does have the ability to override some egregious act on the part of the President of the United States.

Right now, egregious acts are performed by the Congress of the United States and the President basically can't do anything about it. So what we are talking about as Senator Coats said, is a restoration of what we did for 200 years up until 1974. So the Congress is not without the ability to correct evil or improper acts on the part of the President of the United States.

It is not a final say. The final say rests with the Congress of the United States. But they must act affirmatively.

Mrs. MEEK. Senator, would you look into maybe some reason for the power of the President in terms of discretionary funding for the judiciary? Could you look at that a little more closely?

Senator COATS. Congresswoman, if I could just add a response to that, that is a power that the Congress already has. The Congresses could choose not to appropriate a dime for the courts or for the judiciary.

The President could choose to veto an entire—the judiciary—we lump it together with other agencies, but the President could choose to veto the entire appropriations bill that we send to him. The Congress, Founding Fathers understood that, and when they established the procedures under which we operate, they said, well, we will need to give Congress a chance to override the executive branch's decision.

So I just think to exclude an item of appropriation that the Congress was given the power under the Constitution to appropriate in and of itself probably would be unconstitutional. I don't know how we could exempt out a President's ability to veto or a Con-

gress' ability under the Constitution not to appropriate. That is always done under the will of the people, as expressed through their representatives.

Mr. CLINGER. The gentlelady's time has expired.

I would yield now for what hopefully will be a final question from the gentleman from California, Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman. I thank both Senators for coming.

Just one sentence on that last question. Neither, the President nor Congress, one could veto out the salaries of the judges, because that is a constitutional protection provision, that you cannot reduce their salaries while they are in office. But you could surely veto out the clerks, the law library, so forth.

As a staff member, I remember sitting in executive session on the court, and one southern Senator said, "Gee, I don't know why we should give them the $25,000 more for law books. I don't think they they ever read them over there." So they didn't give it.

But to follow up on Congressman Shadegg's very interesting question, I just wonder, Mr. Chairman, if you could get the Congressional Research Service to put an exhibit in at this point which tells us which Governors, if any, have authority to line out language, and not simply the particular item that is in dispute in some States. I think it would be an interesting exhibit. You made it very clear what you do and do not do.

[The information referred to follows:]

A number of governors have authority to not only veto items in a bill but to reduce the items (see attached). This process is fundamentally different from H.R. 2. Governors excercise these veteos at the time a bill is before them, whereas Presidents would use the rescission authority in H.R. 2 after a bill becomes law. Governors can item veto only what is specified in the bill language. Under amendments considered for H.R. 2, the President could go into report language to find dollar levels and propose them for rescission. Federal and state budgeting processes are quite different on this point. State appropriations bills are highly itemized, giving governors substantial choice in applying the item veto. Federal appropriations bills are generally lump sum with relatively little specificity, but under the rescission process Presidents may recommend the termination of budget authority that is not in the bill itself but is found in nonstatutory sources, such as committee reports.

Alaska	Missouri
California	Nebraska
Idaho	New Jersey
Illinois	Tennessee
Massachusetts	West Virginia

Senator MCCAIN. Mr. Chairman, could I mention one thing in passing? Because there has been a lot of question about constitutionality here.

I would like to quote from—perhaps ask the entire section be put in the record. Article I, section 7 of the Constitution says:

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

If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law.

Mr. Chairman, I think the Constitution is pretty clear on this issue. And what I think has happened is that there has been a shift in power and an imbalance.

I would again like to appreciate—I don't know if there is representatives of the administration here, but that the President is very strongly in favor, and I believe that we have a real opportunity here and one that we haven't had in many years.

Mr. CLINGER. If there are no further questions, I want to express the appreciation of the Chair to Senator McCain, Senator Coats, for coming to testify before the committee today.

Senator COATS. We appreciate being asked, Mr. Chairman. We wish you the best.

Mr. CLINGER. At this point I would like to call our colleagues who will appear with the next panel: Representative Jack Quinn from New York; the Honorable Mark Neumann from the State of Wisconsin; and the Honorable Mike Castle from the State of Delaware.

Let the record note the presence of some interesting head gear on Congressman Quinn this morning

Mr. QUINN. Good morning, Mr. Chairman.

Mr. CLINGER. Good morning, Mr. Quinn. May I recognize you at this time.

STATEMENT OF HON. JACK QUINN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. QUINN. Thank you very much, Mr. Chairman. I would note for the record that Representative Solomon of New York is scheduled to appear with us. We don't know if he is going to be here on time. If it is OK with the Chair, we would prefer to proceed as a panel instead of individuals. Hopefully, the time will move along a little bit more quickly. Thank you, Mr. Chairman.

We appreciate the opportunity to be here this morning before you, Mr. Chairman, and the full committee. I want to note in terms of the different kind of head gear this morning, as you mentioned, Mr. Chairman, this was a hat that was given to me by a constituent back home in Buffalo, NY, 2 years ago.

It is not necessarily a prop, but I think it is a chance for us to say that this issue, the line-item veto, while we have listened to testimony from the two Senators who just left us, and we have talked with others throughout the last 2 years, at least in my experience, this is an issue that the American people want to have a vote, they want to have a chance to have their Representatives give the President of the United States the line-item veto authority.

Clearly in some of the information that we have received, 80 percent of the American public are in favor of a line-item veto. There is no question that whenever we discuss the opportunity of giving any President of the United States more authority, there is always going to be some specific questions, certainly some legal questions, and I think a lot of what we heard in the Senator's testimony from Members of this committee are legitimate questions and questions that need to be asked.

However, Mr. Chairman, I also believe that this Congress, 104th Congress, in this coming year, has an opportunity we may never see again, in the fact that we have got a President of the United States who has asked for during his campaign and repeatedly in

the first 2 years of his administration, for this Congress to give him the line-item veto, to give him the opportunity to line-item veto out measures that he believes shouldn't be in there.

Our top priorities during the past year have been those things that can cut spending and reduce the deficit. I also appeared before you this morning, as Congressman Castle has just had to leave to go to the Banking Subcommittee meeting next door and will return, to note that I saw along with Congressman Castle and Congressman Peter Blute, a Member of your panel, this morning have worked along with Congressman Solomon these last 2 years to get this to a vote. We have not been successful, Mr. Chairman.

But I believe as a Congress, when we have the opportunity, where we have a President who wants this authority and a House and a Senate this morning meeting together, talking about the same thing, talking about putting this on a schedule where both the House and Senate can report it out and send the bill to a President who is willing to sign it, is a real opportunity to show the American people that we are not about gridlock anymore, that we are about getting the business done that the people, the American people have asked us to do.

I would yield, Mr. Chairman, to our new freshman colleague, Mr. Neumann and also note that I have a prepared statement for the record that I have submitted and ask that it become part of today's record.

Mr. CLINGER. Without objection so ordered.

[The prepared statement of Hon. Jack Quinn follows:]

PREPARED STATEMENT OF HON. JACK QUINN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, thank you for having me here this morning. I am very pleased to have the opportunity to testify before your Committee in support of a measure for which I hold such strong convictions—the line item veto.

My absolute top priorities upon taking office more than two years ago were: to get government spending under control; to reduce the deficit and; in the process, to strengthen the economy. Passage of the line-item veto would help do all of these things.

I am an original cosponsor of H.R. 2, "the line-item veto act" because I believe in a real line-item veto.

Mr. Chairman, H.R. 2 would allow the President to rescind all or any part of appropriated funds; require a majority of both chambers to disapprove the President's rescissions; and finally, require a two-thirds vote of both chambers to override a Presidential veto of the disapproval bill.

I would like to take just a moment to trace my involvement in the fight for the line-item veto during the past two years.

During the 103rd Congress, my colleagues and I introduced more than two dozen different proposals for strengthened rescission power or a line-item veto. I joined with two of my freshman colleagues, Congressman Peter Blute of Massachusetts, a distinguished member of this Committee, and Congressman Mike Castle of Delaware, to give President Clinton what he asked for in 1992: a real line-item veto.

The House had two opportunities during the last Congress to vote on and grant the Line-Item Veto authority to the President.

One of those votes occurred on April 29, 1993 when the House considered H.R. 1578, the Expedited Rescissions Bill. The Castle, Blute, Quinn Substitute Amendment to that legislation included language similar to H.R. 2. Unfortunately, our Amendment failed by a vote of 198–219. On that occasion, the Line-Item Veto fell 21 votes short.

The line-item veto is exactly what we need to help get spending under control. It must be included in any serious attempt to reduce the staggering federal budget deficit. Eighty percent of the people in this country want a real line-item veto. Forty-three of our nation's governor's have it, and so should the President of the United States.

Let's get wasteful federal spending under control and make Congress balance its checkbook. We need to change the way the Congress overspends, overtaxes, and then increases our authority to spend more.

It is my understanding, Mr. Chairman, that your Committee will mark up H.R. 2 on January 25th. At that time, I urge you and all of the members of this fine Committee to support this crucial measure.

Some of my colleagues and many pundits disparage the line-item veto. While it is true that eliminating small wasteful programs won't balance the budget, it will put us on the right track. Our constituents can also be confident that—before we ask them to accept cuts in important programs—all the programs hidden in the budget for the benefit of politicians are being removed. Americans will no longer pay for wasteful spending projects attached to major legislation such as the $10 million dollars thrown into last year's Supplemental Appropriations Act for the California Earthquake for planning and developing a new train station and commercial center in New York or the $11 billion added to the fiscal year 1995 defense budget for environmental programs and other non-military items.

I believe that without a line-item veto, Presidents will continue to accept pet projects and waste taxpayers' dollars because vetoing an entire bill just for a few extra spending projects isn't practical. We need the discipline offered by the line-item veto to change the spending culture in Washington.

Mr. Chairman, thank you for your time this morning. I'd also like to thank the other original cosponsors of this bill—Mr. Blute, Mr. Parker, and Mr. Clinger. Thank you.

Mr. CLINGER. May we welcome the gentleman from Wisconsin, one of the prime sponsors and authors of this measure, Mr. Neumann.

STATEMENT OF HON. MARK NEUMANN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. NEUMANN. Thank you, Mr. Chairman. Unfortunately, I don't have the head gear to go with it. I was not part of the Congress for the last 2 years as they were working on this project. But I do come to you as a very strong supporter of this bill. I believe I am part of the ultimatum of the American people that sent us here to bring about this sort of change. It is very much a privilege to be here and to be a part of this.

We have a debt in the United States of America that is skyrocketing, in the range of $5 trillion, rapidly moving toward $6 trillion. Something definitely needs to be done about it and done now.

The line-item veto is part of that effort to change what is happening in terms of the increasing debt in the United States. I think it is very important we note this is not a bill that is being put forth strictly by Republicans or Democrats, but rather have strong bipartisan support, and that we do have the executive branch support of this as well.

Studying this issue, there are three main areas that I looked at that led me to support it, along with the fact that I come from a State where it is used very effectively and has kept spending in control while at the same time not being forced in the position where the Governor had to raise taxes on the people.

First, I think this line-item veto helps restore the balance of power that was initially intended in the Constitution of the United States by our Founding Fathers. It puts the President back in a position where he can veto out excessive spending.

Second, I also like the fact that it puts a person accountable and adds some accountability to what is happening when we look at some of the pork barrel projects that have embarrassed this institution in the past.

I think the line-item veto will keep powerful Members of Congress from inserting what is commonly referred to as pork barrel spending and trying to get them passed into law. I very much oppose this sort of thing. I have seen it time and time again. Can I tell you, I hear from my constituents on a very regular basis that this is unacceptable. That is part of the reason they sent me here, to change that particular practice.

Third, the line-item veto is a proven success. Forty-three Governors in the United States of America have this power today. Governor Tommy Thompson in my home State has used this particular power perhaps more extensively than any other Governor in the United States, exercising it approximately 1,500 times over the course of his 8-year period, vetoing out $800 million in excessive spending in the State of Wisconsin.

I would point out that as a result of his efforts using the line-item veto, he was able to control spending in the State of Wisconsin, balance the budget in Wisconsin, and do it without raising the taxes on the people. And I believe that it is imperative that we in Congress perform that same task here.

As a small business owner, interestingly enough, I had budgets presented to me from various departments that I worked with, and various different organizations that I was forced to work with. When they proposed excessive spending or unnecessary spending, I exercised what might be considered line-item veto and crossed out the excessive spending. I think it is common sense that we implement that business practice here in the Government.

Some of my colleagues and many pundits belittle the line-item veto. And while eliminating small wasteful projects, by itself, it will not balance the budget. It will put us on the right track. Our constituents can be confident that before we cut into important projects, that we are going to eliminate pork barrel spending first.

The American people will no longer tolerate wasteful spending. We can look at example after example. I have a whole list of them here with me. We might look at the $10 million addition to the Supplemental Appropriations Act for the California earthquake last year, that is developing a new train station, commercial center in New York. There is approximately $5.8 billion in the fiscal year 1995 defense budget for nondefense-related items, some of which were presented here previously by Senator McCain.

Many of these things must be cut out of the budget if we are going to do it. The line-item veto is a very good way to get it started.

Mr. Chairman, I would like to thank you this morning for taking the time. I express my strong support for this and it is truly a privilege to be part of this.

[The prepared statement of Hon. Mark W. Neumann follows:]

PREPARED STATEMENT OF HON. MARK W. NUEMANN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Chairman Clinger, ladies, and gentlemen—good morning. I'd like to thank you for giving me the opportunity to speak to you today. I'm testifying before this Joint Committee to state my support for H.R. 2—The Line-Item Veto Act.

With the national debt skyrocketing toward $5 trillion dollars and projected to increase to $6 trillion dollars by 1998, run-away spending on wasteful projects must be stopped—and it must be stopped immediately. A Presidential line-item veto, as proposed in the "Contract with America", is the first step toward fiscal responsibility

and will save taxpayers billions of dollars. Today, we have widespread, bipartisan support for a line-item veto in the Executive Branch of government. This support is coming from both sides of the aisle, from a majority of the American people, and from a Democratic President.

In studying this issue, I found three main reasons why this country needs a Presidential line-item veto.

First, a line-item veto would restore the balance of power between the Legislative and Executive branches of government. This crucial balance was lost alter the Budget Act of 1974. The 1974 Budget Act did not require Congress to act on a presidential rescission proposal. By contrast, this line-item veto proposal requires a Congressional debate and a vote on any rescission proposal by the President. Congress will no longer be able to ignore a President's attempt to cut the budget.

Secondly, a Presidential line-item veto would prevent powerful committee chairmen from slipping goodies into spending bills—a practice that has cost taxpayers dearly over the years. For example, in the 1994 Crime Bill, Jack Brooks—a now former Representative from Texas—hid an extra $10 million dollars in the bill for creation of a Criminal Justice Center at Lamar University in Beaumont, Texas. This grant may have slipped through unnoticed save for an overly eager individual in the Lamar University press office who sent out a press release announcing the new justice center. What followed was a slew of national TV coverage and public outrage. This is only the most recent and most public example of extra money slipped into large-scale legislation. A line-item veto can help relieve wasteful spending hidden in legislation.

Third, the line-item veto is a proven success. Governors in 43 states possess some sort of line-item veto authority. The governor of my state, Tommy Thompson, has had the line-item veto for 8 years and in those 8 years, he's used it nearly 1,500 times. Governor Thompson has reduced new taxes and spending increases by $800 million dollars in the last 8 years thanks to the line-item veto. He has also balanced the Wisconsin budget repeatedly—without raising taxes—with the help of this authority. Every time that Tommy Thompson and his line-item veto are mentioned someone in Wisconsin smiles.

The line-item veto is a deterrent for would-be pork-barrel spenders. If members of Congress know that the President has the authority to line out programs, they will be less likely to try and slip in a pork-barrel spending project. In the future, Members of Congress will think twice before putting in unnecessary projects that will waste the taxpayer's money.

As a small business owner, I couldn't afford any unnecessary spending in any of my budgets. If any of my staff tried to slip in extra costs we didn't need and couldn't afford, I used my personal veto power.

Mr. CLINGER. Thank you very much. I would now like to recognize the one gentleman in the House who has actually had the power to exercise and use the line-item veto, the former distinguished Governor of the State of Delaware and Member from the State of Delaware, Mr. Castle.

STATEMENT OF HON. MICHAEL M. CASTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF DELAWARE

Mr. CASTLE. Thank you, Mr. Chairman. It was a much smaller budget and much more manageable than the Federal budget, however. Let me apologize first for having to run out. I may have to run out in the middle of this testimony. The new no proxy voting rule is a little bit of a problem. I am on the Banking Committee which is about 17 and a half seconds away, I have just learned, and I had to run over there and cast one vote.

I would just like to speak about the line-item veto as plainly as I can, as I see it. Of all the things, all the measures in the Republican Contract With America, this is probably the simplest, both in terms of implementing it and in terms of probably how it would end up being used.

Sometimes we talk about the line-item veto and the balanced budget amendment in the same breath. They are vastly, vastly different. This is just a tool, I think, to give the executive branch

some greater powers with respect to budgeting, which frankly I think the President of the United States, who is elected commonly by all the people of the United States of America, should have. I think it is a distinct power the executive branch should have. I must say there are a lot of Republicans who are supporting this in spite of the fact, of course, as we all know, there is a Democratic President.

I commend Peter Blute who is on the committee. We worked hard on this last year. Also, this is not a magic solution. We are not going to balance our budget because of a line-item veto. It is a tool. I think it is a very good and positive tool, but it is simply that. It will not end our Federal budget deficits.

I did serve 2 terms as Governor of Delaware, and my view after that is that while everybody together was not a separate item, it was something that made us work together to get things done. In fact it brought us to the table to negotiate fiscally responsible spending bills that would fund the necessary programs in the interests of all of the testimonies. Frankly, I disagree with those who argue that the line-item veto will unfairly shift power from Congress to the President.

I believe strongly that a responsible executive, and I think all Presidents are such, will only use the line-item veto selectively and it will not be abused. If it is, if there are acts of irresponsibility, the executive risks alienating the legislature and most importantly probably to him or her, the public. And I think many Governors who have made that mistake will tell you that is not likely to happen.

The President, as Governor of Arkansas, used it eight times. I used it a few times. Governor Thompson used it in a different way. And that is fine. But I think it was all in the best public interest.

Just a couple of examples. I had a $1.2 million expenditure during my first 6 months in office, it was for traffic lights. The legislators had not only multiplied by a factor of five of the number of traffic lights, but they also designated where they were going to go so there was no selectivity. I thought that was irresponsible. I vetoed it. There was no effort to override that veto.

And I must also say it does not need to be used to be effective. I remember another night in June 1990 on the last night of the legislative session, we got wind of a pension increase for legislators. The mere threat of veto forced the lawmakers to remove that pension increase from the budget bill. The next day it was never even an issue. So it became a negotiating tool in that particular circumstance.

I think it is a form of budgetary deterrence. I think it will help with our fiscal problems in this country. And I don't think it has to be used often, although it can be, in order to be effective. I think the mere threat of it is significant.

Forty-three States have it. I am doing a little history of this now. Maybe somebody here knows it better than I. But I think most of these have adopted it in the last 30 or 40 years. I don't know of any, although I may be wrong on this, who at some time later got rid of it after they adopted it. Some are majority, some are two-thirds. Basically most of the States have it. They feel it is one of

the very good tools to help them balance their budgets and to deal with their budgetary problems.

And I concur with that, and I don't see why it is any different at a national level with the President and the Congress than it is on the State level where the Governors have adopted it and done extraordinarily well with it.

I think everyone knows what the measure is. You have had other testimony on it. I am not going to take time to go into that. It is interesting. I would prefer, frankly, a constitutional amendment. I think it is a neater process. But I do believe that this legislation has been carefully crafted to be both constitutional and effective insofar as the Congress and the President are concerned.

So I think we can be very comfortable with that. I don't have any questions that that would work out.

We have a budget deficit. We are all talking in terms of trying to balance the budget, whether we are for a balanced budget amendment or not. There is virtually nobody in the public who does not think the government spends too much money. My view is at all government levels, the Federal Government is the one that has the most extraneous expenditures or pork, or fat, or whatever you want to call it.

I believe this is just one of those measures which would help a tremendous amount in helping us move forward.

I don't see a hidden agenda with this. I would love to see the first President abuse it. I think when they do, they will find the public will deal with them. I don't think that is an issue. My view is that this committee is doing a wonderful job of bringing this measure forward, considering it. Hopefully, we can put it before us on the floor and have it considered and enacted not only by the House and the Senate, but by the President who has used it before, who campaigned in favor of it, and who has reiterated recently he is in favor of it. My conclusion is that the time is now. I am delighted to be here and I am delighted the committee is going forward.

Thank you, Mr. Chairman.

[The prepared statement of Hon. Michael M. Castle follows:]

PREPARED STATEMENT OF HON. MICHAEL M. CASTLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF DELAWARE

Chairman Clinger and Chairman Roth, thank you very much for the opportunity to testify here today. I am particularly happy to appear with my colleagues Jerry Soloman and Jack Quinn and before Peter Blute of your committee. They have been real leaders in the effort to enact the line-item veto. I also want to thank you and the members of the House and Senate Government Affairs Committees for your commitment to improving the Federal budget process.

I strongly advocate giving the President line-item veto authority. I will be the first to admit that the line-item veto is not a magic solution—it will not end Federal budget deficits. Nevertheless, it is an effective tool to help prevent unnecessary Government sending and should be enacted along with other budgetary reforms.

Governor Bill Weld will share his views on the line-item veto and I know a number of Members of the Senate are former Governors and I hope they will provide their experience with it.

I was fortunate enough to serve two terms as the Governor of Delaware. My view is that the line-item veto helps bring all sides—Republicans and Democrats, the President and lawmakers—to the table to negotiate fiscally responsible spending bills that fund necessary programs in the best interests of all taxpayers.

I disagree with those who argue that the line-item veto will unfairly shift power from Congress to the President. I think a responsible executive will only use the

line-item veto selectively. It will not be abused. If it is used irresponsibly, an executive risks alienating the legislature and the public. Most Governors have not made that mistake and I don't believe the President would.

As Governor of Arkansas, President Clinton only used the veto eight times. During my eight years as Governor I only used it a few times, but it was effective in making the budget and spending process more responsible.

For example, in 1985, during my first six months in office, I used the line-item veto to strike a $1.2 million expenditure for new traffic lights. This funding was a five-fold increase over the previous year and the provision sought to legislate and politicize where traffic lights should go. I think this use of the line-item veto early in my first term helped set a tone that this type of spending would not be approved and legislators did not propose similar projects in succeeding years.

The line-item veto does not even have to be used to be effective. In June 1990, on the last night of the legislative session, the threat of the veto forced lawmakers to remove a rather hefty pension increase for themselves from the budget bill that year.

The line-item veto is a form of budgetary deterrence. Like a strong military force, it does not have to be used often to prevent foolish or aggressive actions. Forty three States have given their Governors some form of the line-item veto. The President also needs it and I have no problem as a Republican, in giving the authority to a Democratic President.

I believe the form of the line-item veto contained in the Contract With America is the most effective version of this budget tool. It would give the President the power to eliminate all or any part of spending in as appropriations bill or any targeted tax provision in a tax bill. Congress would have to disapprove the President's cuts by passing a resolution of disapproval and then override a Presidential veto of that measure with two-thirds of the House and Senate.

In the last Congress, Bob Nichel, Jerry Solomon, Jack Quinn, Peter Blute and I worked with many of our colleagues in the House to pass this version of the line-item veto. The proposal came within 20 votes in 1993 and 1994 and I believe the House will approve it next month.

I understand some of our colleagues in the Senate prefer a more limited expedited rescission authority. While I would argue for the strongest measure, it is critical that we strengthen current law as much as possible. The current rescission authority is simply ineffective.

In summary, we have a current budget deficit of $200 billion. Under current economic policies, the deficit will again exceed $300 billion in only a few years. With these facts in mind, it is hard to argue that the line-item veto is not needed. It is not a panacea, but we should not reject any reasonable reform in trying to reduce Government spending. I hope the committee will favorably report the legislative line-item veto to the House, and the Senate will also act favorably on this legislation. Thank you very much for the chance to share my views with you.

Mr. CLINGER. Thank you very much. I thank the panel. Let me just pose one question, and that is, criticism is made that the line-item veto could be used as a sort of form of genteel blackmail, if you will, that a Governor or a President having this power could hold over the head of a recalcitrant Member the threat of eliminating some vital project or some vital provision in an appropriations bill as a threat to the Member that if he didn't vote the right way, he would be punished.

I guess as a former Governor, Congressman Castle, you would have dealt with this. Do you think that that is a serious problem?

Mr. CASTLE. Mr. Chairman, it is a very good question, but any President or any Governor who brings a Member of the Congress or the legislature into an office and takes a perfectly good measure in the budget and states that they are going to line-item veto that if they don't vote such a such on a bill is, I think, risking their political future altogether.

I see that happening maybe once. Even the new ones, it happens maybe once. Somebody is going to have to learn a lesson. That is such abhorrent politics that I just don't see it as a problem. I can't

guarantee that it will not happen. You take a risk in any of these things that you do.

But the politics of it is just so totally negative that my view is that no President would get away with that for very long.

On the other hand, let's say something is really a travesty and shouldn't be in the budget to begin with, and the President calls the person in and indicates that and asks him to withdraw it, that is different. That is not a negotiating tool. That is entirely different. I think that is one part of the line-item veto that you have the right perhaps to get the budget in shape before it ever gets to a President.

Mr. CLINGER. I think that is really addressing the problem we are trying to get at here, which is that Members of Congress recognize that the 13 appropriations bills we pass are only going to have to pass, and therefore if you can hitch your wagon to an appropriations bill, even if it is an egregious abuse of the system, you are likely to get it under the present circumstance because the President has no power other than to veto the entire bill, which is also very politically risky.

Mr. CASTLE. While that is a complex procedure, the fact that the President—that the Congress can override a veto by a majority and then go back and the President can veto again, it takes a two-thirds majority to pass it, the Congress does have rights no greater than two-thirds at any time to override an egregious act by a President of the United States. We need to keep that in mind as well. We are not giving up everything to the President to actually set the budget.

We are just giving the President a tool to help shape the budget.

Mr. CLINGER. The gentlelady from Illinois.

Mrs. COLLINS OF ILLINOIS. Congressman Quinn, H.R. 2 says that the Congress has 20 days of session in which to complete an action on a rescission receipts disapproval bill and to present such a bill to the President. H.R. 2 isn't clear on this point. But am I correct in assuming that the 20-day period would begin on the day the President notifies the Congress of his rescission or of his veto?

Mr. QUINN. I think, Mrs. Collins, you asked this question before, I was in the audience, of the Senators, I think the important part here is that the 20-day period is in there, so as your previous question stated, we don't have an action by the President and everything sits aside and it is forgotten and never dealt with.

I think the key to this——

Mrs. COLLINS OF ILLINOIS. When does the 20th day start running?

Mr. QUINN. The first day.

Mrs. COLLINS OF ILLINOIS. So once the 20-day clock starts ticking, it would be in order at any point to introduce a disapproval bill which would then be referred to the appropriate committee, is that not right?

Mr. QUINN. My assumption, my belief, yes.

Mrs. COLLINS OF ILLINOIS. Am I correct that nothing in this bill requires the committee to take up the matter or ensures that it would come up for a vote on the floor?

Mr. QUINN. I can't answer that.

Mr. NEUMANN. I believe that is correct. There is no forcing——

Mrs. COLLINS OF ILLINOIS. Is there a provision in the bill that would at least make sure that a vote occurs on the floor of each House? As I read it, it doesn't say that.

Mr. QUINN. Mrs. Collins——

Mrs. COLLINS OF ILLINOIS. Let me put it this way: Would you be opposed to adding any kind of provision to the bill that would at least make sure that a vote on this disapproval of a rescission of vetoes would occur on the floor of each House?

Mr. QUINN. I personally don't have a problem with that. I think one of the keys to this kind of legislation is that this committee will make the decision.

Mrs. COLLINS OF ILLINOIS. Let me ask you another question. The whole House eventually votes on appropriations bills, is that not correct?

Mr. QUINN. That is my belief.

Mrs. COLLINS OF ILLINOIS. If the President uses this line-item veto, and on the matter of the line-item veto gets bogged down in committee somewhere for more than 20 days, the whole House would then be prevented from getting an opportunity to vote on whether to overturn that line-item veto, would it not, under this bill as it is currently written?

Mr. QUINN. The fact that we have imposed on ourselves as this House, and the Senators can speak——

Mrs. COLLINS OF ILLINOIS. But nothing in this bill requires this House to act. That is my whole problem.

Mr. QUINN. I think—go ahead.

Mr. NEUMANN. That is true. And I for one support that, just the way you are describing it. It becomes a situation where it takes an initiative in the House to bring this back.

If the President looks at this and says this is not something we should be spending the taxpayers' money on, and he crosses it out and says, I vetoed this, and he notifies Congress of that, it then takes an initiative in Congress to say, no, that is not right, that is not what we want, we want this in the budget, and they need to then initiate the action.

I think that is the whole purpose of allowing the veto.

Mrs. COLLINS OF ILLINOIS. If in some committee they decided to just not look at this at all, the 20 days would run and that would mean that all the rest of the 435 Members of this body would not have an opportunity to act on this disapproval, line-item veto.

I think that is not what our forefathers intended. I don't think it is wait, we want to do business. I think every Member of this body has a right to vote on whether or not there is going to be some kind of line-item rescission and the opportunity to overrule it.

Mr. QUINN. I don't disagree with you at all. I am not a committee Chairman, obviously. But I would say that as a Member of any committee, if I was afraid, in one of my committees, where something was—no one took any action, it was going to just sit, as a Member of that committee, I would get to my ranking member and I would get to my Chairman, and I would ask for that matter to be brought up.

Mrs. COLLINS OF ILLINOIS. What would be the opposition to putting it in this bill then? We want to be fair to everybody. Everybody

voted on the appropriations bill. Why not have the opportunity to vote——

Mr. CLINGER. Will the gentlelady yield? There is a procedure, of course, to ensure that the vote would take place. And that is through the discharge petition which would remove the jurisdiction of the committee and bring it to the floor.

Obviously, if there were sufficient votes to override a Presidential veto, I think there should certainly be sufficient votes to ensure that the discharge petition would bring the bill to the floor in a timely fashion.

At this point, I would recognize the gentleman from Massachusetts, Mr. Blute.

Mr. BLUTE. Thank you, Mr. Chairman. I want to congratulate the panel, particularly Congressmen Quinn and Castle, who I think have done a lot of heavy lifting on this issue over the last Congress, and are equally working hard to see it passed in this Congress. I don't think there is any doubt that the line-item veto will bring more accountability to our appropriations process. And it will raise the threshold of scrutiny on spending in the budget.

Congressman Castle's experience as a Governor, later we are going to hear from Governor Weld, is very clear. It is used very well in the State government to discipline the budget process.

My question is about the question of overuse of the line-item veto. I would like to aim this at Governor Castle. Clearly it is a twin-edged sword, having a line-item veto. Indeed it is a shifting of power to the executive. But it also comes with a measure of responsibility in terms of thinking through what items should be vetoed.

I wonder if you can comment on why it is a twin-edged sword for the executive.

Mr. CASTLE. First of all, everything you stated is absolutely correct. We are shifting some power. The way I look at it is we are bringing the executive branch into responsibility for the budget. We often hear it is the Congress' budget, or whatever it may be. This makes it, I think, more clearly a dual responsibility with a division of powers between the executive branch and the legislative branch.

See I think to that extent, we are actually benefiting the budgetary process. As far as the way a President uses it, yes, it is an authority that the President could use, if you will, or overuse. Governor Thompson, we have heard today, has used it excessively. He is highly popular in his State. Apparently that State has agreed it should be used in that way.

Other Governors have chosen not to use it anywhere near as much. But they all do it, subject to public scrutiny, to the reaction of the voting public or whatever.

But I have never heard anybody in any of the States which have this say we should not give the executive branch that particular right. They like the idea that there is another watchdog over the budget. It is politically popular. And I think they know very well what to do if somebody abuses that in some way or another.

So I believe it is actually a vastly improved process. And anything that somebody does that could be considered to be abusive would be subject to scrutiny.

Mr. BLUTE. I think there is a basic difference between being elected by everyone in a particular State or a particular country, forcing that individual to take a macroview, that is quite different than the view taken more parochial by a Member of Congress or by a State legislator. Would you say that is true?

Mr. CASTLE. That is a very good point. I know—I was a State legislator. I was a State senator. Like everybody else, I fought to get things done. All of a sudden I was a Governor. I had to look at other cities in the State of Delaware, other areas of jurisdiction, whatever, and make more balanced judgments.

I tried to sell the budget process that way. I spent a lot of time working with our legislators, but I realized some of the things they were doing were too parochial. I believe it is helpful to have an executive branch who after all initiates the budget process to begin with so that a political party doesn't run rampant or a particular region of the country doesn't run rampant or some populist program that may not be in the long-term interests of this country is not in order. I think it is good that he have that influence on this process.

Mr. BLUTE. Thank you, Mr. Chairman.

Mr. CLINGER. I thank the gentleman from Massachusetts who is a leader in this field and one of the prime cosponsors of this measure. I recognize the gentleman from West Virginia, Mr. Wise.

Mr. WISE. Thank you, Mr. Chairman. A brief observation and then a question. I supported the enhanced rescission process in the past that has passed here twice, I believe, somewhat different from the bill introduced by the Chairman and by other Members of this committee.

I would just like to make an observation. I think, former Governor Castle said, if I may put words in your mouth, this was not a panacea. I note in the State of West Virginia, under a previous administration, in a budget of $1.5 billion, in a State that has both a balanced budget requirement and a tight line-item veto, a former Governor left us $500 million in debt.

I am happy to announce that last night, 6 years later, we have crawled our way back. Last night the Governor was able to announce the first surplus we have had in a period of time. So we can put all the procedures in law and constitutions we wanted, but eventually it gets down to somebody has got to really do the fiscal work.

I would say the easiest vote is for a balanced budget amendment or a line-item veto. The toughest vote is how you actually make the things work.

Now, I guess my question, I do want to follow up, I know that at least two of the representatives on the panel, and of course Chairman Clinger, have not been that long from being in the minority, and probably still have a few dim but painful memories, the burdens borne by the minority. But one of the burdens I think I heard a lot about on the floor for the past few years was not being able to get measures to the floor to be heard. Give us a vote. That is what the Contract For America, I believe, is about, guaranteeing that there will be a vote on these issues.

My concern is that in this process—I have always supported enhanced rescission because I think the President is entitled to a vote

and every American is entitled to see how their representative voted on a rescission. Did they vote to cut or not to cut?

It is something else, though, to say it is now subject to the power of the Chair of a committee or of a powerful Member, whether it even comes to the floor. So I would just urge Members to think about whether we want to abrogate that power entirely, because I know it is a horrifying thought to some, but once again this body may change, and those in the minority will be in the majority and vice versa. And so we need to put in place some protections for all.

I think the American people ought to be entitled to a vote. That is my main concern about the present provision.

Mr. QUINN. Mr. Chairman, may I ask a question? Bob, I don't disagree with a thing you said. Is your concern after the President has taken—as a follow-up to Mrs. Collins——

Mr. WISE. I always assumed there was an automatic vote on it, and apparently there is not, and that is my concern.

Mr. QUINN. Thank you. Now I am clear. Point well taken.

Mr. CLINGER. The gentleman from Connecticut, Mr. Shays, is recognized.

Mr. SHAYS. Thank you, Mr. Chairman. I would like to thank all three gentlemen for their very articulate presentation and thank my colleagues on the other side for raising the issue of when there is a veto, it should go in fact to the committee, and hope that during the process of markup on this bill, if we could take a really good look at that, because I have some concern about that issue as raised by the minority.

I just would make a few comments, and I would love your response to it. They relate to this issue that Ms. Meeks asked originally when we talked about the influence the executive branch could have over the judiciary branch. I basically have grown up thinking there are two principles. There is a separation of powers and there is also the checks and balances. And it means that there is separation, but it also means one branch can have some impact on the other branch as a check.

So I would like if one of you could at least comment on the concept of checks and balances as it related to this concern about the judiciary.

Mr. CASTLE. I will be glad to take a stab at it, unless somebody else wants to usurp me. First of all, I think it is an expanded check or balance, if you will. I really don't—I actually was focused on getting ready for my vote in the Banking Committee, I didn't hear the whole exchange on the judiciary issue.

But I never heard the judiciary really entering into this at the various State levels as a factor. We have to remember that the President is very involved with the budget right now. The President of this country is the one who presents a budget to us. The budget goes to the President.

The executive branch has a responsibility to carry out the budget. I don't see giving the executive branch this added responsibility of being able to line-item veto if something seems to be out of kilter with the way spending should be in this country, as that great a constitutional shift, if you will.

And I think it is a very proper check or a balance, if you will. I don't think it in any way impinges on separation of powers at all.

I would have to research a little more the whole issue of the judiciary, frankly. I am just not up to speed on that to be able to respond to that question. It was a good question. I am just not knowledgeable enough to be able to respond to that meaningfully today, except I have never heard of that being a problem before.

I consider this to be a slight move. I would say, I will repeat again, this is not a panacea. But I do believe the line-item veto is a vastly different measure than almost anything else that we are talking about. And while we talk about it in big letters and lights, the bottom line is, in effect, it won't be that huge a change. It is nowhere close to the balanced budget amendment and some of the other processes that are taking place out there.

Mr. SHAYS. When I served on the Appropriations Committee back in Connecticut, our Governor had a line-item veto authority. He never used it, because he never had to. The threat of some outrageous thing being in the appropriations package was significant.

But what I find down in Washington is you multiply it a 100-fold, the budget is so much bigger. I remember in my earlier years here there was actually an appropriations put in a bill that said we were going to fund parochial schools, religious schools, not Catholic schools, but some religious schools in a foreign country. It would be illegal in this country, yet we were spending money that way.

The hope was it would get lost in the budget. I ended up voting for the entire bill because I didn't want to vote against the entire appropriation because of that outrageous example.

I would love the President to have the authority to veto that out. I believe if he had that authority, that item would never have made it in in the first place.

Mr. CASTLE. I think that is correct, and I also think that if he or in that case a—he did not do that, he would be subject to a lot of criticism, which is fine. That is part of the process of budgeting.

Mr. SHAYS. I will conclude by just saying the big value of this is that you gentlemen have pointed out the whole concept of accountability. It not only makes the President accountable, because the President, he or she has to step up to the plate, but then we have to respond. So I just hope you continue your effort in this regard. I want to thank the minority for raising some very important questions. I think that there should be—and I expect—an open mind in making this a good bill.

Mr. CLINGER. I thank the gentleman. I would now recognize the gentlelady from Florida, Mrs. Thurman.

Mrs. THURMAN. I am interested in the process part of this as far as the President goes into an act, one of the 13 appropriation bills, and goes through and makes his line-item vetoes. When we give that back, and we do an up or down vote, is that vote on each individual item, or is it a package?

Mr. CASTLE. It is a package at that point and it is a majority vote at that point.

Mrs. THURMAN. The reason I ask that is that I will disagree. We talk about abuse, and I don't know that anybody would do this, and I certainly can appreciate that they would be taken to task for this, but just for a scenario purpose, you talked about the screw worm, you talked about the ozone layer, those kinds of things, which—

Readers Digest or any one of them will talk about. However, there may be some very important things we have not had an opportunity to—or are used for retaliation or discipline or something of that nature.

Is there a way for us to present any of that where we don't have to take a whole package or we can take part of a package, which then gives us some of that discretion back?

Mr. QUINN. I don't think it is in there now.

Mr. CASTLE. First of all, all this is subject to discussion, and I hope it will be an open process, and you raise an issue that gets into the gray area of which way to go. I am told that one of the existing—there is a rescission aspect to all this now that the Congress could act on, and the Congress tends to ignore it or whatever.

The wisdom of those who have looked at this is that this should be done as a whole or as a package, if you will, in order to preserve the sanctity of it, that if you start getting it broken down, you are going to get all kinds of political deals or whatever it may be, and it is better to keep it as one integrated package and do it that way. You could argue it either way, I understand that.

Mrs. THURMAN. And then maybe a question to the Chairman on the discharge petition. I thought with a discharge petition that it was a 25-day period of time. I am sorry. When we do discharge petitions, was it 25 days, or you had a certain period of time which would not fit that timetable of the 20 days in which you are speaking of?

Mr. CLINGER. You are talking about 20 calendar days, which are 20 legislative days.

Mrs. THURMAN. However, when you mentioned that there was an alternative route for us to take if in fact it got bogged down into a committee, that we could go to a discharge.

Mr. CLINGER. That is right, and obviously there would be a potential conflict, if you didn't get the discharge petition signed within the 20 days.

Mrs. THURMAN. But isn't it a discharge petition that takes over that 20-day period of time that you have to sign it and then there is a period of time in which it sits?

Mr. CLINGER. You are right. There is a time before you can file a discharge petition. That is correct. I think you are right, we would have to reconcile that.

Mrs. THURMAN. I think if we were serious about the issue raised earlier, we would certainly either have to put it in this piece of legislation as versus through the discharge petition as we know it today.

Mr. QUINN. Mr. Chairman, if you don't mind a discussion, Mrs. Thurman, the point that you have a shot at individual rather than a package can be argued either way. I think if it was an item that affected our district or our State, we might want an individual shot.

Would it concern us, or the committee, I guess, that we would put that 20-day period or whatever amount of days we end up with in jeopardy if we try to look at these things individually? I get a little bit concerned that the reason for the package I think in the original intent was to get it in and out of there within 20 days so it doesn't get bogged down, as the excellent point was made before.

If we have a President now or 10 or 5 years from now that really makes use of this thing and you end up with 15 or 20 or 50 items without some further discussion in weeks to come, I would be a little concerned that we might not get it in within the days we have set forth so far.

Mrs. THURMAN. I guess that last year, if I remember correctly, in the recession bill that was passed, there was an ability for Members to get 50 signatures from within the body for that to be looked at, if I am correct on that. There was a way for a Member to show their case before it could be considered.

I am just trying to figure out so that we don't have that abuse on anybody, and that we don't have the attention drawn to those that all of us would agree are not acceptable, but that there are in some cases issues that are of a major concern to any one of us in our districts, and it is not being used for political purposes.

Mr. CASTLE. If I could just comment, if I may, all this is subjective. Obviously you select the number of days, whatever. I think it is selected on a limited basis. Frankly I think if people can override the veto, they could probably ram it through pretty quickly, if I had to guess.

So I am not sure whether going to 30, 40, 60 days would make any difference as far as that is concerned. But I think you get a pretty good idea most of the time when an executive branch is uncomfortable with a provision and you are negotiating from the beginnings in terms of committee work in appropriations to get it in, all the way through to the time when he or she may veto the legislation, so that it will not come as a surprise.

If you have a meritable case, chances are you are going to have a chance to make—I don't think will' you see a lot of Presidents doing this out of whim or political revenge or whatever. It is so politically distasteful, I don't think it is going to happen.

Mrs. THURMAN. I don't disagree, but let me suggest, being a Governor, it is a lot easier to deal with 150 or 160 members of a State legislature than it is 535 and 50 States with 600,000 persons per issue, and a much, much bigger budget. So while I certainly can appreciate your comments, at the same time, I would have to suggest there is a little difference here.

Mr. CASTLE. Sure, I agree.

Mr. CLINGER. The point is very well taken that there needs to be an assurance that a vote will take place on these vetoes. I think that needs to be addressed in the legislation.

At this time, I would recognize my colleague from the Commonwealth of Pennsylvania, Mr. Kanjorski.

Mr. KANJORSKI. Thank you, Mr. Chairman. It seems to me that we are trying to pattern some of the actions in the Federal Government after some of the State governments. Maybe I will address it to the Governor first. In the States that have the line-item veto, they have that by constitutional provision or by legislation.

Mr. CASTLE. I believe most are by constitutional provision. Somebody may know the precise answer. I know almost all of them are by constitutional provision.

Mr. KANJORSKI. It seems most of my time has been taken up by the Federal or unfunded Federal mandates. Yesterday we spent a

great deal of time on it. Next week we are going to have a balanced budget amendment and then we are going to have term limits.

All of these reforms seem to me to line up a significant change of authority of the Government of the United States, moving from what has been traditionally considered legislative authority to now empowering the President. And we are making certain assumptions, it seems to me, that we always act and do the same processes as this House presently operates under.

I haven't had the chance to go back and study the first Congress, the second Congress, or the early Congresses of the United States, but I will suggest that their appropriation process was significantly different from the process used today. I doubt whether they would have 1,000 items that went through.

I see some time off in the future a weak legislature. Congress could empower a Department of Defense that it shall have $350 billion to provide for the adequate defense of the United States, and nothing else, no broken-out schemes. So the President then basically has become a major part of the legislature is discerning where those items should be expended and how. We could probably do all our appropriations within a week and go home and let the President carry on.

What it seems to say to me with this piece of legislation and the other things that we put together is there seems to be a basic distrust for the basic document, the Constitution of the United States. I guess what my question is going to be, will the gentlemen at the table join me in a petition to convene a constitutional convention to do what you really want to do, change the Constitution of the United States, how it presently is used in the United States, and isn't this the honest thing to do it instead of doing what we are doing now, making assumptions that for political purposes Presidents will do the right thing, suspending or sending over to the executive branch some legislative authority which the Founding Fathers, it seems to me, have defined in the Constitution, if we want to change that, shouldn't the people in a convention have the opportunity to make that change?

Mr. CASTLE. Well, I will start, I guess. These are all interesting points and they are all debatable points. There is no black or white here. But I would almost in a debate format argue that a line-item veto perhaps should not be a constitutional provision, it actually is better as a statutory provision. I think it is a constitutional provision in many States because of the supermajority aspects of it, which we have struggled with to get around here, to go through the majority process and reveto and a two-thirds process on a veto of a bill, which I know is cumbersome, I understand that, but it was necessary.

Clearly, I would like to do it with just one two-thirds vote, so therefore a constitutional amendment would be in order to do that. But in all candor, this is not a balanced budget amendment. I am sure the Founding Fathers never even discussed—I am not sure of anything, but I assume they never discussed a line-item veto or even thought about it. Probably nobody in the 19th century thought about it.

Mr. KANJORSKI. Didn't they say that the people's House and the deliberative body of the House should appropriate——

Mr. BLUTE. Will the gentleman yield on that point? I think the issue is that this line-item veto effort is a congressional usurpation of the executive's role in the appropriations process, with the use of omnibus bills, continuing resolutions, budget riders, those are things that are not there at the founding.

And I think they tend to weaken the executive's role in the appropriations process, which is clearly there in the Constitution.

Mr. KANJORSKI. Reclaiming my time, if we are—and I think the gentleman on the other side makes a point, having sat on the majority for many years, I was offended by the fact that, as Mr. Shays pointed out, that very often bills would come to us of 1,000 pages and we were then called upon, because we agree with 95 percent of the appropriation there, to accept 5 percent that were rather noxious to us.

Aren't we throwing out the baby with the bath water? Shouldn't we go back and just change the rules of the House and change the rulings of the Senate, how appropriations bills come, so we get individual votes on these items?

We are not doing that here. What we are doing is basically changing the thrust of the structure of the American Government. If we want to do that—I have watched over the years the whole idea of the balanced budget amendment, all these things, and they may have merit, but I think the merit that they have is that we are trying to change the basic document without changing the basic document.

If we really want to do that, and it is so important, and we are not practical enough on the legislative side or the executive side to function anymore, why don't we throw this option back to the people and have them have a constitutional convention and write another document? We may end up with a parliamentary form of government.

I have a feeling that out there in the land, the elections that are being held, is some sort of idea that people are frustrated and anxious with Government that is not performing its function as they see other governments around the world doing that. I am not sure that I would ever recommend we throw away the American Constitution as it is.

But maybe that is where the proper question lies, that if people are dissatisfied in this country with the document we operate under and that that document does protect the minority rights and other things, that we shouldn't try and change that document by either legislation or little nitpicking amendments.

I would just ask the question for the gentlemen at the table, would they join me in a resolution to call forth a constitutional convention as set forth under the Constitution?

Senator ROTH [presiding]. The time of the gentleman is up. The hour is growing late. So I am going to ask unanimous consent that we move on to the next panel.

Mr. TAYLOR. Mr. Chairman, I am going to object.

Senator ROTH. The objection is heard. I would then ask that we limit questioning to 1 minute. Do we have unanimous consent for that? Without objection, it is so ordered.

Mr. TAYLOR. Thank you, Mr. Chairman. I want to open this up to the panel. I would like this panel to tell me what a B–5, a T

Slam, or a Mark 5 is, all three, and how you would justify to a populist President that two-thirds of the body thought that voting for that was more important than voting to increase health care for senior citizens. If a populist President chose to veto those programs, then I have to get two-thirds to make these things happen. Please don't—no, no. I want the Congressmen to answer the question.

Mr. CASTLE. I would love to answer the question if I understood it. Could you elaborate on——

Mr. TAYLOR. A B–5, a T Slam or a Mark 5 is——

Mr. CASTLE. Could you be specific? I am having trouble following the exact——

Mr. TAYLOR. If the President vetoes these programs, that is how it would come back, vetoing the D5 program, *x* number of dollars. I am vetoing the T Slam program, *x* number of dollars. And I want to use that money to increase health care for senior citizens. Tell me, as a pro-defense Member of Congress, how I get more than two-thirds of the Members to say this is more important?

Mr. CASTLE. First of all, the line-item veto would not include a spending recommendation. He can do that politically.

Mr. TAYLOR. A populist President would.

Mr. CASTLE. He may, I understand that. But I want to make sure we understand it is not in that. And I think, you know, in this day and age, my judgment is that if a President—it is a political matter to some degree. It is just like a President not recommending it to begin with. It is an issue that you, as a pro-defense, as you have been for many years, Congressman, would have to go out and try to advocate.

Senator ROTH. Time has expired.

Mr. TAYLOR. Thank you, Mr. Chairman.

Senator ROTH. If there are no more questions, we will move on to the next panel. Thank you, gentlemen. We appreciate your being here, your patience and willingness to answer questions.

STATEMENT OF ALICE RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Senator ROTH. The next panel is Dr. Rivlin. Dr. Rivlin, it is always a pleasure to welcome you. We would ask if you could to summarize your statement. In any event, your full statement will be included as if read.

Please proceed. Thank you for your patience.

Ms. RIVLIN. Thank you very much, Mr. Chairman. I will submit my full statement for the record and summarize it briefly. I am pleased to appear before this committee and express the administration's strong support for a line-item veto authority that would help the administration in working with the Congress to control unneeded spending and to reduce the Federal deficit.

The President has expressed his support for a line-item veto authority many times, most recently in a letter to the congressional leadership last week. And we commend you and Chairman Clinger for holding these hearings so soon.

We believe this is a matter on which the administration and the Congress can agree quickly and we hope the Congress will enact early in the session so that the President and the Congress will

have an additional tool for fighting special interest spending and waste of the taxpayers' money.

As you know, under current law, the President can request a rescission of discretionary budget authority, but Congress does not have to vote on such a proposed rescission, and often does not. If no vote is taken, the rescission proposal dies.

Line-item veto authority would strengthen the current limited rescission authority, but there are various ways of going about this.

Under S. 4, and H.R. 2, the President could propose rescissions of budget authority in appropriations bills within 20 days of enactment. In S. 4, a rescission could also be proposed in the budget. And in H.R. 2, narrowly targeted tax benefits would be included.

The Congress would have 20 days to act on a bill to disapprove. If this bill passed, it would then be subject to veto. The rescinded spending or targeted tax provision would be permanently canceled if the disapproval bill did not pass.

An alternative version, S. 14, under which the President would send rescissions, including direct spending, also a broader definition of targeted tax provisions, and accompany this rescission with a draft bill to enact the rescission.

A fast track would force a vote in which the Congress would accept or reject the President's bill. In whatever verse, these measures are designed to increase the accountability of both the President and the Congress. The President's accountability would certainly be raised. The President could no longer blame the Congress for giving him the bad choice between accepting wasteful spending or closing down important activities of the Government by vetoing a whole appropriations bill.

The Congress would also be more accountable. It could no longer so easily hide special interest items in more general bills; a specific vote would take place.

Clearly S. 4 and H.R. 2 are stronger. They give the President most new authority because rescission would stand unless overturned by a vote on the bill which the President could then veto.

S. 14 would provide less authority. It would be possible to overturn the rescission by a simple majority in either House. The President prefers the stronger version, but either way, it would enhance his authority and his accountability.

There are questions of how broad the definitions should be. Should just appropriations be included? Should taxes be included? And if so, how defined? Should direct spending be included?

There are questions of whether the authority should be permanent. We believe that it should be.

In conclusion, the administration supports enactment of the strong version of a line-item veto authority. This is an area in which Congress and the President are in basic agreement and where budget process reform can help control wasteful special interest activities.

We want to work with the Congress to pass a well-designed proposal as quickly as possible.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Rivlin follows:]

PREPARED STATEMENT OF ALICE RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. Chairmen, Members of the Committee, thank you for inviting me to offer the Administration's views on line-item veto authority. I am pleased to express the Administration's support for legislation that would enhance the President's authority to cut spending.

As you know, President Clinton has said repeatedly that he favors enactment of item veto legislation. During the 1992 campaign, the President stated that he supports such a tool "to eliminate pork-barrel projects and cut government waste." He repeated his support in the February 17, 1993 document, A Vision of Change for America, and in speeches and letters in the last Congress.

In a letter to the congressional leadership last week, he wrote:

> The line item veto authority will help us cut unnecessary spending and reduce the budget deficit. It is a powerful tool for fighting special interests, who too often are able to win approval of wasteful projects through manipulation of the congressional process, and bury them in massive bills where they are protected from Presidential veteos. It will increase the accountability of government. I want a strong version of the line item veto, one that enables the President to take direct steps to curb wasteful spending. This is clearly an area where both parties can come together in the national interest, and I look forward to working with the Congress to quickly enact this measure.

Let me only add that we comment you, Chairman Clinger and Chairman Roth, for holding these first, early, and joint hearings on this important subject. We believe that the line-item veto is a matter on which the Administration and Congress ca agree quickly. We hope that Congress moves quickly, in a bipartisan manner, to enact this timely and much-needed budgeting reform.

As the President's letter indicates, he supports passage of the strongest version of the line-item veto, one which ensures that he can cut unnecessary spending, reduce the budget deficit, and fight attempts by special interests to fund wasteful projects at taxpayers' expense. The Administration believes that the line-item veto must be broad in scope and become effective as soon as possible.

I would first like to discuss the current rescission process, and the characteristics of item-veto proposals, before turning to a discussion of the principal features of these proposals.

CURRENT LAW AND ITEM VETO PROPOSALS

Under the Impoundment Control Act of 1974, the President can request a rescission of discretionary budget authority, but Congress does not have to vote on it. That is, the current process does not require a vote. If Congress enacts no bill to affirm the President's rescission within 45 legislative days, the proposal is defeated and the President must release any withheld funds.

Line-item veto proposals seek to amend the Impoundment Control Act to expand the very limited authority that the current process provides. Two examples are S. 4, introduced by Majority Leader Dole, Senator McCain, and others, and H.R. 2, introduced by you, Chairman Clinger, and others. Under both S. 4 and H.R. 2, the President could send Congress proposed rescissions of budget authority in appropriations bills within 20 calendar days of a bill's enactment. Under S. 4, the President also could make submissions along with his budget; and under H.R. 2, the President could submit proposals to rescind narrowly-targeted tax benefits.

Congress could get 20 days to act on a bill to disapprove the rescission. Action on a disapproval bill comes with fast-track procedures. In addition, the President would get 10 days to review any disapproval bill passed by Congress, and Congress would get 5 calendar days of session to override any Presidential veto. The budget authority (or targeted tax benefit) is permanently cancelled unless Congress enacts a disapproval bill into law within a total of 35 days provided for congressional passage, presentment to the President, and (if necessary) veto override.

Another proposal is S. 14, introduced by Chairman Domenici and Senator Exon. It is similar in its basic mechanism to the Stenholm-Penny-Kasich substitute to H.R. 4600 that passed the House in the last session. Under S. 14, the President could send Congress proposed cancellations of items of budget authority, direct spending, or targeted tax benefits within 20 days of enactment or with the budget. The President also could begin withholding the funds. The cancellations would be accompanied by a draft bill that would enact them. Fast track procedures would force a vote on the President's draft bill in the House and Senate. The budget item proposed for cancellation could remain withheld until the day after the date on which either House rejected the President's bill.

ANALYSIS OF ITEM VETO PROPOSALS

Basically, the line item veto is designed to increase the accountability of both branches by allowing the President to pare back—and force a vote on—budget items that would otherwise remain embedded in omnibus bills. Line item veto authority surely would raise the President's accountability on spending: A President could not escape responsibility for spending simply by blaming Congress for making him choose between (1) accepting wasteful spending or (2) shutting down parts of government by vetoing an entire appropriation bill. This authority would let the President recommend spending for elimination, and convince a majority of Congress to accept the recommendation.

The line item veto also will increase Congress' ability to review individual spending programs. As we all know, the fact that a program is included in a larger appropriations bill does not always mean that a majority of Congress actively approved the program. Several of the regular appropriations bills now exceed $60 billion each and include hundreds of items. Requiring a second vote on certain items is a reasonable response to the realities of the legislative tool for the President and Congress—at a time when each branch would find new tools to control the budget particularly helpful.

The line-item veto bills would require some congressional action to defeat a rescission, though they differ on the nature of that action. Bills such as S. 4 and H.R. 2 (and the Michel/Solomon substitute to H.R. 4600, which the House voted on last year) give the President the most new authority, providing that Presidential proposals stand unless both Houses pass a bill to overturn them and the bill is enacted. Such bills as S. 14 and the substitute for H.R. 4600 that the House passed last year provide less new authority. Under these versions, a simple majority in either chamber could reject the rescission, simply by voting against the bill.

But under all versions, Congress finally will have to vote on rescissions. The authors of special interest provisions tucked away in spending bills will have to defend them, and a project or projects would go forward only if they survived a vote. The proposals would shift the burden from proponents of a rescission to opponents.

Currently, rescissions apply only to discretionary budget authority provided in appropriations bills. Some proposals would apply it more broadly, to direct spending and targeted tax breaks. At its broadest, line item veto authority would apply to any budget items that increase the deficit on the spending or revenue sides. Form the standpoint of controlling the deficit, that would be the most effective approach.

S. 14 calls for cancelling items in appropriations bills, items of direct spending (i.e., entitlements), or any targeted tax benefit. S.14 defines the term "targeted tax benefit" quite broadly. On the other hand, H.R.2 would apply to budget authority and "targeted tax benefits," but would define that term narrowly to mean a tax provision benefitting 5 or fewer taxpayers. S. 4 would apply only to budget authority provided in appropriations bills, just as the existing rescission authority does.

The problem of special interest provisions tucked away in large bills is not confined to appropriations; obviously, they can arise in huge tax measures. In this regard, the authority to veto a special interest tax provision only if it applies to five or fewer taxpayers would provide little help. A broader category of tax items would complement the application of a line-item veto to all items of budget authority.

Some item veto bills would apply such authority only for a limited period. For example, S. 14 would apply only through September 1998. We believe that such authority should apply permanently.

And finally, because we don't know when Congress might enact the new authority, we believe that it should apply to any budget items enacted since the start of the 104th Congress. We hope that Congress moves quickly enough to make this last point a moot one.

CONCLUSION

The President supports enactment of the strongest version of line-item veto authority. This is an area where the President and Congress agree, and where strong reform can make a real difference in how government operates. We want to work with the Committees and move forward quickly with a strong, well-designed and sensible proposal.

I'll be happy to answer any questions you may have.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. WILLIAM V. ROTH, JR., TO ALICE M. RIVLIN

Question 1. Ms. Rivlin, under the Congressional Budget and Impoundment Control Act of 1974, "tax expenditures" are defined as reductions in individual and corporate income tax liabilities that result from special tax provisions or regulations that provide tax benefits to particular taxpayers. These special tax provisions can take the form of exclusions, credits, deductions, preferential tax rates, or deferrals of tax liability. Could you tell me, would the "personal exemption" be a "tax expenditure?" Would the "standard deduction" be a tax expenditure? What about a reduction in tax rates, when would that be a tax expenditure? How about the earned income tax credit?

This definition says "income taxes." What about excise taxes? For example, there is an exclusion from certain excise taxes on alcohol under some conditions. Are those tax expenditures? Should they be?

Do you think that you and I would agree on everything that might, or might not be a "tax expenditure" under this definition? The Joint Committee on Taxation currently publishes an annual report on Federal tax expenditures. It states that the committee uses its "judgment" in distinguishing between those income tax provisions that can be viewed as a part of "normal tax law" and those special provisions that result in "tax expenditures." Whose judgment should we rely on in determining what a "tax expenditure" is, if such expenditures are to be subject to the line item veto?

Answer. To fulfill the retirements of the 1974 Budget Act to produce a list of tax expenditures, Treasury and the Joint Committee on Taxation (JCT) have each produced a working definition of the term "tax expenditure". These definitions have been modified over time as changes in tax law have forced both Agencies to reconsider treatment of particular provisions and to determine which new provisions should be, classified as tax expenditures. Although Treasury and the JCT have exercised judgement in developing and refining these definitions, they have done so within the relatively narrow confines of the Budget Act.

These definitions were developed to produce lists that are used strictly for informational purposes and do not affect Federal policy directly. If Congress enacts legislation to allow line-item veto of tax expenditures, it should consider carefully what refinements in the definition of the term tax expenditure it should develop for purposes of allowing a line-item veto.

The personal exemption, standard deduction, and tax rate schedule have never been considered tax expenditures, because they apply uniformly to all taxpayers. (The graduated nature of the rate schedule has not been considered a tax expenditure because it is affected only by the generic condition of the taxpayer's income, not by any particular situation of the taxpayer.) The earned income tax credit is considered a tax expenditure, because it is available only to taxpayers who receive income from labor and meet certain family composition requirements at the same time.

The law defines tax expenditures with reference to the income tax. While they have no legal standing, there have been scholarly efforts to apply the legal definition to other taxes. There certainly are provisions of other taxes that do provide narrowly defined tax relief.

Perhaps because the tax expenditure concept has been used only for informational poses thus far, there has never been a need to determine whose judgment would take precedence. Because of the specificity of the law, the JCT and Treasury lists are quite similar, although they do differ in several significant ways.

Question 2. As you know, the President has said for some time that he would like to have the line item veto. If the President is given the authority to line item veto "tax expenditures" then that will mean that he can use this new power to stop tax reductions from becoming law. However, he would not be able to stop tax increases from becoming law under this authority. This will create a "bias" toward tax increases in the law. Does the President support a bias in the law to increase taxes? Do you think he intended to include in the line item veto the authority to increase taxes that Congress has chosen to reduce? Do you think the President should have the authority to line item veto tax increases, as well as tax expenditures?

Answer. The line-item veto proposals under consideration by the Congress would give the President the authority to reduce spending, but not to increase spending. Thus, if the President had the authority to prevent tax reductions but not tax increases, there would be a logical symmetry; the law would allow the President to take only those actions that would reduce the deficit, and thus would create a "bias" toward deficit reduction. Presumably, that "bias" is intended by virtually all advocates of the line-item veto. The President has said that he would prefer a broad line-

item veto provision. The line-item veto has always been associated with reducing the deficit, not with a general power of the President to item-veto any provisions in whatever law he might choose. Whether the President should have such a broader authority raises wholly different questions.

Question 3. I believe that most Americans think that great scrutiny should be given to how their precious tax dollars are spent. I believe that is why most Americans support extending the line-item veto to the President for spending bills. The public is especially outraged at some parochial spending by powerful members of Congress in their own states and districts, that may not truly be worthy under close scrutiny.

I am also aware of some cases where special tax benefits have been given to a few taxpayers, however, this practice has largely come to an end. Perhaps some very targeted tax benefits are not worthy of becoming law and the President should be able to veto them. However, if the Congress were to enact a capital gains reduction, or pass individual retirement accounts, I do not think the public will feel the President should he able to block those reductions in their taxes. Do you think that there is a difference in the taxpayers' view between the right of the President to stop unnecessary spending, and the right of the President to stop tax cuts from becoming law?

Answer. It is likely that some people would oppose targeted spending projects which benefit other States or districts. It is also likely, however, that, many people would want to protect targeted spending projects in their States or districts—and would see those projects as constructive and worthy of Federal support. That is why such projects are undertaken in the first place. The point of a line-item veto is to put in place a hurdle—not an iron-clad barrier—that such projects must cross.

The public reaction to targeted tax benefits is probably similar. People like tax cuts that benefit them, but tax cutting that benefits only others is often a different matter. A line-item veto puts in place a hurdle—not an iron-clad barrier—that tax cuts must cross. If such proposals have strong support in the Congress, they will become law, regardless of the line-item veto—or the current veto power, for that matter.

Question 4. Before the 1974 Budget Act, there were impoundment rights held by the President that had some similarities to the line item veto. These rights did not extend to "tax expenditures." Can you tell me why not? Do you think tax expenditures should be included in any line item veto? If so, why? If not, why not?

Answer. Any conclusions on the impoundment rights of the President prior to the 1974 Budget Act would be speculative in the extreme, because that power—even with respect to spending—was subject to numerous court cases and has never finally been resolved. The Administration's position is that the President should have a broad line-item veto authority, to help to reduce the budget deficit.

Question 5. Under the "tax expenditure" definition from the 1974 Budget Act, it states that a tax expenditure is a "revenue loss . . . resulting for special exclusions, exemptions or deductions from gross income. The assumption here seems to be that we do not have a perfect income tax because Congress has determined through public policy to reduce the people's tax burden.

My question is, if a tax expenditure requires a "revenue loss," to is going to be the keeper of the "revenue loss" scoreboard? For example, I would argue that although enacting the President's IRA plan may reduce income tax liability for millions of taxpayers, over time it will result in more growth, a higher rate of savings and productivity and a better standard of living—ultimately giving the government more revenue not less. What happens if the Congressional Budget Office decides that a reduction in capital gains taxes results in increased revenue for the government, but the Office of Management and Budget says it loses revenue? Can the President veto the capital gains tax cut under Senator Domenici's bill? What about the luxury tax. If President Bush had decided that tax resulted in less, and not more revenue for the Federal government, under Senator Domenici's bill could he have vetoed that provision? Are you willing to give all future Presidents the authority to veto tax expenditures, as well as be the scorekeeper on all of these decisions?

Answer. I would take issue with your description of the assumption behind the tax expenditure concept. Designation of a legal provision as a tax expenditure does not assume ". . . that we do not have a perfect income tax because congress has determined through public policy to reduce the people's tax burden." Tax expenditures are not assumed to be bad, nor does the concept assume that the Federal government has first claim on all of the taxpayers' income. The identification of a tax expenditure merely indicates that it allows some taxpayers to pay less tax than others with equal incomes because of some particular condition such as the sources of their income (e.g., the earned income tax credit) or the uses to which they put, their income (e.g., charitable contributions). The longevity of the earned income tax credit

and the deduction for charitable contributions is a clear indication that those provisions are widely accepted as appropriate, even though they are designated as tax expenditures.

Basically, the question of who would decide whether a particular tax provision would be subject to a line-item veto would be answered by the law that the Congress chooses to pass. Under the Supreme Court's decision in *Bowsher* v. *Synar*, on the original Gramm-Rudman law, the President, rather than the Congress, would be the scorekeeper.

Question 6. Under the rules adopted by the Joint Tax Committee for determining what a "tax expenditure" is, it is said that they use their "judgment" to determine what a "normal" income tax is. But what if the baseline is already flawed? For example, some economists look to the "tax expenditure" cost of an IRA but ignore the fact that it operates to neutralize the tax code's bias against savings. So, if you isolate the IRA you may think it is a tax expenditure, but if you look at the big picture, you may decide that policymakers should first look to the bias already in the system. To do otherwise could doom very good ideas, including the IRA and even Senator Domenici's idea for exempting savings from the tax law.

Answer. The current tax expenditure definition was made in reference to our current income tax, not a hypothetical consumption tax. Under the income tax, income from capital is subject to tax; under a consumption tax, it is not. Therefore, provisions to reduce the tax on income from capital do fit under the definition of tax expenditures under our current tax system.

With reference to policy choices, however, the scoring requirement for provisions such as the IRA or Senator Nunn and Senator Domenici's expenditure tax is in complete harmony with the purpose of deficit reduction. Budget deficits hurt growth because they reduce national savings, which is the resource from which business can invest. The objective of the Administration's IRA proposal and the Nunn-Domenici expenditure tax is to increase national saving in the long run. However, if either proposal were enacted in a fashion that reduced national caving in the short run, before they had their ultimate effect, they would defeat their own purpose. Thus, requiring that such policies be fully paid for within the budget window, rather than allowing highly speculative estimates of very long-term benefits to be dissipated in the near term, is essential for these policies to achieve their own goals.

Finally, in a policy-making sense, the scorekeeping rules do not "doom" these proposals; they merely require that they be paid for.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN GLENN TO ALICE RIVLIN

I am pleased to respond, for the record, to questions submitted by Senator Glenn, regarding the Administration's position on the line-item veto.

Senator Glenn asked whether the Administration favors the enhanced rescission approach as applied under S. 4 or the edited rescission approach of S. 14. As I have testified, the Administration generally favors legislation which would enhance the President's ability to eliminate wasteful spending, but prefers the stronger approach which permits rescissions to take effect, absent congressional disapproval.

The Administration favors a broad application of the rescission power. As was noted at the Committee's hearing, there are procedural and legal complexities—particularly with regard to tax expenditures and direct spending—and I offer the technical expertise of OMB staff as you consider these issues.

With regard to tax expenditures, the Senator asked how the Administration would propose to define "targeted tax benefits" and whether the H.R. 2 limitation to "five or fewer" taxpayers would have any practical effect. The Administration has not proposed a specific definition for targeted tax benefits, but favors a definition that would cover the range of special interest tax legislation. The House Floor amendment to H.R. 2, which broadened the definition or targeted tax benefits to "100 or fewer" taxpayers, was a marginal improvement over the committee reported version, but the Administration would prefer broader coverage of tax expenditures.

The Senator asked for the Administration's position on sunsetting the new rescission power. The Administration prefers a permanent enactment of the new authority.

Finally, Senator Glenn asked how frequently the item veto power might have been used bad it been available during the last budget year. Each appropriation bill, and each major tax bill of recent years has contained provisions that would have been subject to this new authority. Since the line-item veto authority did not exist, the Administration was limited to signing these measures or vetoing entire bills.

Had the line-item veto authority been in effect, the President would have been able to narrowly focus a veto on the special interest provisions.

Senator ROTH. I thank you for your testimony. I am particularly pleased that the President is supportive of the kind of action under consideration. And we look forward to working with you.

I would like if we can get unanimous consent, because of the lateness of the hour, to limit questions to 3 minutes. Any objection?

Mr. HORN. Reserving the right to object, Mr. Chairman.

Mrs. THURMAN. Reserve the right to object, Mr. Chairman.

Mr. HORN. I would like to ask how you interpret that 3 minutes. I have a series of questions I want to ask Dr. Rivlin. Three minutes is just too short. I have restrained myself on the last panel.

Senator ROTH. We can of course extend time, if requested.

Mr. HORN. I am going to have to object. I don't want to be limited to 3 minutes.

Senator ROTH. We will proceed then on the basis of 5 minutes. Representative from Massachusetts.

Mr. BLUTE. Thank you, Mr. Chairman. Thank you for your testimony. I think it is very good news that President Clinton is going to strongly support this effort in the Congress this year.

I believe that with what has happened out there in the land, that if we can't do this this year, we will have missed maybe our last opportunity to give the President, the executive, this fiscal tool. Later we will hear from Governor Weld, who I know has used it quite well in the State of Massachusetts, facing a tremendous budget deficit when he first arrived in office.

I believe it will be helpful to President Clinton and any future chief executive to discipline the budget process. I wonder if you would comment on the issue relating to the balance of powers and whether the President believes that him having a line-item veto or you believe that it would shift the balance of power in our Constitution too much toward the executive.

Ms. RIVLIN. I think the general view is that it would be a shift of power slightly toward the President. But I think the main point is that it would make the whole system work better. As I said in my testimony, it would make both the President and the Congress more accountable to the people.

Mr. BLUTE. Thank you, Mr. Chairman.

Senator ROTH. Anybody on the right side have questions? The distinguished Congresswoman from Massachusetts.

Mrs. THURMAN. Actually from Florida, but that is OK.

The research that has been done, and I have got something that I guess was in the Congressional Digest, printed in February 1993, on when the line-item veto had been used, and they said the times it was used by the States reveals it has been used to promote the Governors' partisan political interests and spending priorities as much as to cut spending. These were the conclusions of a survey of legislative budget officers in 45 of the States as well as a study of what happened in the State of Wisconsin.

Why do you think the experience under this bill will be any different?

Ms. RIVLIN. I am not familiar with that survey, but I think the main reason for hoping it would not be used in an extremely par-

tisan way would be simply the possibility that if it were, it could be taken away again, and the public scrutiny.

A President would not want to be seen, I would think, as misusing this power. This President and other Presidents have asked for this power in the name of improving budgeting and accountability and saving the taxpayers' money.

And I don't think a President would want to be seen as doing otherwise.

Mrs. THURMAN. Let me go back to a question I asked the panel before you specifically about that, where in a rescission bill where you had a whole bunch of things that people agreed on not to be there, and then there are a few in there, have you talked about that as to how that would work for Congress and how we would actually get to those that—they talked about the screw worm and the ozone layer, those kinds of things, but yet there may be some very good projects in there that are of extreme interest and concern to their constituency that are not—of course, some people might think they were important to their own districts, but how we get to that in a process.

Ms. RIVLIN. I think that would be the kind of process for each House to work out in its own rules. No, we have not talked about that.

Mrs. THURMAN. I would hope you all would, because we did hear from the last panel that they agreed too that might be something we needed to look at. I would hope we do have further discussion on that.

Let me ask you also how the line-item veto authority might work given the fact that the President and the Congress have already agreed to cap discretionary spending in the Budget Enforcement Act. If the spending caps were not already in place, I could see perhaps greater justification for the line-item veto authority.

Isn't the administration's intention to use the line-item veto authority to bring about even greater cuts in discretionary spending than the Budget Enforcement Act would require?

Ms. RIVLIN. I think in answer to your first question, probably if we didn't have the Budget Enforcement Act, we would be much more worried even than we are about wasteful spending and the case would be even stronger. But I wouldn't want to predict how the authority would be used precisely. It would be used in conjunction with all the rules that are already on the books in the Budget Enforcement Act.

But it would give the President an additional tool to signal that some projects or parts of an appropriations bill seem to him unnecessary, not in the public interest, or wasteful.

Mrs. THURMAN. Maybe as a follow-up to what Representative Taylor has talked about, the concern would be is the President is likely to bargain for spending priorities of their own as they are to bargain for fiscal restraint. What is your reaction it that concern?

Ms. RIVLIN. One could get into endless speculation, I think, on how different Presidents might use an additional tool. At the moment is how can we restrain spending best, and this would simply help the President to do that.

Senator ROTH. Thank you, Mrs. Thurman. Next we have Representative Horn from California.

Mr. HORN. Thank you very much, Mr. Chairman. Director, it is a pleasure to have you here. I want to pursue the budget review process that might relate when this particular piece of legislation is passed.

Let me ask you, do you sit in on any of the OMB reviews of agency budgets at the present time?

Ms. RIVLIN. I sit in on all of them. Well, I mean, there are various levels, but I review all agency budgets.

Mr. HORN. I am thinking of the basic budget examiner review process within OMB. Is there an earlier level where they try and get the wheat and chaff separated and you come in on the key policy items?

Ms. RIVLIN. Yes.

Mr. HORN. From that review process, then, do you recommend when an appropriations bill now passes without this veto authority, do you recommend to the President formally whether he should sign or not sign and give him sort of a summary of what some people would call pork barrel projects or whatever that might be in that bill, or since he can't do anything about it, do you just ignore that at the present time?

Ms. RIVLIN. We write a memorandum to the President on each appropriations bill after consulting with the affected agency or agencies recommending that he sign it or veto it. This President has not vetoed one yet, so I haven't been through that experience.

But we also note things that he might not like to have in the bill, some of which might be mentioned in his signing statement, I am signing this bill, but I am unhappy about some provision of it.

Mr. HORN. What do you foresee as the new process? Would it differ from what the current process is when this legislation passes? Would it make your job much more difficult to ferret out every sentence and semicolon in this bill and what it means?

Ms. RIVLIN. I think it would certainly increase our workload, because we would have to look more carefully even than we do for things that might be candidates for an item veto.

Mr. HORN. But at this point there has been no discussion of how that process would work within the agency in anticipation of this legislation passing?

Ms. RIVLIN. No, I don't think it would be a very different process, but the focus might shift somewhat from what we already have, as you know, examiners who work with the agencies and know a lot about what is in each individual appropriations bill.

Mr. HORN. We have heard a lot of concern by Members on both sides about the fear of some President some day, somewhere might abuse the power. Last year I put in, or in 1993 I put in H.R. 1099, which would do two things.

One, it would give the Congress the authority to freeze, in a particular situation such as this current fiscal crisis we are in, where we have a $5 trillion national debt and a $200 billion plus annual deficit.

But more than that, it gives the President the authority to move money around within certain guidelines that would be established by Congress so that if the freeze, affected one agency too much in the executive's mind, that could be adjusted by moving funds from

another agency, within a margin and firewall, if you will, here and there, set by the Congress in advance.

When I asked OMB for their views on it, and I might say I had a fairly good number of cosponsors, including the current Speaker and the current majority leader, and most of the rest of the leadership, and I have talked about it with the President, he seemed to like the idea.

But when I asked OMB for a response, I must say I regarded the response less than serious, and as a former college professor, I would give them about a D plus on the response.

I would appreciate it——

Ms. RIVLIN. Did I sign it?

Mr. HORN. No, you didn't sign it, I don't believe. But even if you had, I wouldn't tell you that you had signed it.

Ms. RIVLIN. I am going to check.

Mr. HORN. I would like you to go back and take a look at it, because I am not done with that approach yet. I think it is the only sensible one to get this fiscal crisis nailed down.

And I would like you to seriously look at it. I would be glad to work with your people as to what are the possible criticisms, what are their concerns, if any. But I thought it was rather interesting that a number of Republicans said we would like the President to have the tools that an executive in a university has, that an executive in a business has, when confirmed by the board of directors, and that is to solve the problem.

Right now the President of the United States cannot have that accountability, or that responsibility, or that authority. And I think while this is a step in the right direction, let's face it, it is a piddling amount when you add up all the so-called pork barrels compared to many other excesses that occur in the budget that don't appear to be a pork barrel.

So I would certainly welcome your thoughts on that.

Ms. RIVLIN. I will certainly check on our nonserious response and make sure we give you a serious one. What you are proposing is, as you note, a much more drastic shift of power to the President than a line-item veto. And I would agree with you that the line-item veto is a more modest change, and one which I believe and the President believes would be very useful.

I do not think, however, it will solve the problems of the budget deficit and the size of spending generally.

Mr. HORN. Thank you.

Senator ROTH. Representative Spratt from South Carolina.

Mr. SPRATT. Thank you, Mr. Chairman. Let me follow up on that quickly. You have watched the budget for many years at CBO and now OMB. I have been a sponsor of legislation that would expand the President's authority to make more rescissions and get action on those rescission, but I never tried to hype or oversell its potential.

Based on your experience in looking at budgets and seeing things which you regarded as wasteful or unwarranted, how much do you think is there wasteful and unwarranted that a President could realistically glean out of a bill, how much can we reduce the deficit if the President has this scalpel, this instrument in his control?

Ms. RIVLIN. I would think that it would be a relatively small proportion of discretionary spending that would be a candidate for a line-item veto, because I would hope that the President would use that tool in very clear instances of wasteful spending or spending that was in some sense pork barrel, that is a hard term to define, not in a broader sense just to use it as a way of disagreeing with the Congress.

Mr. SPRATT. I have some questions about the constitutionality of this line-item veto proposal because I think it allows the President acting by himself unilaterally to repeal selectively laws that we pass. I think the court has said you can't do that except by Congress and the President acting together. We will have to adopt an act to undo what we have done by previous legislation.

I don't think anybody can say, even CRS or anyone authoritatively and unequivocally, that this is constitutional. It is possible if we do enact it, there will be a constitutional test brought and there could be an injunction until it is clear whether or not this is constitutional, which could take some time.

What would you—how would you respond to the idea of passing both pieces of legislation, one to have the expedited or enhanced rescission authority available in case the other authority is enjoined temporarily or ultimately found unconstitutional? And second, possibly, to give you a longer span of time, maybe 90 days in which to use the other authority to send up rescission messages and be granted the assurance of an immediate vote?

Ms. RIVLIN. That is an interesting idea, and I hadn't thought about it, but it seems definitely worth exploring.

Mr. SPRATT. Well, if we could get your response to that and your thoughts about it, I think it might be something worth pursuing as well as exploring.

Thank you very much.

Senator ROTH. The Chair pointed out we will keep the record open 10 days for additional questions and answers. So if practical, it would be appreciated if you could answer Representative Spratt's question.

Next we would call upon Representative Moran of Virginia.

Mr. MORAN. Thank you, Mr. Chairman. Mr. Chairman, I guess where we stand on issues like this is a reflection of where we have sat in our prior lives before coming to the Congress. I was talking with Mike Castle, Delaware's entire congressional delegation, out in the hallway, who had been Governor of Delaware. Of course, he enjoys those executive prerogatives.

I didn't feel a need for it when I was mayor, but I worked in the Johnson and the Nixon administrations, and then was on the Senate appropriations staff during the Ford and Carter administrations. There is no doubt in my mind that during the Ford and Carter administrations, that this tool would have been used in a relatively constructive, responsible fashion.

During the Johnson administration, it would have been a tool for mischief. It would have been abused to a great extent. And during the Nixon administration, I think to a significant extent. While we look at these things in a way that we would if we were in a civics class, perhaps, the reality is that when you mess with the separation of powers that was originally envisioned by our founders in

writing the Constitution, they recognized that it was a terribly important aspect of tension between the three branches of Government.

When a President has what are essentially legislative powers to pick and choose what Members should be able to get their specific projects and in fact to tie a vote on one issue to another, in other words, on something the President wants, if you don't vote for him, he would have the ability to line item out your specific project, and there won't be enough Members to protect you.

Now, that worries me. I think in fact there are a number of these issues that if they are legislated now, we will live to regret them in the future. But with regard to separation of powers, we need also to think about the judicial branch.

And the judicial branch will not have even those nominal safeguards that are in this legislation for the legislative branch to correct any mischief by overturning the President's line-item veto.

They would have to work through the legislative branch, who will not have the kind of vested interest, they will certainly not be understanding of the issue.

How would you propose, Mrs. Rivlin, to rectify the threat to the judiciary's independence that this represents, since the judiciary does have to conduct itself on the basis of appropriations and projects that ultimately have to be authorized and appropriated by the legislative branch?

How would you propose that we rectify this threat to that separation of powers?

Ms. RIVLIN. Well, on the specific of the judiciary, I don't know. I would I guess not give as great weight as you would to the potential for abuse by a President. I would think a President who did that would be very quickly called to account.

But I suppose one could exempt the judiciary in the law.

Mr. MORAN. Would you recommend that?

Ms. RIVLIN. Let me think about that. I am not sure I would.

Mr. MORAN. You are not sure that the appropriations for the Supreme Court, for the administrative courts, for the various functions of the judiciary branch that are wholly dependent on those appropriations—they are not substantial appropriations, but it certainly gives the power of the purse over the judiciary to the executive branch.

The judiciary could not function independently if it was dependent upon the executive branch's prerogatives as to whether or not and to what extent to fund it.

But I would like for you, since you are not certain——

Ms. RIVLIN. As you know, the executive now forwards the judiciary's requests, and without that amendment——

Mr. MORAN. I know they do, but there is no requirement that they do. And this line-item veto does apply to the judiciary branch.

Ms. RIVLIN. It is an interesting point.

Mr. MORAN. Thank you. There are a number of other interesting points, but I am at the disadvantage of having been over at another hearing, and I suspect that the best points would have already been made, since there is any number of colleagues on both sides that I trust would have considered them and raised them. So I don't want to be repetitive.

So I will pass to the next questioner, Mr. Chairman.

Senator ROTH. I thank the Representative. I would like to commend him for raising I think some very important questions with respect to the judiciary. We will have a representative of the judiciary, I believe, Judge Merritt, testifying later.

Mr. MORAN. Thank you, Chairman Roth.

Senator ROTH. Mrs. Thurman?

Mrs. THURMAN. Representative Moran, I don't know if you were here, but we also will leave the record open for 10 days so that if there are questions or issues not raised, we would be given that opportunity to raise those and get answers to them.

Senator ROTH. Next I would call upon Representative Mascara of Pennsylvania.

Mr. MASCARA. Thank you, Mr. Chairman. I apologize for not being here, but I did have the privilege of meeting with the President this morning, although we did not talk specifically about the Presidential line-item veto, H.R. 2, my statements more were, given the questions of the constitutionality of the bill, and given that you said earlier that you didn't see any—although you were not able to quantify the material effect on the budget deficit as a result of the President having the ability to engage in a line-item veto, and given the safeguards in H.R. 2, the President has 20 days to act after an appropriation, Congress can repeal or cancel within 20 days, and then the President has 10 days to override their veto.

I was just wondering whether this is a lot to do about nothing or whether this is a serious piece of legislation given these particular nuances in this bill.

Ms. RIVLIN. I think it is a serious piece of legislation, and an important one, and would give, as I said earlier, the President an additional tool to identify wasteful spending or special interest spending or things not in the general interest, and subject that to an explicit vote.

At the same time, I don't believe that this would be a large dollar figure. It is likely to be a relatively small percentage of total spending.

But that doesn't mean it isn't posh. A small percentage of Federal spending is a lot of bucks. If we can find another tool for protecting the country and the taxpayer from wasteful spending, and identifying it, getting it up to scrutiny, it is a very useful thing.

Mr. MASCARA. Would you or the President have liked to have seen some other types of line-item vetoes with more teeth in it for the President? Are you satisfied with this particular bill? Is the President satisfied? I understand he supports the line-item veto.

Ms. RIVLIN. Yes, and we support it in its stronger version. But either version would be better than the relatively weak rescission authority that the President has now, which need not ever result in a vote.

Mr. MASCARA. Thank you, Ms. Rivlin.

Senator ROTH. If there are no further questions, Ms. Rivlin, I have a number, but because of the lateness of the hour, I will submit mine to you in writing. And again, I want to express my appreciation for your being here today, and particularly for the fact that the President supports the concept. We look forward to working with you.

Ms. RIVLIN. Thank you very much, Mr. Chairman.

STATEMENT OF ROBERT D. REISCHAUER, DIRECTOR, CONGRESSIONAL BUDGET OFFICE

Senator ROTH. I would now call Robert Reischauer, the Director of the Congressional Budget Office.

Mr. REISCHAUER. I appreciate the opportunity to be here before you today. Let me try to be very brief and just do two things with my summary statement. One is to make a comparison between the three basic approaches to providing a line-item veto, because I think there has been a certain degree of confusion in the terminology that has been used here this morning, and then second to discuss two of the important issues that I think are raised by these proposals that are before you.

First, an item veto can be provided by a constitutional amendment that gives the President the authority to veto particular portions of appropriation bills. The President's flexibility would be limited by the way in which the Congress structured the appropriation bills.

If the bills contained many separate accounts, the President could focus on those that he thought were excessive and zero them out. On the other hand, if it contained only a few aggregate or lump sum amounts, he would be faced with the dilemma of approving or vetoing the entire amount because he would not have the option of simply reducing the amount that was in the account.

Those items that were vetoed by the President could only be restored by a vote of two-thirds of both Houses of the Congress.

The second approach is called expedited rescission. This is a statutory approach that would do no more than strengthen the rescission procedures that were established by the Impoundment Act of 1974. Under those procedures, the President can propose a rescission or a cancellation of appropriated funds, and the Congress can approve the President's proposals within a 45-day period.

Expedited rescission simply requires that the Congress vote on the President's rescission proposal, something that is not currently required. This would ensure that the President's proposals were not ignored as sometimes has been the case in the past.

The third approach to an item veto is called enhanced rescission, and much of the discussion here has been about enhanced rescission, even though the terminology of expedited and enhanced has been a little fuzzy.

Like expedited rescission, it is a statutory approach. But it represents a much greater shift of power from the legislative to the executive branch.

Under enhanced rescission, Presidential rescission proposals automatically take effect unless the Congress passes a rescission disapproval bill. If the Congress passes such a bill, presumably the President will veto it.

A vote of two-thirds of the Members of both Houses would be required to override this veto. Therefore, if the President can muster the support of one-third of the Members plus one of either House, he has the power to cancel or reduce any item under enhanced rescission.

There also is the possibility, raised in some of the questions, that you might need even less in the way of congressional support. All you would have to do is find the majority of the committee that would be required to report out that rescission disapproval bill in order to stymie the will of, let's say, two-thirds of the Members of Congress.

In effect, enhanced rescission provides the President greater potential power than even a constitutional item veto, because he would not be constrained by the way in which the Congress structures its appropriation bills. He could reach within a line item to cut a specified project or to reduce budget authority that is provided for that line item.

This is an important distinction, as you know, because projects are often specified in report language, not in appropriation bills, and enhanced rescission authority would enable the President to veto at that level of detail, whether it were a constitutional amendment or not.

Let me now turn to two issues raised by line-item veto proposals. The first of these is the likely effect of these proposals on spending and not in the deficit.

Many have argued here that some form of item veto would be a powerful tool of spending and the deficit. I urge you to be very skeptical about such claims.

Evidence from the States, 43 of which have some form of item veto, suggests that the item veto has not been used primarily to hold down overall State spending, but rather it has been used by Governors to substitute their priorities for those of the legislatures.

If a President cared more about reducing spending in the deficit and not in pursuing his own spending priorities, an item veto at the Federal level could decrease spending and it could reduce the deficit. But history suggests that Presidents who support reductions in one area in the budget often favor increases in other areas. They would then be expected to use the item veto to free up resources provided in appropriation bills and redirect them to spending on their own priorities.

The impact of strengthened rescission authority on spending and the deficit is also likely to be limited as long as the authority is restricted to appropriation bills. This is because aggregate discretionary spending has been constrained by the budget authority and outlay caps that were established by the Budget Enforcement Act.

These caps have kept discretionary spending roughly constant in nominal terms and we have seen real spending and spending as a percent of GDP decline. It is expected that that will be the case all the way through 1998, which is as long as these caps currently run.

Even if the reach of the rescission authority was extended to mandatory programs, as is done in S. 14, its potential to reduce the deficit would be limited, because the growth we expect in entitlement spending results from existing provisions of law, not new legislation, which would be the only area that the rescission authority would affect.

Furthermore, as my prepared statement goes into some detail on, it would be quite difficult to develop workable mechanisms for rescissions in the direct spending area or in the tax area.

A second issue worth considering is the impact that an item veto could have on the Congress' workload. Under expedited rescission, the President would have the authority to force votes on individual items. Even under fast-track or expedited procedures, this could eat up a whole lot of floor time.

Under enhanced rescission, this would not necessarily be the case, but only if the Congress was content to accept the President's spending priorities rather than to defend its own.

Congresswoman Collins raised the issue that she would want a guarantee for a vote even under enhanced rescission, and if that were the case, then this danger would also arise under the enhanced rescission proposal.

Let me conclude by reiterating that the item veto is most appropriately viewed as a shift in budgetary power from the legislative to the executive branch. Enhanced rescission would shift a great deal of power, more than would be implied by the traditional constitutional line-item veto. Expedited rescission would represent a much more modest shift of power.

The item veto would only be a tool for fiscal restraint if the President placed top priority on reducing spending and the deficit. Perversely, under certain circumstances such as those that would pertain if the Constitution required a balanced budget, an item veto might even act to undermine the Congress' fiscal responsibility.

Knowing that the President would have to ensure that the budget achieved balance to adhere to the Constitution, the Congress might be tempted to enact appropriation bills in excess of the amounts it knows to be affordable, and then leave it to the President to use the item veto to make the difficult and politically painful cuts that would be required to adhere to the Constitution.

On that somewhat depressing and possibly cynical note, let me stop, and I will be happy to answer any questions that you might have.

[The prepared statement of Mr. Reischauer follows:]

PREPARED STATEMENT OF ROBERT D. REISCHAUER, DIRECTOR, CONGRESSIONAL BUDGET OFFICE

Chairman Roth, Chairman Clinger, and Members of the Committee, I am pleased to submit this statement, offering the views of the Congressional Budget Office (CBO) concerning proposals to grant the President the authority to target individual items in legislation for elimination or reduction. My statement will cover two subjects:

First, I will review the two most prominent statutory approaches to giving the President the item veto—enhanced and expedited rescission—discussing the changes that each would represent to current procedures.

Second, I will address three of the issues that these proposals raise—their likely effect on spending and the deficit, the concerns raised by applying the item veto to tax and direct spending legislation, and the possible effect of the item veto on the Congressional workload.

STATUTORY ITEM VETOES

Many Presidents have sought to increase their authority in the budget process by being permitted to reduce or eliminate specific items in appropriation bills while approving others, a power possessed by 43 of the 50 state governors. Those Presidents have argued that an item veto would empower them, as representatives of the general interest, to reduce low-priority or locally oriented—so-called pork-barrel—projects that are enacted by the Congress. Many proponents of this change argue that the item veto would be a powerful tool in reducing the deficit.

If the item veto was enacted by amending the Constitution, it would give the President, when appropriation bills were presented to him by the Congress, the authority to veto particular portions of those bills, while approving others. For example, a President could approve portions of the appropriation bill covering the Departments of Commerce, Justice, and State and related agencies, while disapproving other portions. Those items not approved could only be restored by a two-thirds vote of both Houses of Congress.

Moreover, under the constitutional amendment approach, the President's flexibility would be limited by the structure of the appropriation bill as enacted by the Congress. For example, if a bill making appropriations to the State Department included (among others) a lump-sum appropriation of $20 billion for foreign aid, the item veto would give the President only two options: he could approve the whole $20 billion or veto the item in its entirety. He could not reduce the amount to $15 billion, or cut out only aid to a particular country, since the appropriation was not itemized in that way.

Most recent proposals, including those that are being considered by your two Committees, do not recommend giving the President the item veto by amending the Constitution. Rather, they recommend that the item veto be enacted statutorily. Those statutes would not give the President the option of approving portions of appropriation bills while disapproving others at the time that those bills were presented to him for signature. Instead, they would expand his power to rescind funds after they are appropriated or to change other laws by amending the current processes for rescinding appropriated funds created by the Congressional Budget and Impoundment Control Act of 1974.

The Impoundment Control Act permits the President to propose a rescission (in effect, a cancellation of an appropriation) of any funds that the Congress has appropriated. If the President's proposed rescissions have not been enacted into law within 45 days of continuous session, the funds identified in the proposed rescission must be released for obligation, permitting agencies to spend them. Further, if a President proposes rescissions and the appropriations committees fail to report a rescission bill at the end of 25 calendar days, the bill can be taken directly to the floor if one-fifth of the Members of each chamber desire such a discharge.

Rescission procedures need not be initiated by the President. Nothing in the law prevents the Congress from initiating rescissions, or limits the Congress to considering only the President's proposals. In fact, from 1974 through 1992, the executive branch requested $69.3 billion in rescissions. Although the Congress approved only $21.4 billion of those specific rescissions, it initiated another $65.1 billion for a total of $86.5 billion.[1]

The two most prominent recent statutory versions of the item veto—the so-called expedited rescission approach and the enhanced rescission alternative—are variations on these existing procedures. The approaches differ primarily in the extent to which they provide the President with additional authority to pursue his budgetary priorities. Expedited rescission requires the Congress to vote on Presidential rescission proposals, whereas enhanced rescission places the burden squarely on the Congress to disapprove Presidential rescissions in order to prevent them from becoming law.

Expedited Rescission

Expedited procedures for considering Presidential rescission proposals were first considered by the 102nd Congress. In the closing days of that Congress, the House of Representatives passed a bill that would have required the Congress to act on Presidentially proposed rescissions within a specified number of days of the proposals. If either House disapproved, funds would be released for obligation. That change, in effect, would have given the President a guarantee that his proposals would not be ignored. As with existing rescission procedures, the Congress could have initiated its own set of rescissions at any time.

During the 103rd Congress, two separate expedited rescission bills—H.R. 1578 and H.R. 4600—passed the House. The second of those bills would have expanded the expedited procedures to cover not only appropriation bills but tax legislation as well. The President could strike "targeted tax benefits," representing provisions in tax bills that provide benefits to a limited class of taxpayers. Expanding the approach to include tax bills was designed to focus attention not only on spending for narrow interests created through appropriation bills, but also on similar provisions inserted in tax bills.

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[1]These figures are quoted from the statement of Milton J. Socolar, Special Assistant to the Comptroller General, General Accounting Office, before the Subcommittee on Legislation and National Security, House Committee on Government Operations, March 10, 1993, p.12.

In the 104th Congress, S. 14 (sponsored by Chairman Domenici and five co-sponsors) would create expedited procedures for considering repeal or rescission of what the bill refers to as budget items, including proposed rescissions, repeals of targeted tax benefits (defined in this bill as a provision in tax law having the practical effect of benefiting particular taxpayers or a limited class of taxpayers), or repeals of amounts of direct spending. Although both rescissions and tax benefits were the focus of earlier legislation (particularly H.R. 4600, as noted above), S. 14 represents the first attempt to expand the definition to include direct or mandatory spending (including entitlements). Under this approach, the President would be permitted to get fast-track consideration for proposals to repeal particular amounts of direct spending, if he decided that he did not support those amounts after having approved the bill creating that direct spending. The new procedures under S. 14 would not be a permanent change. They would cease on September 30, 1998.

Enhanced Rescission

Enhanced rescission represents a much greater shift of power from the legislative to the executive branch than does expedited rescission. Under the current process, a proposed rescission is null and void if not acted on by the Congress within a specified period. Enhanced rescission, however, allows Presidential proposals to become law unless specifically overturned by the Congress.

Under such procedures, if the President proposed a set of rescissions, they would automatically take effect unless the Congress passed a "rescission disapproval bill," which the President would then presumably veto (to protect his proposed rescissions). The Presidential veto of a rescission disapproval bill—as for any other bill—could only be overridden by a vote of two-thirds of the Members of both Houses. In effect, therefore, enhanced rescission would give the President the authority to cancel any item that he wished, as long as he could convince more than one-third of the Members of either House to go along with him.

Furthermore, enhanced rescission would provide the President with greater potential power than a constitutionally approved item veto. As noted above, a constitutional amendment would limit the President to approving or vetoing line items according to the manner in which the Congress structured a given appropriation bill. He would have no authority to reach within a line item to cut a specified project or to reduce budget authority within a line item (many projects are actually specified only in the report language accompanying the bills). Enhanced rescission, however, would empower the President to define a line item as any portion of an appropriation enacted into law. In fact, because enhanced rescission would permit the President and one-third of either House to eliminate or reduce funding for a given item, it is equivalent to some of the strongest item veto powers possessed by state governors. Such "reduction veto" authority is possessed by chief executives in only 11 states.

Two of the most prominent current proposals are variations on enhanced rescission. S. 4 (introduced by Senator Dole and nine cosponsors) is a traditional approach to enhanced rescission in that it applies only to appropriation bills. H.R. 2, sponsored by Representative Clinger and patterned after language accompanying the "Contract with America," is identical in its approach to appropriated spending, but it also would apply the approach of enhanced rescission to "targeted tax benefits." The bill defines such tax benefits more narrowly than does S. 14. Included would be provisions that the President determines would affect five or fewer taxpayers. Each of those two approaches would provide for Presidential rescissions (or repeals of tax benefits) to take effect unless specifically disapproved by the Congress, and both would make those procedural changes permanent.

ISSUES RAISED BY EXPEDITED AND ENHANCED RESCISSION

Both expedited and enhanced rescission would represent a shift of power from the Congress to the President. As noted above, enhanced rescission would represent a greater power shift than expedited rescission. In fact, enhanced rescission has the potential to increase the President's power even more than a constitutional amendment. The power created would be even greater if it applied to tax bills in addition to appropriation bills. Although expedited rescission is less of a shift of power (primarily because it does not require a supermajority to override a Presidential proposal), it would enable Presidents to expand their power to set the Congressional agenda.

Aside from the shift in power, however, the statutory versions of the item veto raise other issues that warrant consideration. I will highlight three of them: the probable effect on federal spending and the deficit, the difficulty of expanding the process of canceling budget items to include tax and direct spending legislation, and the possible effect of the item veto on the Congressional workload.

The Effect of the Item Veto on Spending and the Deficit Is Unclear

Proponents of the item veto often tout it as a tool that could offer substantial assistance in reducing federal spending and the budget deficit. Reducing the deficit is the most important action that could be taken to increase long-term living standards, but the potential for the item veto to decrease the deficit is uncertain.

Evidence from the states suggests that the item veto has not been used to hold down state spending or deficits, but rather has been used by state governors to pursue their own priorities. Researchers have reviewed the impact of state item vetoes through case studies of individual states, surveys of multiple states, and statistical techniques. For example, a study of the use of the item veto in Wisconsin over a 12-year period found that governors were likely to use the authority to pursue their own policies or political goals but not to reduce spending.[2] Similarly, a comprehensive survey of state legislative budget officers found that governors were likely to use the item veto for partisan purposes (for example, Democratic governors vetoing projects enacted by Republican legislators), but were unlikely to use the veto as an instrument of fiscal restraint.[3] Finally, several researchers have used statistical models to test the effect of the item veto, and few have found support for the contention that the veto reduces state spending.[4] Although the item veto may affect state budgets, it is more likely to substitute the governor's priorities for those of the legislature than it is to reduce spending.

The item veto at the federal level could decrease spending and the deficit in cases in which the President cared more about reducing spending or the deficit than he did about pursuing his own spending priorities. That outcome could occur in two ways. The first is obvious: selected provisions that could not gain support (majority in the case of expedited rescission or supermajority in the case of enhanced rescission) in both Houses would be reduced or deleted without causing anything to be added to the budget, thus reducing the deficit. In addition, the President could use the threat of an item veto to bargain with the Congress, encouraging it to adopt a broad package of deficit reductions in exchange for a pledge not to single out items that some Members support.

If the President did not give top priority to spending cuts or deficit reduction, however, the situation could be much different. Recent experience suggests that even Presidents who support reductions in one area of the budget may favor increases in others. In that case, the President would be unlikely to target items for reduction or elimination in areas of the budget that he supported. He could also use the threat of an elimination or reduction to win votes for the provisions that he supported. That approach could lead to an increase in total spending and the deficit rather than a decrease.

Some evidence at the state level also indicates that gubernatorial item vetoes may encourage some state legislatures to shift responsibility. Since many state legislatures know that their governors are likely to use the veto to ensure the enactment of a balanced budget, they have an incentive to enact appropriation bills in excess of what they know to be affordable, thus shifting the burden of cutting spending from the legislature to the governor. It is useful to consider whether that incentive might surface in the Congress, particularly under the budget tightening that might occur if the Congress was to approve, and the states were to ratify, a balanced budget amendment.

Under any scenario, expedited rescission would probably pave the way for replacing some Congressional budget priorities with Presidential ones. A number of analysts argue that that is a sufficient reason to adopt the procedure. Under such an argument, the effects of expedited rescission on overall spending and the deficit might be considered to be less important if they were successful in eliminating Congressionally induced spending that has a narrow focus (or, in the case of tax bills, targeted tax benefits). For example, the President could raise the visibility of specific proposals, including pork-barrel items, by forcing debate and votes on a selected number of spending items (or tax benefits). Such increased attention might result in those items being deleted from bills for fear of later embarrassment by a proposed

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[2] James Gosling, "Wisconsin Item Veto Lessons," Public Administration Review, vol. 46 (July/August 1986), pp. 292–300.

[3] Glenn Abney and Thomas Lauth, "The Line-Item Veto in the States: An Instrument for Fiscal Restraint or an Instrument for Partisanship?" Public Administration Review, vol. 45 (May/June 1985), pp. 372–377.

[4] See, for example, David C. Nice, "The Item Veto and Expenditure Restraint," Journal of Politics, vol. 50, no. 2 (May 1988), pp. 487–499; and Douglas Holtz-Eakin, "The Line Item Veto and Public Sector Budgets: Evidence from the States," Journal of Public Economics, vol. 36 (August 1988), pp. 269–292. For a study that finds a restraining influence, see W. Mark Crain and James C. Miller III, "Budget Process and Spending Growth," William and Mary Law Review, vol. 31, no. 4 (Spring 1990), pp. 1021–1046.

rescission. But note that the process would only affect narrow-interest provisions passed by the Congress. Presidents have broad discretion in the spending of certain appropriated funds, and they have been known to allocate a portion of those funds toward narrow constituencies. The item veto would not directly undercut that practice.

Under some approaches (such as the enhanced rescission process created by S. 4, as discussed above), the item veto would apply only to the one area of the budget (namely, discretionary spending) that is, comparatively speaking, under control. Discretionary spending has been declining as a percentage of gross domestic product (GDP) in recent years, largely because of the statutory caps that have existed since fiscal year 1991. Those caps freeze discretionary spending in nominal terms through fiscal year 1998. Mandatory spending, however, has been increasing as a percentage of GDP, fueled by the rapid growth in health care costs. CBO estimates that health care spending will continue to grow much more rapidly than GDP into the next century. For that reason alone, if an item veto was enacted that applied only to discretionary spending and if the discretionary caps were extended, its effects might necessarily be limited.

Applying the Item Veto to Tax and Direct Spending Legislation Raises Implementation Problems

Largely because of the limitations of a line-item veto that applies only to appropriation bills, some bills (such as H.R. 2 and S. 14) apply expedited or enhanced rescission procedures to other parts of the budget, such as tax bills and direct spending. Proponents of such measures hope to give the President the authority to target other areas of the budget—specifically, revenue or direct spending provisions—for reduction or elimination.

Although the approach is appealing because of its broad coverage, it has inherent limitations as well. It is particularly difficult to define the type of tax benefit that such a provision is designed to reduce. That is, proponents of applying enhanced (as in H.R. 2) or expedited (as in S. 14) procedures to tax bills have in mind the elimination of narrow-interest tax breaks, which allegedly surface in tax bills, sometimes very late in the process. But recognizing the problem may be much easier than devising a workable definition.

Consider the two definitions of the term "targeted tax benefit" included in the above-mentioned bills. In the case of the expedited rescission proposal (S. 14), a targeted tax benefit is defined as a provision that "has the practical effect of providing a benefit in the form of a different treatment to a particular taxpayer or a limited class of taxpayers" (excluding differences based on income, marital status, or number of dependents). Based on that definition, however, there is apparently little distinction between targeted tax benefits and "tax expenditures" as defined by the Congressional Budget Act of 1974. Such provisions affect millions of taxpayers. For example, the definition of targeted tax benefits seems broad enough to apply to many current itemized deductions under the personal income tax, such as the home mortgage interest deduction, and to business tax preferences, such as the research and experimentation credit.

Alternatively, H.R. 2 defines a targeted tax benefit as "any provision of a revenue Act which the President determines would provide a federal tax benefit to 5 or fewer taxpayers." Clearly this definition is much narrower than that in S. 14, although one could imagine ingenious ways to get around such a requirement. One obvious way is to ensure that such provisions apply to at least six taxpayers. That would be easy enough to do as to make the application of such procedures to tax bills effectively meaningless. In any case, the President would have broad authority to decide whether he believed that a particular provision met a given definition, and the Congress would have no standing to challenge his judgment.

The fundamental problem raised by efforts to apply the item veto to direct spending concerns the incompatibility between the creation of rights (or entitlements) to benefits on the one hand, and the possible elimination of funding for those benefits on the other. Unless the President is given the authority to recommend changes in law concurrently with the "item veto" of direct spending (a power that S. 14, as drafted, would not give him), simply repealing or reducing an "amount" seems insufficient. Unlike appropriation bills, direct spending bills usually do not provide specific amounts of funding. Rather, they set the terms and conditions for funding. For example, if the President recommended the repeal of an amount of Social Security spending but did not change the criteria for eligibility or benefit levels associated with Social Security, the result would be unworkable and ultimately not have the effect of reducing spending on the program. Moreover, even if underlying law could be changed, the item veto would presumably apply only to legislated expansions creating increases in direct spending. By far the greatest increases in direct spending

result not from such legislated changes, but from previously existing provisions of law that would be unaffected by the item veto.

The Item Veto Is Likely To Add to the Congressional Workload

Any procedural change that requires the Congress to take an action that it can now avoid has the potential to increase the workload of the Congress. Providing the President with the authority to force a vote on individual items (appropriations, direct spending, or taxes) could prompt a substantial amount of legislative activity in each House. Such an increase in Congressional workload could eat up many hours of floor time. S. 14 does take that concern into account. For example, it includes procedures that would limit debate and the use of motions to strike proposed items from a bill. Conversely, subjecting direct spending and taxes to expedited procedures greatly increases the potential for more such items that need to be considered on the House or Senate floor.

Enhanced rescission proposals do not necessarily imply the same workload demands on Congressional activity as expedited rescission. They do not require votes on Presidential proposals, since these proposals could become law without Congressional action. But if the Congress was interested in protecting its own spending priorities from a hostile President, even enhanced rescission could result in a substantial increase in floor activity, if only through attempts to override Presidential vetoes of rescission disapproval bills.

CONCLUSION

The item veto is most appropriately viewed as a shift in power from the legislative to the executive branch. This shift, however, would not necessarily lead to less spending or lower deficits. Simply put, the item veto is a tool for fiscal restraint only in the hands of a President who places a top priority on reducing spending and the deficit.

Despite limited potential for reducing spending and the deficit, the item veto might be warranted if substituting Presidential priorities for Congressional priorities resulted in less low-priority spending or fewer tax breaks. In fact, the strongest case for the item veto relies on a belief that Presidents can identify provisions with purely local benefits and are willing to act against them without substituting their own budget priorities. The extent to which that belief is true depends heavily on the desires of an individual President. It also depends on whether Presidents would use their new powers to achieve policies that are in the larger public interest, as opposed to their own narrow interests.

The alternative, of course, would be for the Congress and the President not to pursue narrow-interest policies to begin with. However, if that is not going to occur (and narrow-interest provisions may indeed be a necessary part of the legislative process), the argument over the item veto should really turn on the desirability of the President's priorities versus those of the Congress, not on the probability that the item veto would be a major tool for deficit reduction.

In short, those who believe that Presidents need a great deal more leverage to pursue their priorities should favor enhanced rescission. Those who do not should favor something more like expedited rescission or should seek no change to existing procedures.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. WILLIAM V. ROTH, JR., TO ROBERT D. REISCHAUER

This letter responds to questions that you raised subsequent to my appearance before your committee on January 12. These questions concern tax expenditures, the distinction between tax expenditures and the normal income tax structure, the relationship between tax expenditures and pending legislation to give the President a line item veto, and the powers of the President under S. 14.

TAX EXPENDITURES AND THE NORMAL TAX STRUCTURE

The Congressional Budget and Impoundment Control Act of 1974 (Public Law 93–344) defines tax expenditures as "revenue losses" arising from provisions in federal tax laws that "allow a special exclusion, exemption, or deduction from gross income" or that "provide a special credit, a preferential rate of tax, or a deferral of tax liability." In other words, tax expenditures are revenue losses arising from provisions in the Internal Revenue Code that give selective relief to particular groups of taxpayers or special incentives for particular types of economic activity. The definition of tax expenditures in the Budget Act does not include exceptions to excise tax provisions, and neither the Congressional Budget Office (CBO) nor the Joint Committee

on Taxation (JCT) has attempted to identify or to estimate the revenue losses resulting from them.

The Normal Tax Structure

The use of the term "tax expenditure" (generally and, more specifically, in the legislative history of the Budget Act) assumes that the income tax has preferential elements that contrast with a "normal structure" for collecting revenues from individuals and corporations. The Budget Act does not specify what shall be included in the normal income tax structure. As the Joint Committee on Taxation and the Treasury have defined it, the normal structure includes both an individual and a corporate income tax and general rules defining the taxpaying unit and setting forth accounting periods.

For individuals, the normal income tax structure has included whatever the rate schedules, personal exemption, and standard deduction (or its equivalent) happen to be at any one time. A few of the many exceptions to the normal structure are the deductions for charitable contributions, home mortgage interest, and state and local income and property taxes; the exemption from federal taxation of interest earned on state and local government debt; the exclusion from income of health insurance premiums paid by employers; and the earned income tax credit.

For corporations, the normal income tax structure includes deductions for ordinary and necessary business expenses, but it does not include graduated rates. Graduated rates for individuals reflect a judgment on how much tax people at different income levels should pay. Graduated rates for corporations provide relief to businesses with lower profits, but do not necessarily reduce rates for lower-income taxpayers. Reduced corporate rates, corporate tax credits for particular types of investment (such as research and development), and accelerated depreciation of machinery and equipment are only a few of the items that appear on the tax expenditure list published by the JCT.

Distinguishing Tax Expenditures From the Normal Income Tax Structure

Although judgment is involved in defining expenditures, the lists published by the JCT and the Treasury are nonetheless quite similar. The JCT's concept of the normal tax structure is slightly narrower and therefore its list includes some items that do not appear on the Treasury's list. An example is the cash accounting option, which the Treasury views as part of the normal tax structure and the JCT considers a tax expenditure. Also, the lists cover slightly different time periods. For the last five years, the President's budget has also included a special listing of estate and gift tax provisions that the Treasury considers tax expenditures. The JCT staff views estate and gift tax provisions as being outside of the normal income tax structure and therefore omits them from its list of tax expenditures.

The appearance of an item on the JCT's or the Treasury's tax expenditure lists implies no judgment about the merits of the provision as a matter of public policy. Tax expenditures are simply one of the ways in which the federal government allocates resources. As with federal spending programs, the evaluation of a provision depends on its cost and effectiveness compared with other ways of achieving the same objective and the purposes being served.

PRESIDENTIAL IMPOUNDMENT POWERS BEFORE 1974 AND TAX EXPENDITURES

The impoundment powers that the President exercised before the passage of the Budget Act applied only to appropriated funds. Those powers, which the Congress subsequently challenged, did not extend to entitlements or tax expenditures.

S. 14, "TARGETED TAX BENEFITS," AND TAX EXPENDITURES

S. 14 would create expedited procedures for considering repeal or rescission of "budget items"—which would include amounts in appropriations acts, amounts of direct spending, and "targeted tax benefits." The bill defines "targeted tax benefits" as provisions in tax law having "the practical effect of providing a benefit in the form of a different treatment to a particular taxpayer or a limited class of taxpayers, whether or not such provision is limited by its terms to a particular taxpayer or class of taxpayers." The term excludes differences among taxpayers based on income, marital status, or number of dependents.

The definition of "targeted tax benefits" would seem to exclude changes in rate schedules—even if the changes benefited relatively limited numbers of taxpayers. (Such changes might include a reduction in the top income tax rate for individuals.) The definition also would seem to exclude changes in the personal exemption and the standard deduction that affect all taxpayers. But it would not seem to exclude the increases in the standard deduction for the blind and the elderly, because those affect limited classes of taxpayers. The standard deduction, as noted above, has tra-

ditionally been considered part of the normal tax code, whereas the increases in the standard deduction for the blind and the elderly have been included among tax expenditures.

In brief, the language of S. 14 suggests that targeted tax benefits could include all measures that enact new or expand existing tax expenditures—regardless of their breadth. But "targeted tax benefits" and "tax expenditures" are not necessarily synonymous terms. The language in the Budget Act explicitly defines tax expenditures as revenue losses resulting from certain provisions of federal income tax laws. The language of S. 14 does not limit targeted tax benefits to preferences under federal income tax laws. It consequently raises the possibility that targeted tax benefits could also include preferences under the estate and gift and excise tax laws. Thus, the definition of targeted tax benefits may actually be broader than the definition of tax expenditures. This could be problematic, particularly since excise tax expenditures have no basis in law, and federal agencies have made no efforts to define, identify, or estimate them.

Lower taxes can result from changes in the normal tax structure—such as reductions in rates or increases in the amount of the personal exemption or standard deduction—or from the enactment of new or expanded tax preferences. Similarly, tax increases can result from raising rates or lowering the amount of the personal exemption or standard deduction or from cutting back or eliminating tax preferences. S. 14 would probably not apply to reductions in tax rates or to increases in the amount of the personal exemption or standard deduction; however, it most likely would apply to tax reductions that stemmed from new or expanded tax expenditures or other tax benefits. S. 14 would not apply to tax increases—regardless of their source—because increases presumably would not confer a "tax benefit."

PRESIDENTIAL POWERS UNDER S. 14

Under S. 14, the President would determine what constitutes a targeted tax benefit. In the case of the example you cite, if the Congress passed legislation that included a provision to lower rates on capital gains and the President determined that the measure was a targeted tax benefit, he could veto it. Revenues losses or gains are not a determining element in the exercise of Presidential powers under S. 14. Thus, in the event that the JCT or CBO estimated that a measure would result in revenue gains, and the Office of Management and Budget estimated that the measure would result in revenue losses, nothing in the language of S. 14 would preclude a Presidential veto.

Senator ROTH. Senator Thompson, any questions?

Senator THOMPSON. No questions, Mr. Chairman.

Senator ROTH. Representative Shays?

Mr. SHAYS. No questions.

Senator ROTH. Representative Horn?

Mr. HORN. Thank you very much, Mr. Chairman. Mr. Reischauer, you presented an excellent statement. I find it is the most substantive of the ones we have considered, and that is an excellent analysis. We all know about the $5 trillion debt. We all know about the $200 billion annual deficit.

Outside of sheer political will in either this chamber, the other chamber, or the White House, what devices do you suggest, not limited to these, that might be the most effective as to how we come to grips with this situation?

Mr. REISCHAUER. Let me preface my answer by saying, that in my judgment, as I leave my 6 years of working for the Congress, I am struck by how much has been accomplished, not how little. That if we go back to where we were in the spring of 1990, the underlying structural deficit that faced this country, given the spending and revenue promotion in effect at that time, we have probably grappled with somewhere between 50 and 60 percent of the overall problem that existed. The 40 to 50 percent that remains is still a humongous problem, but I would look back and say what we have done in the past in fact has worked. It has been terribly painful;

it has probably cost one President his job and could cost another President his job.

But nevertheless, the collective efforts of the Congress working with the executive branch in summit negotiations to thrash out spending cuts and tax increases that were acceptable to a majority, bare as that majority has been, is the way to go.

Procedures can then be adopted to enforce and reinforce that which you have done. We at the Congressional Budget Office are terribly skeptical about the notion that procedures can force this body or the executive branch to do things which otherwise they would not be willing to do.

Pay-go procedures and caps on discretionary spending, can enforce decisions that are already made. But those decisions are made in the normal process.

Mr. HORN. Let me pursue that with one question, and that is this: As you look at the record of how we cut the annual deficit, the best performance is under the Gramm-Rudman Act, when they got it down in their final year before there were numerous other things going on. There was, as I remember, about a $110 billion deficit.

Mr. REISCHAUER. I would disagree with that proposition, but I will let you ask the question.

Mr. HORN. I haven't seen any other device, any other combination that worked as successfully as Gramm-Rudman was about to work. That was lifted by the 1990 Budget Agreement, the new President who came in, whoever—whatever party, in 1993, had a choice of reinstituting it.

Do you think the President should have reinstituted it as an additional tool to get at the deficit?

Mr. REISCHAUER. The simple answer to that is no. I among many academics who is rather extreme in arguing that Gramm-Rudman did have an important and discern an impact on congressional behavior. Most academics who have studied this have argued that is not the case.

As you noted, the deficit did go down to around $176 billion, but that was by and large the result of two things: 1, the recovery from the recession, and No. 2, a whole lot of gimmickry, a whole lot of smoke and mirrors, a whole lot of movement of money from one fiscal year to another.

We engaged in such things as moving pay dates for the military from one fiscal year to another. We sold assets: in other words, we sold the jewels of the American public to reduce the deficit. We engaged in all sorts of smoke, mirrors, and gimmickry to bring the deficit down without imposing pain. The pain associated with raising taxes or cutting spending, which after all really are the only ways to reduce the deficit.

And that was basically a game. And the game began to become unraveled. And the next President was left with that problem.

And we were in a situation in the spring of 1990, where because of the games we had played throughout the years of Gramm-Rudman, there was no way we could achieve the deficit cuts that would have been required without it causing not just a political revolution that would have left many of you in the lines of the unemployed,

but without visiting really serious hardship on many vulnerable populations and many institutions in America.

Mr. HORN. One rapid question, just for a short answer, you said about 60 percent of the problem has been solved. How much of that 60 percent would you credit the 1990 budget agreement to having solved?

Mr. REISCHAUER. Up——

Mr. HORN. It is still going. I look at the discretionary funds, I think that agreement might well be mostly responsible.

Mr. REISCHAUER. All of this 50 or 60 percent I am talking about was attributable to the 1990 and the 1993 packages. The 1990 package was the larger of the two, and it probably accounts for 60 to 65 percent of the total.

Mr. HORN. Thank you.

Mr. CLINGER. The Chair will now recognize the gentlelady from Florida, Mrs. Thurman.

Mrs. THURMAN. Actually I was quoting when I asked Dr. Rivlin that question from something you had said about the powers of Governors using this in the 43 States. And then in your testimony, which you did not expand on, and I would like you to expand on it, making this, this is a rescission bill or an enhanced rescission bill that we are looking at.

And you make it clear you think there could be potentially even more just because of the depth in which you could go into this. You suggest there are now only 11 States that actually have the power we are talking about doing.

Do you want to talk a little bit about that?

Mr. REISCHAUER. It is a lot of talk here. Everybody says 43 Governors have line-item vetoes. The answer is, yes, they do, they have some form, but State-by-State, these vary tremendously. At one extreme there are Governors who cross out words, and provide substitute legislation, and at another extreme, they have to veto whole appropriated amounts, and can't deal with anything except the dollar value as opposed to these rescission proposals that you are considering in which the President could lower the amount that was appropriated as opposed to choosing between what the Congress approved and zero.

And so there is a tremendous range of powers that Governors have right now.

Mrs. THURMAN. Let me follow up, because in their ability to do these line-item vetoes in the States, how—does it vary in how their legislature reacts to those as well?

Mr. REISCHAUER. I am not an expert on that at all, but as you know, the Congress is a full-time job, more than a full-time job, that meets throughout the year, that has a very competent staff, and has a lot of expertise at its disposal.

In some States, the legislatures still meet only once every other year. In some, they meet for a very limited time period. So I don't think it is really comparable to look at States and ask yourself, "What would happen if we had a national enhanced rescission or expedited rescission or line-item veto?" And say, "I am going to answer that question based on the behavior of State legislatures and Governors," because there is a very different distribution of power State by State. But just in general, I think the Congress is a much

more powerful body than the average State legislature in the scheme of national policymaking.

Mrs. THURMAN. Maybe as a follow-up, since Ms. Collins is not here, she had asked the question about getting bogged down in a committee and the entire Congress. How would you respond to that? Do you believe it should be a vote of the full Congress or that there should be an opportunity for us to participate?

Mr. REISCHAUER. When I have left, I will answer that question. CBO doesn't make recommendations. We don't tell you how you should structure your procedures. We point out the pros and the cons and the advantages and disadvantages.

The response of the witnesses at that point in the hearing was that they thought it was not likely that the Members of a particular committee that was given the rescission disapproval bill, that a majority of them would not report out that bill to the floor, if it were in fact probable that two-thirds of the Members were going to support the bill and thereby override the President.

And I think that was actually a real-life, good answer to that question on why maybe you shouldn't be tremendously worried about that issue. And as I said in my statement, you are really weighing off a couple of things here. One is how much floor time you want to be eaten up with these types of votes and considerations.

And, you know, if there were very little chance of generating that two-thirds support to override the President's veto, do you really want to chew up a couple of days' time getting 51 percent? Maybe you do for political reasons, but far be it from me to suggest that.

Mrs. THURMAN. Maybe the same political reasons the President might have vetoed them.

Mr. REISCHAUER. Maybe.

Mrs. THURMAN. Thank you.

Mr. CLINGER. Do any other Members have questions? Mr. Mascara from Pennsylvania?

Mr. MASCARA. Thank you, Mr. Chairman. Mr. Reischauer, given that this bill also includes that the President can veto any targeted tax benefits to five or fewer taxpayers, has the Congressional Budget Office been able to quantify what kind of a savings that would mean?

Mr. REISCHAUER. No. That would be virtually impossible to do. But as I suggested in my prepared statement, if the law were written that way, it is not very hard at all for the Ways and Means Committee and the Senate Finance Committee to make sure that virtually every provision affects six taxpayers. I mean, even if it affects them to the tune of 10 cents or affects them with no change in tax liability.

So I don't think that that extension would really be significant at all. The other alternative, then, is to go to the more broad definition, which is included in the Senate bill, which targeted tax benefits, and then exclude ones associated with types of family and income levels. Then you have something that is really very, very broad.

And that is why I said in my statement that trying to find a workable mechanism for having enhanced rescission or expedited

rescission apply to entitlement spending, mandatory spending, or taxes, is really a very difficult thing to think through.

I mean, I don't think what is in these bills actually would be very effective with respect to the entitlement spending or the mandatory spending part. It implies that the President would just sort of cancel some money or say this money shouldn't be spent.

But the underlying legislation, remember, creates a legal entitlement which enables citizens or businesses or whoever is the beneficiary to go to court and sue the Federal Government to demand payment. And the fact that the President has erased the amount of money through this procedure in effect doesn't reduce, I don't think, the legal obligations for the Federal Government to pay.

So one really has to get into some complex nitty-gritty definitions and application, I think, to make this effective beyond the appropriation level

Mr. MASCARA. Thank you.

Mr. CLINGER. If there are no further questions at this point——

Senator ROTH. Mr. Chairman.

Mr. CLINGER. I am sorry. Senator Roth.

Senator ROTH. First of all, let me thank you for your distinguished 6 years of service. I know that it is an extraordinarily challenging, has to be fascinating, but also a frustrating job.

Mr. REISCHAUER. No, never.

Mr. CLINGER. You can answer that one truthfully after you leave.

Senator ROTH. So I wish you well. One question. You are rather pessimistic about the positive effect of the proposed legislation. Let me——

Mr. REISCHAUER. On the deficit and on spending. On the shift of powers, I am not pessimistic at all. I think enhanced rescission would represent a very significant shift of power to the executive branch.

Senator ROTH. But let us assume that you have a chief executive that sincerely wants to use it to eliminate pork and to the extent he can to reduce unnecessary spending. Can it be a positive factor, as many people have testified before?

Mr. REISCHAUER. Yes, as I said it could be if that were the President's primary focus in his presidency. But generally, in 1990 and in 1993, we have had multiyear deficit reduction agreements between the Congress and the executive branch, which then set out a path of spending and revenues, and then the fights in the intervening years have been over how are we going to allocate that spending. And in that kind of situation, deficit reduction during the last 2 years has not been the issue on the table. It wasn't in 1992 either. And in those years you are going to have President Clinton, for example, anxious to increase resources going to, let's say, education and training programs, and reduce some other area and the Congress might not agree with that.

Senator ROTH. I just think it is important that your testimony is not lost as to the fact that there are circumstances in which it could have a beneficial impact.

Mr. REISCHAUER. Yes, and it might have a beneficial impact in situations in which the President was trying to put together a deficit reduction package with the Congress and much of the difficulty in 1990 and 1993, of course, was that priorities were different be-

tween the two branches. This would say that we are going to give the President, in a sense, a bigger say in putting that package together.

Senator ROTH. Thank you, Mr. Chairman.

Thank you, Mr. Director.

Mr. CLINGER. Thank you, Senator.

Mr. Spratt had a question.

Mr. SPRATT. Dr. Reischauer, thank you for your excellent presentation.

Let me ask you, how does the so-called enhanced rescission authority compare to the President's impoundment authority prior to the Impoundment Control Act of 1974? Is it the same thing by another name?

Mr. REISCHAUER. I am not the person to answer that question. I think there is a question of how much impoundment authority the President really had and whether that impoundment authority extended beyond holding back resources that for various reasons really could not be spent.

For example, if you were building a ship in Pascagoula and the workers went on strike and so the funds were, obviously, available to the Defense Department but incapable of being spent because——

Mr. SPRATT. That is management deferment rather than policy deferment.

Mr. REISCHAUER. A policy priority issue, where the President would say, "I know that the Congress has expressed its will and has said that it would like to spend more money on blueberry research, but I disagree with that, and even though I have signed the bill which had that in it, I am still not going to spend that money." And under enhanced rescission, then, two-thirds of the Congress would have to come back and say, "spend that money."

Mr. SPRATT. The implication earlier was that this was just taking us back to prior to 1974.

Mr. REISCHAUER. No, I think it is much broader.

Mr. SPRATT. You used the phrase "cancellation". What the President would effectively acquire under the enhanced rescission bill, as to whatever it is, is the authority to cancel out spending.

Mr. REISCHAUER. Cancel appropriations that have been approved by the Congress.

Mr. SPRATT. Which is to undo a law enacted by the President and the Congress together?

Mr. REISCHAUER. Correct.

Mr. SPRATT. I will not ask you any legal questions, then.

OK, thank you very much.

Mr. CLINGER. The gentlelady from Florida.

Mrs. THURMAN. Dr. Reischauer, just a note personally. We want to thank you for your testimony today and also for your service to the House.

Mr. REISCHAUER. Thank you.

Mr. CLINGER. And I would join in that, Dr. Reischauer, for hearing from you today and also for your very valuable contribution to the House over the last 6 years. We are very grateful to you, sir.

At this point I want to call our next witness, Governor Weld. I want to ask your colleague from Massachusetts, Mr. Blute, to make the introduction.

Mr. BLUTE. Thank you very much, Mr. Chairman. It gives me great pleasure to present to the Senate Governmental Affairs Committee and the House Government Reform and Oversight Committee this morning the Governor of the Commonwealth of Massachusetts, William Weld. He was elected Governor in 1990 during our State's most severe fiscal crisis in its long history. The Governor faced a $3 billion budget deficit, which in State budget terms is a huge number, as you know.

In 4 years, he balanced the budget without raising taxes by instituting wide-ranging Government reforms and utilizing his line-item veto authority. He was recently reelected with 71 percent of the vote, which is no mean feat for a Republican in Massachusetts and it is my great honor and privilege to welcome the Governor of the Commonwealth, William Weld, to the committee.

STATEMENT OF HON. WILLIAM WELD, GOVERNOR, COMMONWEALTH OF MASSACHUSETTS

Governor WELD. Thank you very much, Chairman Clinger, and I want to thank you and Chairman Roth for giving me this opportunity to be here with you today and particularly my good friend, the Congressman from my State, Peter Blute, for that introduction. I will be very quick.

I just want to say that I not only favor the line-item veto, but I consider it a pretty essential device for any Governor or indeed any President who hopes to preside intelligently over a balanced budget. In my book, the balanced budget amendment is really the cornerstone of the Contract With America and Government has to, at the Federal level, start acting like taxpayers who have bank accounts and have to balance their accounts at the end of every month.

I think the line-item veto is the natural compliment to the balanced budget amendment. As you all know, 43 Governors have the line-item veto in various forms. I have never understood why the President does not have it. And now that I think the whole country is focused on the need to control spending in the future, it is time for that reform to be brought in at the Federal level.

Let me just tell you a couple of anecdotes about Massachusetts that may be illustrative of this point. When I came into office in early 1991 we were in a fiscal basket case situation. We had to come up with $2.6 billion in cuts my first month in office and I had no background in State Government, which perhaps was a plus. But we did close that deficit and I used a line-item veto very liberally that first year.

My favorite example is a State welfare program called General Relief. There was no Federal money so it was not, did not involve you all, but it was a State entitlement and I line-item vetoed it down to zero and said unless you repeal the entitlement feature here, the appropriation is going to stay at zero. And that veto was sustained by only one vote, but it was sustained and that meant that the proponents of the welfare, that welfare program, had to give some ground, and so the entitlement nature of the program

was changed. It really was one of those bloated programs that you read about. It gave welfare to every ex-convict by virtue of his being an ex-convict on the theory otherwise he would go back to a life of crime. It gave welfare to all substance abusers on the theory they could not really manage their own affair. It gave welfare to people who were over 45 years of age even slightly overweight and did not have any stable work history. That is me. I would have qualified for that program under that category. It gave welfare to people who had situational anxiety, whatever that is.

But we made it not an entitlement and reenacted it as the program was originally intended to be for the disabled and the frail and elderly and the amount we spent on that program the next year went from $270 million to $104 million. More than a 50 percent cut. So programmatic changes can result in very serious savings of money.

I have used it in other ways. And this may not all be good news, because Bob Reischauer is right, there is a power shift involved here and we should not pretend that there is not, but in the debate over welfare reform in my State I line-item vetoed the appropriation for AFDC down to 4 months this last year. So it will run out February 28th. Well, that is a means of trying to create some sense of urgency to get a welfare reform bill addressed early in the year, and I think that we are going to do it.

You may say, you know, does it really hold down spending? The answer is, yes, it really does hold down spending. And one reason for that, and I will just say that this occurs in Massachusetts, I will not say it occurs in the United States Congress, but sometimes in Massachusetts in the State legislature, members will trade support for various projects and you will see things coming through that do not really have majority support. They have very vocal but narrow support.

And if the executive vetoes those measures, there is often not going to be enough broad-based support in the legislative branch to come back and override a line-item veto of something that really, if truth be told, was not a terrifically great idea except from the point of view of just a very few districts.

I have had Democrats in our legislature breathe a sigh of relief when we would take the spear, our parlance, not theirs, for the veto. On the other hand, if it is something that the legislative branch feels strongly about, you can override. I line-item vetoed $250 million my first year for a State employees pay raise, and the Democrats were not having any of that. It got overridden—neither were the Republicans, as a matter of fact, it got overridden about six-to-one in about 2 days. So your bedrock prerogatives are not being dealt away, but I do think the line-item veto creates downward pressure on the size of the budget as a whole and a lot of us out in the States think that is something we need a whole lot more of in Washington, DC.

Thank you, Mr. Chairman.

[The prepared statement of Governor Weld follows:]

PREPARED STATEMENT OF WILLIAM F. WELD, GOVERNOR, COMMONWEALTH OF MASSACHUSETTS

Thank you, Messrs. Chairman. I'm delighted to have this opportunity to offer my thoughts on the line-item veto, which I not only favor, but consider an essential device for any governor or president who hopes to preside over a balanced budget.

I consider the Balanced Budget Amendment to be, both in its practical effect and in its spirit, the cornerstone of the Contract with America.

Government, both state and federal, ought to approach its finances the same way the families we serve do. Rather than deciding how much to spend first, and worrying later about finding the money, we have to reorient government toward considering the available resources before spending.

In other words, it's time the federal government counted the cash in its wallet before whipping out the credit cards.

And a natural complement to the Balanced Budget Amendment is a line-item veto. I and 42 other governors have the power to strike the wasteful, the redundant, and the ludicrous from our budgets. It is crazy that the president has no such weapon. He needs to be similarly empowered if the federal government is to control spending and taxes in the future.

The strongest case for the line-item veto, I believe, is anecdotal. When I came into office in January of 1991, Massachusetts' state government had an $850 million deficit we had to cut in our first month, and a $1.8 billion structural deficit we had to resolve by June of 1991. We did close the deficit, without raising taxes by borrowing, thanks in large part to my having a line-item veto.

One example of where I used the line-item veto in those early days was with a program that was known as General Relief. This was a welfare program that gave cash benefits, sometimes to people truly in need, but too often for murky and even bizarre reasons.

About 64 percent of the General Relief caseload was classified as mentally or physically disabled, which included a category known as "situational anxiety." I am still at a loss to describe exactly what situational anxiety is, and our Public Welfare Commissioner said, when he was asked about "situational anxiety," that he didn't have "the faintest idea" what it was. And he was the one who was supposed to administer the program.

For some, I suppose testifying before a congressional committee is a situation that might occasion some anxiety. And there were other questionable conditions that qualified a person for the General Relief program, such as being an ex-convict or a drug addict or over 45 years-old, overweight, and without a stable work history. I might have even qualified.

The point is, this program was absurdly overbroad. So we forced the legislature to make it apply only to those truly in need. And us did this by vetoing all but six weeks of the General Relief appropriation

What we got was a drastically scaled-back program—now called Emergency Aid to the Elderly, Disabled, and Children. The cost of the new, more tightly-regulated program was $98 million, as opposed to $190 million for the old General Relief. The caseload dropped by about 18,000, some of whom were simply judged able-bodied and able-minded, and thus able to work. Seven-thousand of the 18,000 didn't even bother to reapply, and thus fell off the rolls automatically. And despite predictions that our veto of General Relief would result in a burgeoning of the homeless population, nothing of the sort happened.

This was not only a budgetary change, but also a psychological change for Massachusetts, which was leading the country in bloated entitlement programs.

We have also used the line-item to get action on welfare reform. Last year, we vetoed one-third of the AFDC appropriation in order to light a fire under the legislature's feet. Funding runs out at the end of February, and our hope is that will add a sense of urgency to the debate over welfare reform, just as it did with General Relief.

While there is clearly a new spirit in this Congress, and excessive spending has gone decidedly out-of-fashion, I remain convinced that the President needs the line-item veto. The president needs the line-item veto not just to force the debate on major issues, but also to act as the guardian against the budget becoming burdened with parochial appropriations. Often these items appear trivial in isolation, but as someone who goes through a budget line-by-line every June, I can tell you that in the aggregate they do begin to add up. Since it is presidents and governors who are charged with protecting the general interest, it is they who can, with a clear eye and without alienating their broad constituency, extract the chaff from budgets.

Thank you.

Mr. CLINGER. Thank you, Governor. I would now recognize the gentleman from Massachusetts, Mr. Blute.

Mr. BLUTE. Thank you, Mr. Chairman, and I think the points that you made are well taken and I recall that veto of the pay raise for State employees and even though you were overridden, it served the purpose of raising that issue in the minds of the public. And I believe that many a legislator felt some heat, at least a little bit, back in their districts for that action and for overriding your veto.

Let me ask you, Governor, critics claim the line-item veto will be used by the President to strong arm legislators on one issue, to get support on another issue. In other words, threaten a project in their district in order to get support for another bill they may not want to vote for. As a former member of the State legislature, never saw that done by either you or your predecessor and I would wonder if you would comment on the likelihood that a Governor or President would use it to pressure a legislator to vote for something entirely different.

Governor WELD. That would be like getting involved in a land war in Asia voluntarily to get in the middle of the minutia of legislative priority setting like that. I cannot imagine that would be very advisable from the point of view of a wise executive, Mr. Congressman.

Mr. BLUTE. Thank you, Governor.

Mr. CLINGER. Thank you. I would now recognize the gentlelady from Florida, Mrs. Thurman.

Mrs. THURMAN. Governor, welcome. We just have a couple of questions, and I feel bad because you were not here for some of the testimony before you, just to give you a little bit of the background, but you will probably pick it up very quickly, I am sure.

We know that 43 of your fellow Governors now have an item veto authority. The fact so many have this authority has often been cited as one of the reasons the President should have this kind of authority, as well. Of the 43 States in which the Governor has item veto authority, only 10 States, and I believe Florida is one of them, give the Governor authority to reduce as well as to wholly rescind the amount of budget authority passed by the legislature, just as this legislation we are considering today gives the President that authority.

Do you know how to explain why so few States give their executives the authority this bill gives the President?

Governor WELD. Madam Congresswoman, I know there is a wide variety among the States. I think in North Carolina the Governor may even lack the power to veto legislation and in other States, such as Wisconsin and Michigan, and Massachusetts is right up there, the Governor has item reduction veto authority, and Wisconsin and, I think, Michigan they can knock words out of a statute that I cannot do. But I can reduce in part.

I don't know why the 30-odd States do not give the Governor the power to reduce in part because I find that very useful. Sometimes, if you reduce in part, you are not going to see the override that you would see if you reduced entirely. It is like a judge in an eminent domain proceeding setting the award at a level where he knows the landholder will not appeal.

So I think giving the item reduction veto increases the downward pressure on the size of the overall budget, which is something we are all going to have to be wrestling with. So I favor the item reduction veto I believe as reflected in

H.R. 2.

Mrs. THURMAN. Thank you.

Mr. CLINGER. Thank the gentlelady. At this time I would like to recognize the Senator from Tennessee and welcome him for any questions he may have.

Senator THOMPSON. Welcome, Governor. We're pleased to have you here.

Governor WELD. Senator.

Senator THOMPSON. You demonstrate what the will to use the line-item veto can do. It is one thing to have the authority but it is another thing to use it. You demonstrated what can be done when you have the will to use it. I have just a couple of questions.

Some of us are somewhat concerned about the separation of powers questions with regard to the Presidential line-item veto. Do you have, in your State, the authority to veto judicial appropriations bills or specific items pertaining to the judiciary?

Governor WELD. Yes, we can line item the judicial appropriation. Nothing to do with the judges' salary, though, that is protected by the Constitution.

Senator THOMPSON. Conceptually, do you see any problem with that in terms of a potential abuse or separation of powers question?

Governor WELD. Well, my supreme traditional court in my State sees a problem with that in that they have held there is inherent power in the judiciary to command the expenditure of sufficient moneys to allow them to discharge their function. So that is the State law of Massachusetts. They do not generally go after the line item for the judiciary, but if they have a real problem, say court security, they have held that the inherent power of the judicial branch gives them that authority.

Senator THOMPSON. Where does the legislative branch fit into all of that?

Governor WELD. They do the annual appropriation for the judiciary and in my State I favor a lump sum transfer to the judiciary and let them manage their business, but in my State it tends to be rather micromanaged by the legislature, so many dollars for so many court officers in such-and-such a court where a leading legislator has to represent the jurisdiction.

Senator THOMPSON. Thank you very much.

Governor WELD. Thank you, Senator.

Mr. CLINGER. Thank you. I now recognize the gentleman from South Carolina, Mr. Spratt.

Mr. SPRATT. Governor Weld, thank you very much for your testimony. You said that no one would want to get involved in a land war in Asia. We did have one President who got us involved in a land war in Asia and we had a Speaker here once who was from the State of Texas, Jim Wright, and he used to tell his fellow Democrats, particularly young ones, you had to search Lyndon Johnson to understand how the line-item veto could be abused if the President had that power. So the potential is there.

Robert Bork has said anybody who purports to find in the Constitution power in the President that no President has noticed for 200 years at least has the burden of explaining how it has to be there. And what I have been grappling with this morning is, how can a President, how can the Congress enact a law, you used to be in the Justice Department, which gives the President the authority to undo part of that law not by a repeal letter, not by enacting a rescission or repeal of the law or selected repeal of it, simply gives the President not to carry out the law of Congress as enacted? How do you get around that constitutionally?

Governor WELD. Conceptually, I suppose I would consider it a veto in part and, thus, a lesser included part of the veto power of the President.

I may say, I had heard your question to Dr. Reischauer about are we going back to earlier than 1974, when the Impoundment Control and Budget Act of 1974 went through. I think, in all candor, it goes further than that.

I was quite familiar with the exercise of the impoundment power under President Nixon because I was on the House Judiciary staff on the impeachment inquiry. In fact, was in charge of that issue. And the impoundment practices of that administration, if memory serves, got 10 or 11 votes for impeachment of the President of the United States. So it was taken very seriously by the Congress. But the reason it was taken so seriously is because Congress felt it was not congressionally authorized.

If H.R. 2 is passed, and that is going to be congressional authorization, then I do not think you will see the same questions raised about the executive trampling across the natural dividing line between the two branches and usurping the powers of Congress. Many Governors have a power similar to that which President Nixon was purporting to exercise in the cases under, for example, the Clean Water Act, when moneys were not spent. And, frankly, the administration was not quite as wild about that act as some Members of Congress who had passed it.

I have what is called the power of allotment, which is a kind of impoundment power, and I have to certify that this nonspending of funds is necessary to balance the budget, not just, as in H.R. 2, I think it says it will help to balance the budget. I have to say that if I spend these funds I am going to run over, I will run over and not have a balanced budget. Now, of course that means something at the State level because we all have a constitutional requirement of a balanced budget.

So that is the executive discharging his or her constitutional duty to have a balanced budget. And if the balanced budget amendment goes through at the Federal level, that is also going to mean something at the Federal level.

Mr. SPRATT. This really purports to grant the President, to delegate to the President certain authority not to spend money according to certain standards. One of them is that it would reduce the deficit or help to balance the budget but that is a tautology, isn't it? Any lesser spending will lead in that direction.

Governor WELD. As I say, the standard is a little different in my State, it is that this is necessary to balance the budget. It did not

look like a very high hurdle, the recitals in H.R. 2. But I am such a supporter of the line-item veto that does not detain or trouble me.

Mr. SPRATT. I understand that, but the question is whether or not it will pass constitutional muster.

Thank you very much.

Mr. CLINGER. Thank you. I would now recognize the gentleman from Connecticut, Mr. Shays.

Mr. SHAYS. Thank you.

Governor Weld, it is really terrific to have you here. I use you as an example of what a President can do if they use the full powers that they have. You veto budgets that are not balanced and you get the legislative branch to cut spending, and, to me, you are an example for all Governors and anyone who assumes the office of the Presidency. We would not, in my judgment, need a balanced budget amendment if we had a President of either party who had used the powers to veto.

Having said that, I would love to have you address the issue. I am constantly hearing the concept of separation of powers, and I would love to hear you just briefly talk about what I consider is the other principle of checks and balances. We are going to have a judge who is going to and others who have addressed this concern of the judiciary. The judiciary cannot be a law unto itself. It is not a separate power without some checks and a balance. Why is it wrong to have the legislature have to appropriate money, a Governor having to sign a bill that authorizes spending in the judiciary? Why is it wrong for an executive branch or the legislature to deny funds to the judiciary branch like we would deny to any other branch? What is wrong with that check?

Governor WELD. Nothing is wrong with it up to a point, Mr. Congressman. All these checks and balances are matters of degree. If I purported to go after the salaries of my State supreme court because they had ruled against me in an impoundment case, say, that would be unconstitutional.

If the legislative and executive branches together gave the judiciary such an appropriation that they could not employ court officers and they were exposed to violence from criminal defendants appearing before them, I think you would have a pretty substantial constitutional question about that. But if the annual appropriation is $406 million instead of $422 million, I have not heard anyone suggest that the State supreme court would declare that an unconstitutional impairment of their prerogatives.

These are, it is a little bit messy, because the power to see the law all the way through to enactment and have the money appropriated and spent and the participation of the President in that process means that it is a little bit mixed up. But it is a little mixed up already when the President has the power to veto and force Congress to go back and have to override by a two-thirds margin.

So I think it would not mess it up any more constitutionally than the constitution already anticipates. And I think you are quite right and you make a profound point when you imply, as I think you are, that the reason the Constitution permits that is the notion of checks and balances.

Mr. SHAYS. To make sure that not one branch became too dominant.

I want to address another issue as it relates to the legislature. I have heard members in the statehouse threaten Governors that if they did not agree to something they wanted in the budget they, as members in the legislative branch, would simply not allow a Governor to have something he wanted.

And I am having a difficult time understanding—we make this assumption that somehow with a line item budget that this will be some new issue that will come to the forefront. Have you ever had a member in the legislative branch say, Governor, if you do not agree with what I want, that he would not agree to what you wanted?

Governor WELD. Not quite in those terms, but that sort of thing does go on.

Mr. SHAYS. Surely you jest.

Governor WELD. In the Reagan administration we used to send veto signals as a way of trying to slow down trains in Congress. And in a way as a negotiating tool. You know, this is a veto signal unless this number is changed. That sort of thing goes on all the time.

Mr. SHAYS. Well, I really thank you for your willingness to take the time to speak on this issue.

Mr. CLINGER. Thank the gentleman. The gentlelady from the District of Columbia, Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman.

I appreciate your testimony, Governor Weld, because my greatest interest here is in the specific practical effect of the line-item veto on the legislative culture and on the dynamic between the executive and the legislative branch, and I would be very much assisted by knowing, for example, whether the use of the line-item veto was frequent or rare; whether it tended to have a deterrent effect or to require its actual use; and whether it tended to stimulate partisanship or not within the legislature, in your experience.

Governor WELD. I think I have probably used the line-item veto about 1,200 times, that is rough, in the last 4 years, and I have a 3–1 Democratic legislature. So if people want to—I have had that for the last couple of years—if people want to, they can override. They tend to override on big ticket items that they really care about as a body, the $250 million pay increase for the State employees.

A lot of the line-item vetoes are just striking out individual outside sections to the annual budget or appropriation bill that are there at the behest of an individual member. And they are there, frankly, so that the Speaker or the Senate President can get an individual member off their back. As I mentioned earlier, those items do not often have majority support even in the legislature. They are in there as an ingredient of the sausage that went in to help the sausage get made, but most of those line-item vetoes have stuck.

I get overridden more than most Governors, but I still think it would be well under 100 out of those 1,200 that have been overridden.

Ms. NORTON. Was it there before you got there? Was the line-item veto there before?

Governor WELD. Oh, sure, this power of allotment and the line-item veto have been there for a long time.

In terms of your question about the culture of the legislature, it spurs me to another criticism I have heard and that is that the line-item veto is used to affect priorities instead of to reduce spending. It really does both, to be honest.

In the human services area, if people sent me a billion dollar of spending for prevention accounts, which I believe in, and a billion dollars of spending for what I call maintenance accounts, you know, here is $10,000 per person, which I am less fervent believer in, and I had to find $200 million, I am going to take it out of the maintenance account and I am not going to take it out of the prevention account.

Ms. NORTON. Does it make any difference whether the legislature and the executive are held by different parties, in your experience, on the use of the line-item veto?

Governor WELD. It has not in my 4 years because I work very closely with the Democrats in the legislature. So it would not have made a difference the last 4 years.

Ms. NORTON. Thank you, very much, Mr. Chairman.

Mr. CLINGER. Thank the gentlelady and I would now recognize the gentleman from California, Mr. Horn.

Mr. HORN. Thank you, Mr. Chairman.

I am tremendously impressed by what you have accomplished in Massachusetts, and it is evident from your testimony you have approached that job with great verve and persistence and energy. One of the problems we face at the Federal level, and Dr. Reischauer began to get into it, is that no matter what Congress does in some areas, whether they try to level a freeze, whether they have a Gramm-Rudman, whatever, until they get down into the guts and processes of those entitlement programs, the courts, the Article 3 judiciary, will overrule anything we try to do in cutting expenditures, and they will say to the citizen, 1, 2, or 10 million, you have a right to go and collect your check. So that means we have to do a lot of work down there in each authorization committee.

I am curious, when you cut some entitlement funding, it sounds like in Massachusetts, were you taken to court and what did the State courts of Massachusetts rule?

Governor WELD. We were not taken to court because of the leverage I had from having my veto sustained, in a rare development. I was able to say the appropriations can be zero unless you repeal the statute so it is no longer an entitlement. So it was recast as a capitated program so that opponents had no leg to stand on in going to court because there was no longer any entitlement.

The import of what you say, I would think, is that it is not enough to pass a line-item veto. You need the balanced budget amendment to put the pressure on you folks so you cannot just print money at the end of the year, and you need to work on the entitlement programs to maybe get more of them into the block grant type area, or else you may lose in the article 3 courts what you are gaining by passing the line-item veto.

Mr. HORN. I remember when I first discovered that series of court cases. I went over to say hello to Senator Byrd and said, "By the way, Senator, the Senate Appropriations Committee no longer has any power." That shook him up a little. And I said here is the cases. It is unbelievable. So we are going to have to face up to that.

Governor WELD. Well, but that is a cudgel that Congress surrendered to the courts in the first place by making those programs entitlements.

Mr. HORN. Yes. Governor, thank you for being here. As 1996 approaches, you will always be welcome in Long Beach, CA.

Mr. CLINGER. Governor Weld, we want to thank you very, very much for being here, for your very candid and very helpful testimony as to how the line-item veto works at the State level. And for guiding us in how we are going to impose it at the Federal level.

Thank you very much.

Governor WELD. Thank you very much, Mr. Chairman.

Mr. CLINGER. At this point, I would like to ask our next panel, actually, our next witness, to come to the table. This is the Honorable Gilbert S. Merritt, the Chairman of the Executive Committee, the Judicial Conference of the United States, and the Chief Judge of the 6th Circuit of the U.S. Court of Appeals.

Judge Merritt, welcome to the committee and we look forward to your testimony.

STATEMENT OF GILBERT S. MERRITT, CHAIRMAN, EXECUTIVE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, AND THE CHIEF JUDGE OF THE 6TH CIRCUIT OF THE U.S. COURT OF APPEALS

Judge MERRITT. Thank you, Mr. Chairman. I am a Federal judge and I come as the representative of the Executive Committee of the Judicial Conference of the United States, which, as you know, is the Board of Directors for the Federal Judiciary. I have a short oral statement I would like to ask that the written statement be made a part of the record.

Mr. CLINGER. Without objection, so ordered.

Judge MERRITT. A number of Members have asked questions about the judiciary and that is what I want to address. Several witnesses have responded in part.

Alice Rivlin says maybe we should make an exception of the judiciary, and that is the basic thrust of my testimony. The judiciary as a separate and independent third branch of Government is the weakest branch. The Founding Fathers in the Federalist Papers, Madison and Hamilton, referred to the judiciary as the least dangerous branch, and we in the judiciary have some serious concerns about giving the President the line-item veto over the various accounts of the judicial budget.

The Constitution and our institutional traditions have set up a balance of power among the branches and when Congress, which is the first and the most powerful branch in the minds of the Founding Fathers and, in fact, wants to give up some of its power to the President, that may very well be a good thing to do, that may be fine. But it is quite a different matter, quite a distinct matter to cede some of the protections of the weakest branch in the

same process, and there are several reasons why we think that Congress should give very serious concern and consideration if this is going to include the judiciary, and we would hope that you would except us from this.

First and foremost, the Congress, which funds our budget and, and I can tell you from personal experience very closely supervises the appropriations process, does not litigate cases before the courts. No conflicts of interest in litigation arise for judges with Congress. The President and his Department of Justice, however, litigate approximately half of the cases which are before us. The executive branch is very often upset with our rulings.

Many Presidents have gotten very upset with us from the beginning. Jefferson sought to impeach Federalist justices on the Supreme Court, as you know. Justice Chase, and that failed. But if that had been accomplished, Chief Justice Marshall was next, history tells us. President Jackson, after a famous set of controversial cases in the lower courts and before the Supreme Court, said the judges have made their decision, now let the blankety-blank, expletive deleted, enforce their judgment. President Roosevelt attempted to pack the Supreme Court, so irate did he become because of the rulings over the Federal courts. President Nixon was a litigant in his personal capacity before the lower courts and before the Supreme Court of the United States. And the incumbent President, in his personal capacity, is now before the Federal courts.

This puts the Federal courts in a very difficult position. If the President cuts our appropriations, we are, unlike Congress, we are basically defenseless. We have no power to override his veto and we are prohibited from engaging in politics. We have none of the power that protects the Congress in this situation. Presidents, attorneys general and members of the Department of Justice have a great deal of power.

To permit them to control the judicial budget would endanger the integrity and the fairness of the judiciary. And litigants against the Department of Justice would legitimately doubt the capacity of the courts to dispense evenhanded justice if we have to look over our shoulder to a line-item veto by the President. This may further erode public trust in the courts, and this is our concern.

Second, and finally, there is no evidence that I know of that the judiciary is a part of the pork barrel process. Our budget is two-tenths of 1 percent of the Federal budget. It consists in large measure of the salaries of judges and employees and our staff plus rent paid to the General Services Administration. There is nothing in our budget to build office buildings or courthouses. Congress appropriates money for this purpose to the General Services Administration and the General Services Administration builds the courthouses. Congress can eliminate the judiciary from the line-item veto and the President will still have the power to veto courthouses.

So it is difficult to see exactly what the purpose will be, what will be gained, what interest will really be served by including the judiciary in the Presidential line-item veto, and we see it as a serious threat to the evenhanded administration of justice.

I might say that the line-item veto, because of the different context for the Federal judiciary, is not the same as for the State judi-

ciary. Most State judiciary's claim and assert the power, the inherent judicial power, to require constitutionally funding. The Federal judiciary, at least to date, for 200 years, has never claimed that power. It has never had to—this question has never come before us. We have always looked to the Congress of the United States to appropriate the moneys necessary to run the courts of America and, to date, Congress has appropriated those funds to us. But I do not know of any appropriations to the Federal judiciary that could in any way be considered a part of the pork barrel process.

We are a separate, independent branch and that has not been a problem, so I think that this problem that you are addressing today is not one which requires you to bring within it a separate, independent branch of Government, which is essentially defenseless, in the face of the line-item veto by the President.

And, Mr. Chairman, thank you so much. It is a privilege for me to appear before you represent the judiciary, and I would be happy to know what your comments and questions may be.

[The prepared statement of Judge Merritt follows:]

PREPARED STATEMENT OF GILBERT S. MERRITT, CHAIRMAN OF THE EXECUTIVE COMMITTEE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND CHIEF JUDGE OF THE 6TH CIRCUIT U.S. COURT OF APPEALS

Chairman Roth, Chairman Clinger, and Members of the Committees:

Thank you for the opportunity to appear at this joint hearing to present the Judiciary's views on the line-item veto legislation. I am Gilbert S. Merritt, Chairman of the Executive Committee of the Judicial Conference of the United States and Chief Judge of the Sixth Circuit Court of Appeals. The Judicial Conference is the Judiciary's Board of Directors.

The Judiciary, as a third and co-equal branch of government, has serious concerns about policy implications of applying a Presidential line-item veto to appropriations acts for the Judiciary. We believe that the Judiciary should be excluded from this legislation. As currently drafted, the line-item veto legislation applies to appropriations acts containing discretionary funding. Therefore, the vast majority of the Judiciary's appropriations would be subject to a line-item veto by the President. Among our activities only the salaries of Article III and bankruptcy judges and retirement-related programs are currently classified as mandatory and would therefore not be covered by the bills.

It should be noted that the Judiciary's budget does not include funding for courthouse construction. Thus, our request for an exclusion from the line-item veto does not apply to the construction appropriation. The budget request and subsequent appropriation for building construction is within the province of the Executive Branch. The General Services Administration, Office of Management and Budget, and Congress control courthouse construction funding. It is not part of the Judiciary's budget and the Judiciary has no role in the funding for this activity.

It requires little imagination to see how a threat to judicial independence could come from undue financial pressures by the Executive Branch. Thus, the financial affairs of the Judiciary in the last 56 years have been carefully insulated from political influence by the President and his staff. The Constitution itself protects the salaries and tenure of Article III judges. Similarly, the Budget and Accounting Act provides that requests for appropriations for the judicial branch shall be submitted to the President and transmitted by him to Congress "without change" (31 U.S.C. § 1105(b)). It seems inconsistent to prohibit the Executive Branch from changing the Judiciary's budget prior to submission, but then to give the President unilateral authority to revise an enacted budget.

Prior to the creation of the Administrative Office in 1939, budget submissions and all other administrative support services for the lower Federal courts were provided by the Department of Justice. The inevitable conflicts arising out of this relationship reached a crisis level during the Depression. In carrying out Presidential policy, units of the Executive Branch continually rejected the Judiciary's requests for funding. The Bureau of the Budget refused to pass on requests for new judgeships, for example, and the Department of Justice cut judges' travel funds, eliminated bailiffs, criers and messengers, and reduced the salaries of secretaries to retired judges by

one-half. Federal judges from across the country expressed their discontent, but were powerless to prevent the assault on their productivity and professional stature.

The Judiciary needs to be protected from this danger; it must be free to develop funding requests and implement the budget in light of its own unique needs and missions, without regard to the oft-times conflicting priorities and loyalties of the Executive Branch. In creating the Administrative Office in 1939, and in explicitly directing that the budgets of the lower courts be submitted to the Congress without change, Congress acted to protect the independence of the Third Branch.

These protections need to endure. While Congress and the President attempt to reallocate between themselves the power to enact and approve what are often complex and controversial appropriations bills, the Judiciary should not be a part of that process. The Congress can protect itself but the Judiciary would be at the mercy of the Executive Branch. The current system of providing funding for the courts is fragile enough as it is—witness the funding shortages in 1986 and 1993 that led to deferral of both civil jury trials and payments to criminal defense counsel. Further, even with these protections in place, and in violation of the Budget and Accounting Act, there were three recent instances, once in 1989, again in 1993, and a third time in 1994, where the Executive Branch in effect unilaterally reduced the Judiciary's budget request by a total of over $1 billion. This occurred twice before the budget was transmitted to Congress, and once when the budget was pending before Congress.

The last thing needed is a new mechanism to give the Executive Branch control over the Judiciary's budget, particularly in light of the fact that the United States, almost always through the Executive Branch, has more lawsuits in the Federal courts than any other litigant.

The Judiciary's budget requests are subjected to full review by the congressional appropriations committees in keeping with the fiscal power conferred on Congress by the Constitution. The Judiciary must justify each dollar it receives. This is appropriate and the Judiciary cheerfully respects this role of Congress. We do not get a free ride, we never get all that we ask for or need. But the balance would be tilted dangerously toward Executive dominance and control over the Judiciary if the President had line-item veto authority over the Judicial Branch. Of course, the President should retain his general veto power over judicial and other appropriations.

I appreciate the opportunity to testify and am available to answer any questions you may have.

Mr. CLINGER. Thank you very much, Judge, for your testimony, and I would now recognize the cochairman, Senator Roth, from Delaware.

Senator ROTH. Your Honor, I have just one question. As I understand what you are requesting, it is basically consistent with the current practice; that in funding the judiciary, the practice now is for the judiciary to make its recommendations to the executive branch, which, in turn, transmits them without change to the Congress. This practice has been adopted as a means of helping to ensure the independence of the judiciary.

So that in asking for an exception to the line-item veto, you are really asking that that practice, that policy, be continued. It is not asking really for any change or new policy, but merely the implementation of the policy that has already been established; is that correct?

Judge MERRITT. Senator Roth, that is correct. It would be very inconsistent with the present statute, which provides that the executive branch shall transmit to Congress the budget for the courts as presented to the President, and to do so without reducing it. It would be very inconsistent with that legislation to then, thereafter, have the President, with the authority to veto parts of that which he had nothing, could not do anything about in the beginning.

Congress has been very careful to look at our budget. Our budget has been cut where Congress saw fit many times over many years for the last 200 years, but the President has not had the authority to do that. And I think that the reason for that legislation is simply

because it is recognized that if we give the President the power to control the judiciary, the President is the main litigate for before the judiciary, and that puts a lot of pressure on the judiciary.

Senator ROTH. Well, there is no question that if you look at the practice in other countries, where there has been an effort to dominate the judiciary, the funding of their operations has often been the means of doing so.

Judge MERRITT. Well, that is true, and I have talked to many judges in other countries, countries which are trying to develop an independent judiciary and which look to the United States as the model, and they often ask the question how are you able to operate against an executive in an oftentimes highly political process, where you are adjudicating lawsuits involving the executive. And my response has been the executive in the United States does not have the power to cut the budget.

Senator ROTH. I thank you for being here today, Judge.

Judge MERRITT. Thank you, Senator Roth.

Mr. CLINGER. Thank you, Senator Roth. I recognize the gentleman from South Carolina, Mr. Spratt.

Mr. SPRATT. Judge Merritt, are you in the position to render a declaratory judgment on——

Judge MERRITT. Congressman, almost 200 years ago in *Hayburn's* case, the Supreme Court declined to render advisory opinions. Maybe because they were only worth what you pay for them, but we have a tradition of long-standing that a sitting Judge should not render an advisory opinion on a matter that could come before the judiciary. So I respectfully would have to decline rendering any advisory opinions. I am happy to discuss the topic, but I am disinclined to render an opinion.

Mr. SPRATT. Well, there have been some old discussions in the past about the constitutional provision which prohibits, I believe, the lowering of any compensation for sitting judges during the tenure of their office, and whether or not income tax changes and other Governmental actions might have an impact on that, and, if so, whether judges would be able to rule on the constitutionality of that because of their inherent conflict of interest.

Judge MERRITT. There is the doctrine of necessity, which the Supreme Court has sometimes referred to and followed, and that is that where there is nobody else and no other circumstance, even though there may be an interest on the part of the judiciary, we are unable to recuse ourselves and have someone else decide the case. So under the doctrine of necessity we have sometimes decided cases that involved our own interests, and, obviously, if you decide an income tax case, you may, in a general way, be deciding something that has, that you have an interest in, but, anyway, that has been the doctrine of the past.

Mr. SPRATT. Well, I thought maybe I was going to get my constitutional qualms resolved here with a declaratory judgment but I understand your reluctance to rule.

Thank you very much.

Judge MERRITT. Thank you, Congressman Spratt.

Mr. CLINGER. Thank you. And I would now recognize the gentleman from Tennessee, Senator Thompson.

Senator THOMPSON. Thank you, Mr. Chairman.

I want to welcome Judge Merritt. Judge Merritt is an old friend of mine from Nashville, TN. He has not only had a distinguished career on the bench but a distinguished career as a lawyer beforehand. I would venture to say back, when we were both practicing law in Nashville, TN, you along with me would have strongly disagreed with the Founding Fathers that the judiciary was the weakest branch of the Government. I will not ask him how he made this transfer of opinion.

Judge MERRITT. They at least said the least dangerous branch.

Senator THOMPSON. Well, you said the weakest, that is even better.

Judge MERRITT. I am translating.

Senator THOMPSON. I do welcome you and I appreciate your being here. I think you raise some very serious questions.

I would like to ask you, in view of the fact that salaries would not be covered, and retirement comes under the entitlement category, apparently building construction, what would be covered, possibly, by the President's exercise of the line-item veto pertaining to judicial operations?

Judge MERRITT. Well, thank you, Senator Thompson. We have been friends for many, many years, and I am pleased that you are here to ask me questions.

There is a distinction in the budget process and it includes the judiciary between discretionary and mandatory spending. The salaries of judges are mandatory, and I think one of the bills here before you may allow some line-item veto for mandatory spending, but most of it applies only to discretionary spending. And then, even if there were an attempt of a line-item veto on mandatory spending, that is salaries of judges who are protected under the Constitution, there would become a serious constitutional problem with that.

But there are quite a large number of items in the Federal judicial budget that are discretionary items. Let me give you a few examples, by no means an exclusive list. The salaries of the public defenders and the Criminal Justice Act appointed lawyers who represent indigent criminal defendants, for example.

Senator THOMPSON. We have run into problems with that before, have we not?

Judge MERRITT. There have been problems with that before where actually the money has run out a couple of times. We had to have a supplemental appropriation. Congress has always caught it up, but in the last 5 or 6 years there have been a couple of years where that became a problem. Congress looks at that—Congress has always looked at that account very carefully.

Another is the payment of juror fees. And that account has run out once or twice or come very close to running out. But that account itself is not a mandatory item. All of the staff, the clerks' offices, the staff in Washington, the administrative office of the courts—and Mr. Meekam is here sitting in the—he is our director—there are employees here in Washington and they are not covered by the mandatory spending. So there is a sizable part of our budget that is not mandatory.

Senator THOMPSON. It has to do with how much mischief could a President wreak, if he really wanted to.

Along those same lines, are you into the budgetary process or the appropriations process enough—I am sure you know more about the judicial appropriations process than I do at this stage—but could a President, do you believe, reach a particular court or perhaps a particular judicial district? Would it be that much in detail that he could exercise a line-item veto to punish a particular jurisdiction if he wanted to.

Judge MERRITT. Depends on which of these bills is passed and which of the stated analysis is followed. Dr. Reischauer described the enhanced rescission process very briefly in which, yes, you could go down and say we do not like the way the judges in the middle district of Tennessee are deciding these cases and reach their appropriations. On the other hand, if it is a line-item veto that is more general in nature, and does not allow sub accounts to be reached, then perhaps not.

Senator THOMPSON. I would just make one other observation. It seems to me, that in terms of the override, you would be less likely to get an override out of Congress; that Congress probably would be willing to bite the bullet for itself before it would the judiciary. That might be an additional problem.

Judge MERRITT. I think there is less of an interest in the judiciary; less of an understanding. Not all members are well educated about what the judiciary does. Beyond that, Congress has a lot of work to do, and we would get caught up in the haste—there is a very short period of time under these bills given for the override. And I think we would get caught up in the haste of the business of the Congress and fail to be able to make our point with sufficient clarity in a short period of time to get action.

There are a lot of reasons, I think, that we see this as a danger and we see ourselves as really defenseless, because we could not make our point clearly and get it acted upon in such a short period of time.

Senator THOMPSON. I have not been out of the practice long enough to think in terms of the judiciary as defenseless, but I understand what you are saying. I have no further questions.

Judge MERRITT. Thank you.

Mr. CLINGER. Thank you, Senator.

The gentlelady from Florida.

Mrs. THURMAN. I would have to agree with the Senator, that I don't think some of my constituents believe that the judiciary is defenseless, either.

Just to follow up and maybe not a question to you so much but to the chairman and the sponsor of the bill. In H.R. 2, what you have suggested is what the Senator has suggested, that this actually goes deeper or could possibly get to those areas where there has been a case reversed or something said that they did not like. Are we going to look at an ability to provide some provisions in there for this or what is your thoughts on this particular issue?

Mr. CLINGER. Well, I think the Judge is making some very interesting points about how this would play out and I think that certainly requires looking at, yes.

Mrs. THURMAN. Just to follow up, not only with the judiciary, but it might be something we would want to look at on a whole, so that

there was not the ability for the games that might be played in going further.

Mr. CLINGER. We certainly want to prevent any games from being played, I would assure the gentlelady of that.

Mrs. THURMAN. OK, thank you.

Mr. CLINGER. The gentleman from Connecticut.

Mr. SHAYS. Judge Merritt, it is really nice to have you here, and I am thinking you do us a service by being here. I am going to apologize for my attitude to start off with, because I think some of what you said is an absurdity, to my way of looking at it, from my view as a legislator who served in a statehouse on the Judiciary Committee, filled with lawyers who were officers of the court, who served in the Congress, where you also have officers of the court. For you to say the court is powerless, to me, is hard for me to reconcile.

If I were the President, I could say to you, as a Judge, we are powerless when you decide that what we do in the executive branch is not proper. We are powerless when you decide that what we do is unconstitutional. You make your decision and we have to stop.

So I think everyone could take the position—and I also, with some respect here, want to say that when you say what you say, I listen to you and I say, well, this is a judge and I respect the sense of the preciseness of his words, yet did our Founding Fathers really say that the court was the least dangerous or it was the weakest?

Judge MERRITT. The least dangerous.

Mr. SHAYS. To me, there is a difference.

Judge MERRITT. I agree.

Mr. SHAYS. I agree you are the least dangerous. And I agree we have to go out of our way to protect the judicial system, but I do not think in any way that you are the weakest at all, and I don't think our Founding Fathers did.

I think of someone like Judge Greene, who basically did awesome things in terms of AT&T, and has affected the lives of people in untold ways. I wonder if our Founding Fathers ever envisioned that a judge would have that kind of power.

So, judge, what I want to say to you is that I think that the court, that the legislature has the power to appropriate, it has the power of the purse. If it uses that power improperly, it has the executive branch to check it out. If the legislative branch uses its power improperly, we have the judicial branch to check it out. And I don't know of any President who has a lifetime tenure. I don't know of any Congressman who has a lifetime tenure. I don't know of any—I just am trying to give you a feeling of how I feel in the legislative branch and to just be honest with you.

So I come down and say it is good you are here, you are doing your job and making a presentation, but I really believe I have a constitutional responsibility to protect the power of appropriation to make sure that we do not make the judiciary an island unto itself.

I know I have kind of gone on and I would love you to respond.

Judge MERRITT. Well, there is a lot to respond to there. I know that many Members of Congress, at least have said to me jokingly,

sometimes seriously, that you guys and women have got life tenure and that makes you all powerful. That is, from a point of view of a sitting judge, not really accurate.

No. 1, let us take your case of Judge Greene. Judge Greene—the Founding Fathers, of course, would not have foreseen the telephone, No. 1, or the Sherman Act, although they did have some view about monopolies. But Judge Greene made that decision, that decision was appealable if anyone had wanted to appeal. Actually, they settled the case based upon Judge Greene's decision. But that case was appealable first to the District of Columbia Court of Appeals, and then to the Supreme Court of the United States.

And if there were, in that particular case, sufficient view that he was wrong or that if he had been affirmed by the Supreme Court that he was wrong, that was not a constitutional decision. It could have been easily changed by Congress, and, actually, subsequently, I think the decision has basically been changed by new legislation.

We only have authority to decide constitutional questions against the will of Congress in a very limited set of circumstances and very, very few times has that ever been exercised by the Federal courts. Congress retains the power to reverse our decisions and has frequently done so. And Congress has article 1——

Mr. SHAYS. If the gentleman would yield.

Judge MERRITT. Yes.

Mr. SHAYS. Reversed its decisions unilaterally or with another branch that has to also sign off that? That is my basic point. It takes two.

Judge MERRITT. If judges construe a statute contrary to the way in which Congress wishes it to be construed, then Congress has the authority and has often changed that.

Mr. SHAYS. With the concurrence of another branch.

Judge MERRITT. Of the President, that is correct.

Mr. SHAYS. It seems to me what we want to make sure happens is that no one branch has ultimate power to do something without another branch's involvement. And it seems to me that that is what is a major protection to all of us.

Judge MERRITT. Well, let me just be clear, if I may. We cannot do anything in the appropriations area or in the spending area without the concurrence of Congress. We simply ask you to not put us under the power of the President with respect also, in addition to Congress, with respect also to our appropriations because we see it as a great conflict of interest.

Mr. SHAYS. I hear that point, and I would just ask the indulgence of the chairman just to pursue that.

We are saying, though, that the executive branch has to concur. And I just say to you, as a judge, just as a President can abuse his power, if Congress allows that abuse, then, yes. But a judge can abuse his or her power by deciding almost unilaterally and incorrectly, it is an abuse, that something the executive branch is doing is wrong.

So we can all make the claim there can be an abuse. The fact is, though, there needs to be another branch to make sure that abuse does not occur. And my judgment is that we make sure it does not occur because the legislative branch has to also concur. That would just be the argument I would make to you.

Judge MERRITT. This is a seminar. We could debate this for a long time, and I know your time is circumscribed.

Mr. CLINGER. The gentleman's time has expired. I would recognize the gentlelady from the District of Columbia.

Ms. NORTON. Thank you, Mr. Chairman.

Judge Merritt, this is important testimony, and testimony of particular interest to me because I still teach a seminar at Georgetown University Law Center, and one of the issues that is routinely discussed is separation of powers. When I began to teach the seminar I was amazed how little litigation there has been around the separation of powers issue in the Constitution.

The reason I think that has been the case, as I look at the materials and the history that is there, is that there is an almost natural restraint, more rigid, I believe, than the Constitution requires, that has resulted, in, if anything, lack of communication and miscommunication among the branches.

Now, I don't know where I stand on this bill, but I do have questions for you about separation of powers. You indicated that there may well be a conflict of interest on the part of the President if he gets involved in this matter but you concede that the Congress, of course, can do so. The fact is, Judge Merritt, it is in this body that one hears most of the criticism of the judiciary. I don't know the last time I heard a President care much about it.

Moreover, when the executive goes before the courts, the executive is defending legislation that has been enacted by this body and is almost never speaking for itself as some kind of independent branch of Government. It is protecting the *x, y, z* act or the *a, b, c* act against a litigator who is trying to overturn one of our pieces of legislation.

I would like to ask you whether, if you concede that the legislature must be involved, if there is any greater danger in involving the executive for a similarly restrained role, since each will obviously feel constitutionally compelled not to cross over whatever line in which it feels its duties lie.

So my question to you is, if there is a conflict of interest with respect to the executive, why isn't there a conflict of interest when we look at your legislation? And you can see it can do virtually anything except lower your salaries and retirement and the rest

Judge MERRITT. Well, the President's power, the President has two great powers, one is as Commander in Chief, and the second is as the chief law enforcement officer of the Nation bringing indictments, charging people with criminal offenses, and it is in the second respect that it seems to me if the President also has the power to control our budget as well as the power to control the litigation that comes before us, that I see the conflict of interest.

And it is in the pursuit of the law enforcement power, that is, the power of indictment and charging people with a crime, that the President or the executive branch is likely to become most upset when they lose, and is likely to take out at least in part its wrath on those parts of the judiciary that may be the source of the loss in court.

And I don't view that simply in the abstract. It seems to me that is a historical fact. For example, I am told that during the desegregation days, that both the executive branch and the Congress were

sufficiently upset with the Supreme Court of the United States after the *Brown* v. *Board of Education,* that when the Court of Appeals judges, the people in my position, got a $10,000 pay raise, as a matter of spite or something, the Members of the Supreme Court only got a $4,000 pay raise.

Ms. NORTON. That was this body, not the executive.

Judge MERRITT. The executive went along with it.

Ms. NORTON. Again, I just leave you with the notion that if you are the least dangerous branch, probably we are the most dangerous branch. It is probably not the executive.

Let me put a practical question before you that is perhaps less abstract than that one. Suppose the Congress of the United States says there shall be a wage freeze——

Judge MERRITT. Excuse me?

Ms. NORTON. Suppose the Congress of the United States says there shall be a wage freeze on its employees in the Federal Government and in the Congress itself? Suppose the judges say, we want our employees to have a raise, and we intend to, when we get our budget, manipulate it in a way so as to effect a pay raise?

Should we be able to say, if you work for the Federal Government, you work for the Federal Government, and if you happen to work, to be a computer operator in a court, you are no different from a computer operator in the Department of Labor, and we say everybody should have a wage freeze? Should we be able to do that?

Judge MERRITT. Yes, and you have done that, and no one in the judiciary has ever contested the power of Congress to do that.

Ms. NORTON. So if the President were to line-item veto a part of a budget approved by us that gave wages, you wouldn't have any problem with that, that gave raises?

Judge MERRITT. I have a problem with the whole concept of the President having a line-item veto over the accounts of the judiciary as a conceptual as well as a practical matter in the institutional balance of power that we have created historically.

I don't know if it would be the end of the world if you gave the President line-item veto power over the judiciary and he exercised that power in order to cut the budget of a particular court. I am sure the republic would survive. It certainly has survived much worse.

I am just saying that in the process we ask you to think carefully about whether it is wise to create this power of the President over the judiciary when the President has so many reasons to be upset with us as a result of being the main litigator before us.

Mr. CLINGER. The gentlelady's time has expired. I recognize the gentleman from New Hampshire, Mr. Bass.

Mr. BASS. I have no questions at this time, Mr. Chairman.

Mr. CLINGER. If there are no further questions—I am sorry, Mr. Horn.

Mr. HORN. Judge, I read with interest your testimony, and I would just like some clarification. You note at the bottom of page 4 that there were three instances, once in 1989, again in 1993, the third time in 1994, where the executive branch, in effect, unilaterally reduced judiciary's budget request by a total of over $1 billion. Could you elaborate on what items were affected by that?

Judge MERRITT. You know, let me get a little intelligence on that.

It was unspecific, I am told, and one occasion was when Mr. Panetta was in Ms. Rivlin's job, when the budget came over from the White House, it had been cut despite the statute that Senator Roth mentioned, and that was done twice before.

But it was not specific. It was a figure, but not specifically allocated to any particular part of the judicial budget.

Mr. HORN. In other words, they left it to the judiciary branch as to what to do in response to that squeeze on resources?

Judge MERRITT. And we protested that in each situation. We now have an understanding at least with the present administration that they will no longer do that because it violates the statute which Congress has adopted.

Mr. HORN. Just to get the years straight, are these fiscal years or calendar years when you mention 1989, 1993——

Judge MERRITT. Fiscal.

Mr. HORN. So the first one would be under the Bush administration in 1989. The other two would be under the Clinton administration; is that correct?

Judge MERRITT. She tells me they were calendar years.

Mr. HORN. Calendar years. OK. Then it is Bush, Clinton, and Clinton.

The reason I ask that is it seems to me if the country is desperate with an annual deficit and an out of control national debt and the executive squeezes all accounts but does not touch what is prohibited by the Constitution, in your case, which no other branch has that protection to speak of, then that is not unreasonable.

Now, that is why I wanted to know what happened when you had to cut out $1 billion. What was harmed by that?

Judge MERRITT. You mean what specific items?

Mr. HORN. You obviously had to make it, I take it—was this an increase you were asking for and a reduction, or did they cut a billion below the previous year's expenditure?

Judge MERRITT. Well, you are talking about three different years there which totaled——

Mr. HORN. It is totaled, yes. But in those years, were they cuts from a previous year?

Judge MERRITT. They were cuts from—let me be accurate.

The first one, I am told, was the last Reagan year, and the cuts were cuts from requested increases that were sought because of additional work we had projected as a result of crime bills that had been previously adopted. And in each case, I am told, that is what it was. And I don't know—let me ask one question.

In each case, I am told that when it came to Congress, we protested, and some of it was restored, but not all. The Appropriations Committees of the House and the Senate which look at our budget look at it quite carefully, and are fully aware of what we are doing, and they oftentimes cut items or accounts in our budget back.

But—I am sorry I was not there, and I don't know with great specificity exactly what happened, but in general I think I have explained it.

Mr. HORN. I get the feel for it. It is really what we have faced with the executive branch, and their baseline budgeting, and the

fact that you have an upward ratchet every year, and everybody accused of cutting the budget, putting the lame and the poor out into the streets in their wheelchairs, when actually we are giving them more money each year than they had the preceding year. That is why I wanted a clarification of what we mean by cuts.

I gather the judicial branch has the same view as the executive branch in that respect, that when you squeeze them a little, it is a disaster.

Well, I can appreciate that with the congressional statutes on drugs and other areas, the courts have been flooded.

We have looked at another aspect which isn't under the judiciary, but maybe should be, U.S. Attorneys, and their misallocation around the country. I think Montana or Wyoming, one of two, has the greatest per capita number of U.S. Attorneys.

But the rest of the country is starving for the resources to handle the cases in your courts, and we are very sympathetic to that, and we need to do something, and maybe this committee will, as best it can, to maybe readjust that.

Thank you.

Mr. CLINGER. The time of the gentleman has expired.

Judge Merritt, again, thank you very much for appearing this afternoon and for giving us the viewpoint of the Federal judiciary. We will certainly take that into account.

Judge MERRITT. I appreciate your allowing us to be here. Thank you.

Mr. CLINGER. At this point I would like to call our final panel for the afternoon. Mr. Thomas Schatz, who is the president—I am sorry. In place of Mr. Schatz, we have Mr. Joseph Winkelmann, who is the government affairs director of the Citizens Against Government Waste; Mr. David Keating, executive vice president, National Taxpayers Union; and the gentleman I refer to as the intellectual Boswell of the Congress, Mr. Norman Ornstein, the American Enterprise Institute.

Gentlemen, welcome. We look forward to your testimony.

Mr. KEATING. Thank you. Who would you like to proceed first?

Mr. CLINGER. Why don't we do it in the order in which it is on the panel here. Mr. Winkelmann.

STATEMENTS OF JOSEPH WINKELMANN, GOVERNMENT AFFAIRS DIRECTOR, CITIZENS AGAINST GOVERNMENT WASTE; DAVID KEATING, EXECUTIVE VICE PRESIDENT, NATIONAL TAXPAYERS UNION; AND NORMAN ORNSTEIN, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE

Mr. WINKELMANN. Thank you, Mr. Chairman. I appreciate your acceding to the change this afternoon. Mr. Schatz had to leave quite suddenly.

I would also appreciate your indulgence. I have made it a habit in 18 years of lobbying to always work for the people who sit at this table. So this is my maiden voyage. I will try to do the best that I can.

I represent the 600,000 members of Citizens Against Government Waste, which was created 11 years ago after Peter Grace delivered to President Reagan 2,478 findings and recommendations of the Grace Commission, which was known as the President's Pri-

vate Sector Survey on Cost Control. These provided a blueprint for a more efficient, effective, and smaller Government.

Since 1986, implementation of the Grace Commission's recommendations have helped save taxpayers more than $250 billion. And other Grace Commission—and other cost cutting proposals enacted by Congress in 1993 and 1994 will save more than $100 billion over the next 5 years.

So for those of your critics who say the Congress has not been trying to cut the budget, we are here to say that you all have been doing a good job. The job is not finished, but we appreciate what you have done.

In recent years, Congress has appropriated tens of billions of dollars for projects that were not competitively awarded, authorized, or subject to congressional hearings or debate. Revenue bills have been padded with special tax breaks. Business as usual in Washington has meant that the interests of taxpayers in an economic, efficient and accountable Government are readily overlooked in favor of the personal interests of career politicians. It cannot be denied that the republic is ill-served when self-aggrandizement determines the Nation's spending decisions. When public moneys are used for private interests, rather than the interests of all the people, the American republic itself is assaulted. How can the people be sovereign if pork is king?

A line-item veto would allow the President to reject wasteful spending slipped into appropriations bills and tax breaks for narrow interests without having to veto the entire bill, to shut down large agencies, or disrupt major Federal programs. The power to veto and reduce line items in spending bills and tax bills would enable the President to remove pork and fat more easily without disturbing the normal flow of Government.

I would like to add that it is our view that Secretary Reich is correct. Congress has passed numerous bills, particularly from the Ways and Means Finance Committees that are laden with corporate pork. Whether you call it corporate pork, corporate welfare, whatever.

In my early days, part of my job was to get those special tax breaks, specific to a specific company, specific to a county board of supervisors somewhere, whether it was a transportation bill or a Ways and Means bill. Of course, we all know it happens. And I think when you look at the line, we need to look seriously at how we can reach all of this. So we really applaud the authors for including the special interest tax breaks that are included in where the President can reach.

Expanding the line-item veto to entitlements might cause heartburn for some, but it would forever remove the label of uncontrollable spending that has been applied to the mandatory parts of the budget. A line-item veto for authorizations would mean coverage of all Federal spending.

The Presidential veto power as a tool of fiscal discipline has been weakened by congressional budget practices and the Budget and Impoundment Control Act. As an intern, I worked for Bill Brock when this bill was being drafted. The times have truly changed. I would submit to you the great constitutional challenge of 1974 was resolved the wrong way. Certainly, President Nixon had to resign.

But the Budget and Impoundment Control Act forever since then has changed the balance of power in favor of the legislative branch. We think unfairly so.

A line-item veto would restore the President's appropriate role in the budget process. It would not tilt the power of the Nation's purse strings in favor of the President, we believe, but restore the balance that has been eroded by Congress' budget rules which favor big spending and pork. As it does in 43 States, a line-item veto would make both the legislative and executive branches more accountable jointly for our tax dollars. Following November 8th, 1994, I believe accountability is in.

A line-item veto is necessary because under current law, the President's rescission proposals can easily be ignored. It is an affront to common sense that while the President now can propose to rescind any portion of an appropriations bill, Congress is not required to vote on his rescission package.

The Contract With America and several bills introduced in the 104th Congress would give the President a permanent legislative line-item veto authority which he could exercise to strike spending items in appropriations bills or targeted tax breaks in tax bills.

The vetoed items would be automatically stricken from the spending or taxing bills unless a majority of the House and Senate vote within 20 days to disapprove. The proposal further allows the President to veto the disapproval, forcing Congress to reconsider the bill in question and muster a two-thirds vote of both Houses to override. Perhaps the most significant provision of these proposals, and if I can verbally underline that, I really want to do that, is the ability to reach into report language where earmarks and wasteful spending are often hidden away.

By including provisions whereby Congress can overturn a line-item veto by a two-thirds vote, the separation of powers, that cornerstone of our Republican Government, is not overturned.

Furthermore, it is doubtful that a President could use the authority to blackmail Congress into passing Presidential pork because Congress would have the moral high ground to ensure that such pork is overturned.

Presidential and congressional pork are equally objectionable.

Citizens Against Government Waste's 1993 and 1994 Pig Books identified more than 150 examples of egregious pork-barrel spending that cost taxpayers billions. I will recite just a few: $58 million to bailout millionaire New York Yankee owner George Steinbrenner's American Ship Building Company in Tampa, FL; $25 million for an Arctic region super computer at the University of Alaska to study how to trap energy from the aurora borealis; $2 million for restoration of the Liberty Theater and Lucas Theater, both in the historic district of Savannah, GA.

And in 1994 there were plenty examples of rampant pork-barrel spending: $120 million for a courthouse in Phoenix, AZ; $11.5 million for power plant modernization at the soon-to-be-closed Philadelphia Naval Shipyard; $2.4 million for design and construction of a Federal parking facility to provide 200 parking spaces for 18 Federal employees. Mr. Chairman, I could go on and on.

Mr. SHAYS [presiding]. With that in mind, I would like to ask the gentleman to wrap up. I have spoken to you enough to know your outrage at this. I don't want you to get too carried away.

Mr. WINKELMANN. I will be happy to. I will conclude by saying that the General Accounting Office estimated in 1992 that a Presidential line-item veto could have cut $70.7 billion in pork-barrel spending from fiscal years 1984 through 1989. That is unnecessary spending that could have been taken out of the hands of the Government. And successive Presidents have asked Congress to pass a line-item veto to keep their promise to cut the deficit. We believe it is time to give the President the tools to bring the country back from financial ruin. Thank you.

Mr. CLINGER [presiding]. Thank you.

[The prepared statement of Mr. Schatz follows:]

PREPARED STATEMENT OF THOMAS A. SCHATZ, PRESIDENT, CITIZENS AGAINST GOVERNMENT WASTE

Mr. Chairman, thank you for the opportunity to testify today on the line-item veto. My name is Tom Schatz and I represent the 600,000 members of Citizens against Government Waste (CAGW). CAGW was created 11 years ago after Peter Grace presented to President Ronald Reagan 2,478 findings and recommendations of the Grace Commission (formally known as the President's Private Sector Survey on Cost Control). These recommendations provided a blueprint for a more efficient, effective and smaller government.

Since 1986, CAGW and the Grace Commission have helped save taxpayers more than $250 billion, with another $100 billion in savings over the next five years. Many of our waste-cutting recommendations have been adopted by members of Congress seeking to reduce the costs of government and the deficit.

In recent years, Congress has appropriated tens of billions of dollars for projects that were not competitively awarded, authorized, or subject to congressional hearings or debate. Revenue bills have been padded with special tax breaks. Business-as-usual in Washington has meant that the interests of taxpayers in an economic, efficient and accountable government are readily overlooked in favor of the personal interests of career politicians. It cannot be denied that the republic is ill-served when self-aggrandizement determines the nation's spending decisions. When public monies are used for private interests, rather than the interests of people, the American republic itself is assaulted. How can the people be sovereign if Pork is King?

A line-item veto would allow the president to reject wasteful spending slipped into appropriations bills and tax breaks for narrow interests without having to veto the entire bill, shut down large agencies or disrupt major federal programs. The power to veto and reduce line items in spending bills and tax bills would enable the president to remove pork and fat from the budget without disturbing the normal flow of—government. Expanding the line-item veto to entitlements might cause heartburn for some, but it would forever remove the label of uncontrollable spending that has been applied to the mandatory parts of the budget. A line-item veto for authorizations would mean coverage of all federal spending.

The presidential veto power as a tool of fiscal discipline has been weakened by congressional budget practices and the Budget and Impoundment Control Act of 1974. Congress funds all executive agencies and departments through 13 major appropriations bills. As a consequence, the president cannot block a specific pork-barrel project without vetoing the entire bill. He must either let the pork go through or risk disrupting major programs and shutting down whole departments. Presidents seldom choose to exercise the veto in such circumstances and, as a result, pork, wasteful spending, and insidious tax breaks cannot be excised before the bill is signed.

Congress has confronted the president repeatedly with hastily-crafted omnibus continuing resolutions or 11th-hour reconciliation bills that cover all or substantial portions of federal spending for the year. This practice inhibits the exercise of the veto, which under such circumstances would have the effect of closing down the federal government. A line-item veto would restore the president's full constitutional role in the budget process by granting him authority to veto line items in spending bills. The line-item veto would not tilt the power over the nation's purse strings in favor of the president, but restore the balance that has been eroded by Congress'

budget rules which favor big spending and pork. As it does in 43 states, it would make both Congress and the president more accountable for our tax dollars.

A line-item veto is necessary because under current law, the president's rescission proposals can easily be ignored. It is an affront to common sense that while the president now can propose to rescind any portion of an appropriations bill, Congress is not required to vote on his rescission package. If Congress chooses to ignore the president's request, it expires after 45 days. The spending proposals stand as law.

Mr. Chairman, that is the problem. For too long, pork-barrel and non-essential spending have been allowed to continue with no checks and balances. The interests of taxpayers have been ignored, and the country has endured more than a quarter century of chronic deficit spending and a national debt of more than $4.7 trillion.

The Contract With America and several bills introduced in the 104th Congress would give the president a permanent legislative line-item veto authority, which he could exercise to strike spending items in appropriations bills or targeted tax breaks in tax bills.

The vetoed items would be automatically stricken from the spending or taxing bills unless a majority of the House and the Senate vote within 20 days to disapprove. The proposal further allows the president to veto the disapproval, forcing Congress to—reconsider the bill in question and muster a two-thirds vote of both houses to override. By giving the president a bigger presence in the spending and taxing decisions of our nation's government, fiscally sound legislation and not members' political interests should be the order of the day.

The fear that the line-item veto would give the president unlimited power is unfounded. The fear that the president could use the veto authority to expand his power exponentially and upset the checks and balances between the branches is addressed by restricting the president's veto power to withholding funds and preventing increased spending on a program or the creation of new programs. In this way, the line-item veto would not give authority to the president to alter the budget priorities set by Congress in its spending decisions, since the veto can only be used to withhold funds or possibly lower funding for an item. CAGW would like to see this power enhanced at some later date.

By including provisions whereby Congress can overturn a line-item veto by a two-thirds vote, the separation of powers, the cornerstone of our republican government, is not overturned. Furthermore, it is doubtful that a president could use the authority to blackmail Congress into passing presidential pork because Congress would have the moral high ground to ensure that the pork is overturned. Presidential and congressional pork are equally objectionable.

For more than a quarter century, the federal budget has been unbalanced. The federal debt has skyrocketed to more than $4.7 trillion, provoking the frustration and anger of taxpayers. History shows that Congress is not capable of balancing the federal budget and controlling its wasteful spending and special tax breaks. The line-item veto could reduce these excesses.

CAGW's 1993 and 1994 Pig Books identified more than 150 examples of egregious pork-barrel spending. Examples from 1993 include:

$58 million to bailout millionaire New York Yankee owner George Steinbrenner's American Ship Building Company in Tampa, Florida;

$25 million for an Arctic region super computer at the University of Alaska to study how to trap energy from the aurora borealis;

$2 million for restoration of the Liberty Theater and Lucas Theater, both in the historic district of Savannah, Georgia;

$1.5 million for a National Pig Research Facility in Iowa;

$1.1 million for a Plant Stress Lab at Texas Tech University.

In 1994, there were plenty of examples of rampant pork-barrel spending:

$120 million for a courthouse in Phoenix, Arizona;

$11.5 million for power plant modernization at the soon-to-be-closed Philadelphia Naval Shipyard;

$2.4 million for design and construction of a federal parking facility to provide 200 parking spaces for 18 federal employees in Burlington, Iowa, a project which was later rescinded;

$1 million of the Palmer Chiropractic School in Davenport, Iowa; and

$600,000 to ease fish migration up the Sacramento River.

In addition to pork-barrel projects passed by Congress, there are hundreds of special tax breaks. To be effective, a line-item veto must also allow the president to address the issue of pork-barrel tax breaks to ensure that all Americans are treated equally and fairly by the tax code. Some examples of tax expenditures buried in tax bills include:

$32 million special depreciation schedule for tuxedo rental

$6 million special exemption from fuel excise taxes for crop dusters.

By extending the line-item veto to include tax breaks for narrow interests, the president could ensure that future tax-reform initiatives really do simplify the tax code without adding loopholes that overly complicate the tax system, benefiting the few while leaving the many to carry the tax burden.

The line-item veto should also be extended to include new entitlement spending programs and other mandatory spending. Programs which begin with good intentions are often expanded in a manner that severely strain resources and tax dollars. A presidential veto could act as a restraint on such consequences of entitlement programs. It would bring accountability to the two thirds of the federal budget which is now on automatic pilot.

Consideration should also be given to extending line-item veto authority to authorization legislation, which sets the legal spending levels for appropriations. Not only would the line-item veto ensure that appropriated funds are authorized, it would ensure that funds stay within the authorized level.

A prime example of the need for the inclusion of authorization language is the Intermodal Surface Transportation Efficiency Act of 1991. This measure authorized—$151 billion in new infrastructure spending over five years. Adjusted for inflation, that's as much money as the federal government spent on infrastructure during the 1960s when the highway system was built. House members voted overwhelmingly in favor of the bill one hour after a single copy was presented to the floor; yet nobody had read it.

Why the rush to pass the $151 billion highway bill, without reading it? Each member knew there would be some road, bridge, tunnel, sidewalk bus or subway earmarked for his home district.

Furthermore, by applying the line-item veto to the authorizing process, programs that have to be re-authorized periodically would come under presidential scrutiny. If the presidential will is there, those programs that are duplicative of other federal programs, that have fulfilled their purpose or are no longer necessary would be eliminated. For decades, the opportunities for reducing wasteful government programs and reducing the size of government have been scarce. A line-item veto that can be applied to authorizing legislation would provide opportunities for Congress and the president to work closely for a smaller, more efficient and less costly government.

The General Accounting Office, Congress' own investigative agency, estimated in 1992 that a presidential line-item veto could have cut $70.7 billion in pork-barrel spending from fiscal years 1984 through 1989. That's $70.7 billion in unnecessary spending taken out of the hands of the private sector.

The line-item veto would help restore citizen control over the political process. This, in turn, would promote a return to fiscal sanity, efficient government, and policies favorable to economic growth. The line-item veto is not only sound fiscal policy, it is good government policy because of its effects of incumbency protection.

Mr. Chairman, the line-item veto would allow the president to weigh special tax breaks and expenditures which benefit the few against the common good and the priorities of the many. The results of the election last November suggest that it is time to change the way we have been doing business in Washington. Voters are tired of finger pointing and excuses. Giving the president a line-item veto and ending the sovereignty of pork-barrel spending and special tax favors is just what they have in mind.

Successive presidents have asked Congress to pass line-item veto legislation to keep their promises to cut the deficit. It is time to give the president the necessary tools to help bring the country back from the brink of financial ruin. The president must have no excuses for failing to lead. Congress must show that it is serious about controlling spending by passing line-item veto legislation. The time is now.

This concludes my testimony. I'll be glad to answer any questions you may have.

Mr. CLINGER. Mr. Keating.

Mr. KEATING. Thank you, Mr. Chairman.

Our organization represents 250,000 members and we support line-item veto legislation. In particular, we support H.R. 2 and S. 4. We could also support S. 14 if Congress is not able to pass either of the measures I just mentioned.

Now, it is getting all too common for Members of Congress to attach pork-barrel appropriations to must-pass legislation. That is what the line-item veto is all about. Since many of these provisions are not subject to debate or separate vote, in many cases Members of Congress don't even know they exist. A legislative line-item veto

will allow the President to draw attention to these provisions and force Congress to repass them if Congress wants them to become law.

Additionally, I think the line-item veto will help reduce hypocrisy in the executive branch. We have heard rhetoric about the need to cut out pork-barrel spending. If we give the President the line-item veto, here is his opportunity to really make a difference, not only rhetorically, but with a special power.

I also think this would increase the likelihood that the President will work more closely with the Congress in cutting pork-barrel spending.

Governors in 43 States already have a form of line-item veto. Not many Governors use it all the time. But we have seen in many cases the Governors who do wish to use it can use it very effectively, and they have been able to cut spending at very important times during fiscal crises.

I should say that we oppose granting an item veto power over tax legislation, which we believe is unwise and probably also unconstitutional. We do not believe, however, that the tax expenditure repeal procedure contained in S. 14 is unconstitutional, and we would have no objection to including such a procedure in a line-item veto legislation.

My written statement also describes an alternative method of modifying H.R. 2 to carry out the intentions but not to run into the complexity or possible constitutional problems.

Unfortunately, none of the bills before the committee address the so-called entitlement programs. I hope that at some time, either in this Congress or in future Congresses, we can have a special power for the President to control entitlement spending, and particularly those programs on a permanent appropriation.

Now, some people will warn that the item veto will affect the balance of power between the legislative branch and the executive branch. Our much greater concern, and I submit that of most Americans, is the risks inherent in a record amount of peace-time debt.

We can argue all we want whether it is going to enhance the power of Congress or the President. What we should recognize, as most people have, that the process has broken down and our general interest is best served by a nation that brings its fiscal house in order. And I think a legislative line item would do that.

If Members of Congress are overly concerned about the President's power, let's suspend the line-item veto when the budget is balanced. I think that would give Congress an incentive to get the budget in balance, if they are worried about too much Presidential power.

The President is the only official elected by the Nation who exerts direct control over legislation affecting the whole budget, and we think it is entirely appropriate that the President be given an opportunity to veto items of spending that are not in the national interest by doing so separately and without placing other important legislation at risk.

The line-item veto is not a panacea. But it is a step, and we believe an important tool that can be used to reduce pork-barrel and low-priority spending.

Thank you very much.

Mr. CLINGER. Thank you very much, Mr. Keating.

[The prepared statement of Mr. Keating follows:]

PREPARED STATEMENT OF DAVID KEATING, EXECUTIVE VICE PRESIDENT, NATIONAL TAXPAYERS UNION

Thank you for the opportunity to present the views of the 250,000-member National Taxpayers Union on legislation to provide the president with the line-item veto.

We strongly support legislation to grant a presidential line-item veto power over appropriations. In particular we support H.R. 2 and S. 4, which approach a true item veto power. If it is not possible to pass either of these measures, we also support S. 14, which provides for an expedited rescission process. While a constitutional amendment is not the subject of today's hearing, we believe that such an amendment should be passed by the Congress and ratified by the States. A line-item veto constitutional amendment would permanently protect this power from being revoked by Congress.

The need for a line-item veto has become more pressing in recent years as Congress has tended to aggregate legislation into mammoth continuing resolutions and omnibus bills. Such a practice greatly reduces the likelihood that the president will use his veto power because of his objections to a relatively small provision in the legislation.

The all-too-common congressional tactic is to attach parochial, pork-barrel appropriations to must-pass legislation that the president has little choice but to sign. Since many of these provisions are neither the subject of debate nor a separate vote, many Members of Congress do not realize they exist. The legislative line-item veto would allow the president to draw attention to pork-barrel provisions and force their proponents to justify them. Meritorious provisions would be repassed by Congress, while the rest would be eliminated.

Additionally, the line-item veto would make the president more accountable on the issue of wasteful spending. Many presidents have repeatedly criticized Congress on spending. By giving line-item veto authority, the president could no longer blame Congress for loading up spending bills with non-essential spending and would have to work actively, rather than rhetorically, to trim wasteful spending.

Governors in forty-three states have the line-item veto. While many governors use it rarely, the item veto can be a powerful tool for an executive who is determined to cut wasteful or low priority spending. Certainly the nation's governors believe it is a useful tool. A 1992 Cato Institute survey of current and former governors found that "ninety-two percent believe that the 'line-item veto for the president would help restrain federal spending.' " Governors were also asked, "Was/Is the line-item veto a useful tool to you as governor in balancing the state budget?" Overall, "sixty-nine percent of the governors said the line-item veto was a 'very useful tool'; 23 percent said it was a 'somewhat useful tool'; and 7 percent said it was 'not useful.' "

Although the discretionary account of the federal budget is by no means all of the federal budget, it is an area of tremendous waste, causing cynicism among taxpayers who see the dollars they send to Washington squandered on blueberry research or bike paths. Our national debt is now over $4.5 trillion. Clearly Congress needs to reevaluate its spending practices and take strong steps to restore fiscal discipline. The line-item veto is one of those steps, and would be an important signal to taxpayers and voters nationwide that Congress is finally taking our fiscal crisis seriously.

Both H.R. 2 and S. 4 would amend the Impoundment Control Act of 1974 so as to give the president line-item control over federal spending. The president would be authorized to rescind all or part of any appropriation by notifying Congress within twenty days of the bill's enactment. The rescission would take effect unless both Houses of Congress passed legislation to disapprove the rescission. S. 14 is not a true line-item veto bill, but would instead set up an expedited process for considering rescissions proposed by the president. In addition, S. 14 would create the same procedure for rescissions of direct, or entitlement, spending.

We oppose granting an item veto power over tax legislation, which we believe is unwise and is likely unconstitutional. We do not believe, however, that the "tax expenditure" repeal procedure contained in S. 14 is unconstitutional. We are sympathetic to the proposal in H.R. 2 that would allow the president to item veto tax breaks if they benefit five or fewer taxpayers. This provision could be improved by requiring the president to analyze whether fewer than five taxpayers would benefit from a tax break in any legislation signed into law. If the president found that five

or fewer would benefit, the measure would not take effect unless the president made a finding that the provision was essential for improving the fairness or efficiency of the tax laws. If such a tax break was not implemented because of either of these reasons, the Congress could repass the measure with a waiver of these two provisions in the law. Alternatively, the repeal procedure proposed in S. 14 could be substituted.

H.R. , and S. 4 would not allow the president to reduce spending on so-called entitlement programs. This flaw should be corrected. One way would be to adopt the expedited rescission procedure for direct spending that is contained in S. 14.

All entitlement programs must be funded through appropriations legislation. However, many of these programs are under a permanent appropriations or have other special status. An item veto should allow the president to make changes in the rules defining the people who may qualify for such benefits or the amount of such benefits, provided that the total spent on a program after such changes are implemented is not less than the previous year's spending. Unfortunately, none of the proposals before the Committees today contain a procedure to allow the president to restrain the future cost of entitlement programs.

Some people warn that the item veto will affect the balance of power between the Executive Branch and the Legislative Branch. Our much greater concern, and I believe that of most Americans, is the risks inherent in a record amount of peace-time debt, which endangers our country's financial future.

Many people don't count the tally day after day, but on average $556 million per day was borrowed every day in 1994 by the federal government—business days, Saturdays, holidays, Sundays too—which puts us in a position no country has successfully handled very well: to be at the beck and call of our creditors.

The federal government has run deficits in 33 of the last 34 years, and has run a deficit every single year for the past 25 years—an entire generation. During the 1960's, deficits averaged $6 billion per year; during the 1970's, $35 billion; during the 1980's, $156 billion; during the 1990's, $248 billion. As a result, last year gross interest payments alone on the national debt approached $300 billion. This was the second largest item in the federal budget, and was more than the total revenues of the federal government in 1975.

The Bible reminds us that the borrower is the servant of the lender, and I believe this has been true from time immemorial to today. Interest rates affect the service payments on our national debt, the mortgage that we take out to buy a home, the business loans that create new jobs, the car or truck that we buy, and the money parents borrow to put their children through college. All of these expenses, which are built into the fabric of our lives, are higher than they would be, and they could be higher still, because the federal budget is out of control.

It is far beyond the point where we ought to quibble about whether this is going to slightly enhance the power of the president or Congress. We should recognize, as most people have, that the process has broken down and that our general interest as a nation lies in bringing our financial house to order.

The president is the only official elected by the nation who exerts direct control over legislation. It is entirely appropriate that the president be given an opportunity to veto items of spending that are not in the national interest. The line-item veto is not a panacea, but it is a step, a tool that the president can use, to reduce pork-barrel and low priority spending.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN GLENN SUBMITTED TO DAVID KEATING

Question 1. What level of savings do you believe could be realized through enactment of an enhanced or expedited rescission?

Answer. A General Accounting Office study indicated that the line-item veto power could have saved $70 billion over the last twenty years. The Cato Institute estimates annual savings at between five and ten billion dollars. I believe these estimates are reasonable. The most important factor is the willingness of the President to use the power to cut spending.

An enhanced rescission power would produce greater savings than an expedited rescission procedure. under current law, rescissions proposed by the President have often been ignored by Congress, and the money has been spent. If Congress does not repass a rescission proposed under enhanced rescission, the spending is canceled. Because rescissions could automatically take effect, a President would be more likely to use the enhanced rescission power.

Question 2. What are the reasons for your opposition to line-item veto power over tax legislation?

Answer. None of the legislation before the Committee would grant a line-item veto or an enhanced rescission power over all tax legislation. One proposal would allow an enhanced rescission power only for tax breaks that benefit five or fewer taxpayers. my written statement outlines a procedure that would better implement this concept. We have no objection to the "tax expenditure" repeal procedure contained in S. 14.

We believe that the power to tax should not be delegated to the President. However, we agree that the Supreme Court would likely uphold this power.

Allowing a line-item veto over all tax legislation could play havoc with efforts for fundamental tax reform. It might allow a President to pick and choose among tax increase or tax relief measures contained in a reform bill, and result in a law that bears little resemblance to what could have passed the Congress.

Question 3. Could you please expand on your views regarding the constitutionality of item veto power over tax legislation?

I see a distinct difference between an item veto power over tax legislation and appropriations. For appropriations, the proposed item veto grants a form of an impoundment power. There does not seem to be any limit to such action by Congress.

Article I, Section 8 of the Constitution says that "The Congress shall have Power to lay and collect Taxes . . ." I believe that this places limits on the ability of Congress to delegate the taxing power, but acknowledge that the Supreme Court has acknowledged a few limits in this area. I note that the Tax Court, which is the most important forum for review of tax disputes, is an Article I, Section 8 Court, and it is funded from Legislative Branch appropriations. Such status for the Tax Court provides further evidence for the view that the Founders wanted Congress, not the President, to "lay and collect" taxes.

The special status of the taxing power is also confirmed by Article I, Section 7 of the Constitution, which provides that all tax bills shall originate in the House of Representatives. Many tax increase bills pass only the narrowest of majorities. Often tax relief measures are incorporated in a bill that increases taxes. A line-item veto could allow a President to increase taxes beyond Congressional intent since a President might item veto the tax relief sections of the bill. I believe this contrary to the provisions of the Constitution that provide for special legislative branch control over the power of taxation. As Chief Justice John Marshall wrote in *McCulloch* v. *Maryland*, "The security against the abuse of power [of taxation] is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."

Mr. CLINGER. Norman, Dr. Ornstein.

Mr. ORNSTEIN. Thank you, Mr. Chairman. I want to thank you for your nice words earlier and say in return that I am tickled to see you wielding the gavel up here.

I already have bifocals. I think I need to get a new pair of glasses to get used to seeing Republicans on my right here in this body and Democrats on my left.

But I hope that this very salutary change in power, which is something that is supposed to be built into democracies, will also bring some rethinking of basic propositions on everybody's part.

And I would like to take just a couple of minutes, having listened, and I commend all of you who stayed through and carefully listened to all of us. Mr. Bass, a new Member in particular, who has been sitting thoughtfully through all of this, it is a tough position to be in.

Through most of our history, conservatives were far more wary of power concentrated in the hands of the executive, and for more appreciative of the power of Congress. It is only in the last 30 or 40 years, as we have seen these changes that were really unprecedented, that had one party with a 40-year control of the House of Representatives, we hadn't had even half that length of time where there was an unbroken control by one party before.

And as Republicans tended to dominate the White House, we had a different and rather revisionist viewpoint. And I would urge you

all, among other things, to go back and read the book that James Burnham, the intellectual father of the National Review wrote, called Congress and the American Tradition, which sets outs the more traditional view, and a view, frankly, that I as a long-standing proponent of the powers and prerogatives of Congress would hold.

And I would remind you, among other things, of a quote that Burnham has in that book coming from Chief Justice Taft: "It is a breach of the natural fundamental law if Congress gives up its legislative power and transfers it to the President and judicial branch."

We should always think very carefully, especially when it comes to the most fundamental power you have, which is the power of the purse. I am glad at this point at one level that you are considering a piece of legislation and not a constitutional amendment because once you pass a constitutional amendment, you can't say very easily, oops, we made a mistake, we better go back and tinker with that, as we can with laws.

Frankly, I am hoping that with all the other constitutional amendments we are considering, which if they passed would be more than we passed at any other point in American history other than the founding period with the 10 known as the Bill of Rights, that we will think those through very carefully as well.

You don't want to make mistakes. You don't want to have unintended consequences. I think you have got some problems having a piece of legislation that will pass constitutional muster, especially after the Chada decision. I have misgivings about the Chada decision, but it is there. And you are going to have to work very carefully at it. But think about it.

And I would like you to think about, too, just simply what is implied by this transfer of power. I believe what we are dealing with here more than anything else is a transfer of power and not so much a question of spending restraint. If you look through the course of American history, I do not believe that you can really make the case that Presidents are more penurious than Congresses are. I don't think in fact that Presidents are budget cutters. I think if you look across the ocean, we have a significant amount of research which would suggest that executive centered political systems tend to spend more and more rapidly than legislative centered political systems. So be careful about how much power you want to move.

In addition, let me say I really think we have had a myth developed about the powerlessness of the regular Presidential veto. During the Reagan years, I argued long and mostly fruitlessly with friends in the Reagan White House to use that veto and to threaten the use of that veto more effectively.

I believe when you get an appropriations bill that contains items that a President doesn't like or when we have those omnibus continuing resolutions that bundle all kinds of junk into them, that if the President had vetoed them, brought sizable portions, if not the entire Government to a halt, draw the line in the dust and said the Congress wants all of these things and I say no, that inevitably the President would win in those confrontations, and you had as much as anything a failure of will with a President who was more con-

cerned about cutting that kind of spending than other Presidents have been. But if we, in fact, had a reinvigoration of the regular veto we could deal with a lot of these problems.

Let me just very quickly address a couple of specific things. I would underscore what Bob Reischauer said about the way in which you have worded the language on cutting or vetoes involving direct spending, i.e. entitlements and tax breaks. I believe certainly if you have a veto that is a line-item veto that is limited to discretionary spending you are going to do very, very little if the overall goal to bring in spending restraint. But you have to be careful how you deal with these other areas.

I don't think it works if you simply cut spending from programs that—at the Federal level that are in fact built on formulas where people are entitled by law. You have got to go back and should go back to changing those formulas, or you have got to find another way of building in something that will work and won't be getting tangled up with endless lawsuits and not accomplish the goal.

My judgment on taxes would be that you should have—if you are going to have a line-item veto or an enhanced or expedited rescission, it ought to involve the entire Tax Code. If in fact a President decided that he or she wanted to line-item veto a very popular, broad-based tax benefit like the mortgage interest deduction and Congress doesn't like that, that is fine, they can go back. But once you start to make distinctions about the number of people involved, you are into a very, very tricky process, as Bob Reischauer suggested.

Finally, let me just suggest I would favor an expedited rescission. I think giving the President the authority to have a vote, turning things a little bit more in that direction makes sense. The enhanced rescissions we are talking about I really believe is considerably more power than the old impoundment authority, to get to one of the issues that we discussed before, and troubles me greatly.

One quick word, as we have had this debate about the courts, I would hate to get into the business of exempting anybody. But it certainly occurred to me we are all going to think of historical examples, and do not think that Governor Weld, with the way in which he has exercised an item veto, would be the same as any other Governor of Massachusetts or that any President would be the same as other Presidents. The historical examples, the example of Lyndon Johnson is the one you always ought to keep in mind. Lyndon Johnson, Richard Nixon, think of how they would use that empowerment.

You don't have to have a Member of Congress in and say explicitly, I will veto your dam unless you vote for my MX missile. Smart Presidents are much more subtle than that. But it would be a substantial transfer of power. I can only think of FDR in the court packing time, when you had a very great disagreement between the President and the Supreme Court, and the outlet the President chose was to try to enlarge the size of the court. Just imagine what a President with a line-item veto would have done at that point, given his great disagreements with the courts.

So that is a historical example we ought to have on the record. Thank you.

Mr. CLINGER. Thank you very much, Norman.

Mr. CLINGER. Congressman Shays.

Mr. SHAYS. Thank you. I would just like to thank all three gentlemen who have testified because they have been giants in this whole issue, taxpayers groups, Citizens Against Government Waste.

Dr. Ornstein, I love your affection for Congress, and I thank you for having that affection even when we haven't always been lovable. I would like to yield my time to Mr. Blute.

Mr. BLUTE. I would agree with what my colleague from Connecticut said. I believe most Members of Congress have a great deal of respect for all of your organizations and the work that you do.

I wanted to ask Dr. Ornstein, in a colloquy with one of my Democratic colleagues earlier on this, on the issue of whether the President in the early days of the republic actually, inasmuch as a line-item veto, because the appropriations bills that the Congress sent him were narrow and he was able to veto them, and that with the rise of things like omnibus bills and continuing resolutions and budget riders, that the President didn't have to deal with at that time, that, in effect, what we are trying to do is restore the President's capability that he had in the early stages of the republic before these more modern developments.

Mr. ORNSTEIN. There is a lot of truth to what you say, Mr. Blute. I am kind of amused, whenever in the past I would show Mr. Smith Goes to Washington to my students, which, as you will recall, dealt with a pork-barrel project that the noble Jimmy Stewart was trying to save, they showed the piece of legislation, which at the time had every little small item as a separate line in the bill. That is not the way we legislate, and it hasn't been the way we have legislated for a long time.

And back when it was the way we legislated, it was much easier for a President to single out items. That is one reason why a kind of constitutional breach has been discussed in the past would not be effective, because so much of what we do is in reports now, and in omnibus bills.

But let me say as well that the power of the President has evolved and enlarged itself enormously since those days in many, many ways as well. The Congress and what we do with legislating in the modern era has changed. The President's power is an awesome one right now.

As I suggested in my testimony, if a President were more effective and more aggressive in using the veto, I believe that you could make the case that having a veto over an omnibus bill, which really would shake things up and shake up everybody, is a far more effective tool, and indeed, what we found, at least twice during the Reagan years, was that President Reagan, when an omnibus bill came up, but this came late after much cajoling, said here are 10 or 12 specific items I find noxious and unacceptable. If you include them, I will veto this and I will take it to the country. If you don't include them, I will accept it. And they were excluded.

If a President wants, that President can use the equivalent now. Most Presidents these days have been far too passive in their willingness to take on a lot of these issues. And of course what we have seen often is when Presidents have been willing to take them

on, as Jimmy Carter was, rather clumsily, with water projects, they get burned and step back from it.

I am not sure this power would make them more willing to take on those narrow and more controversial issues, but rather would make them far more willing, I believe, to use this enhanced power, to get their own priorities, which history has suggested do not involve, on balance, less spending than Congresses.

Mr. BLUTE. Thank you, Mr. Chairman.

Mr. CLINGER. Thank you. The gentlelady from Florida?

Mrs. THURMAN. Thank you, Mr. Chairman.

Mr. Keating, I have to ask this question because I always want to ask this question of what is pork-barrel spending. How do you define that? So if we have to go to the President to talk about this——

Mr. KEATING. I would say it is anything that is not in the national interest, something targeted toward a certain district, region, or State. That would be my definition.

Mrs. THURMAN. OK. Let me ask a couple of other questions. One of the concerns that we have talked about a little bit was the incredible amount of power over the Congress by the President. And some of this, not just the power to stop Congress from spending but also to increase spending. I am going to give you an example.

Last year, many Members in both parties objected to the President's crime bill on the grounds that it was too costly, and their defeat of the bill forced the President to agree to change it in the bill in order to get it passed. In fact, what we saw was those dollars come down.

Do you think that if he had had a line-item veto at that time and had used that to threaten Congress and Members about particular projects in their area, that we would have seen a result of that bill going down in cost as versus staying at $33 billion?

Mr. KEATING. Well, I guess the answer is we will never know. But given the climate around that bill, given the national attention of that bill, I doubt it would have changed. I think Members would have stood firm on the issue at that time. I don't think they would have been bluffed by the President at that time. That is not to say that every Member would take that view, or even in a future Congress other Members may take that view. But I think during that debate, certainly we probably would have seen a similar result.

And I think also President Clinton tried such tactics. Members who were subject to them, given especially the President's popularity last year, they probably would have gone to the media with them and said what they were being threatened with. So it probably would have even further undercut the President's position on the spending.

Mrs. THURMAN. Dr. Ornstein, you look like you want to answer this, too.

Mr. ORNSTEIN. Of course. We know, first of all, that Presidents, including President Clinton, will use every bit of power and authority that they have, including promising things to Members to try to get votes. So with President Clinton, as with other Presidents, we can look at areas where they would have gone the extra steps to try and bring those votes over.

It would have been on the stimulus package in 1993, in the Senate. And I think, clearly, it would have been before the vote on the rule in the House.

Now, most Presidents are not going to issue press releases saying that they have threatened Members of Congress with the denial of things that matter to them very much. But they will do it in a more subtle fashion. But I would make the case that when you are just a few votes away, and you have things that are very small in dollar terms in the overall budget but that matter enormously to individual Members of Congress, the leverage becomes very substantial and he very possibly would have gotten the votes to put him over the top on the rule, and if the rule had passed, the crime bill as it was originally written probably would have passed overwhelmingly.

Now, there may be instances, as with the budget in 1993, where a President would use that power to bring more savings, more discipline to the budget as opposed to the other. But I would argue that over time it would have the opposite effect. And we would get more bridges, more dams, more of those things that matter to individual Members, and more of those President's priorities, which are going to mean more spending.

Mrs. THURMAN. Mr. Keating, let me ask another question. In your testimony you talked about that, with the passage of a line-item veto it would kind of send a signal that Congress is finally taking our fiscal crisis seriously.

The discretionary spending part of the budget, I know you are aware, has been declining as a share of total outlays under the spending caps enacted as part of the Budget Enforcement Act. Are not the spending caps on discretionary spending we have already put in place an even better signal of congressional awareness of our country's fiscal crisis than the line-item veto?

Mr. KEATING. I think it is another good signal. But I think that there are a lot of Republican candidates that campaigned on a line-item veto in this last election, and I think one of the things they certainly ought to follow through on is their pledge. If we had seen President Bush follow through on his pledge in 1988, I don't think we would have the kind of spending control problems we have today.

So I think one reason why people are so cynical about Congress is, we hear very explicit promises made in elections about controlling spending, controlling taxes, and then when it comes to actually putting those promises into effect we don't see them happen.

So I think that is another reason why it is important to follow through with the line-item veto. I believe that on balance it will help control spending, and I think if you look at the States where chief executives in the States, Governors, have used the line-item veto, I think the evidence would tend to indicate a slight reduction in spending, not overwhelming——

Mrs. THURMAN. However, Mr. Keating, I will disagree with a report that was given to us earlier that showed that they did use it for political reasons as well and not necessarily for deficits in spending. I am going to run out of time.

Mr. KEATING. An intergovernmental relations report a number of years ago looked at this and didn't find any evidence that a line-

item veto would increase spending. It didn't find strong evidence it would decrease it very much, either. I think the real important thing is the character of whoever is Governor or President at the time.

I would agree that President Reagan and President Bush should certainly have tried to draw the line in the sand more often and more publicly. And if I were President, I certainly wouldn't have had any problem vetoing these big bills and tossing them back in Congress.

Mrs. THURMAN. Mr. Winkelmann, you talked about the 43 States having line-item veto, yet we saw today that there was a clear indication that there were 10 States that went a little bit further.

Have you got an opinion on which one of those you prefer?

Mr. WINKELMANN. We don't, and we want to limit our recommendations at least here to the alternatives before us, and we are very satisfied that the Contract for the time being is more than sufficient, taking into consideration the comments that Norm Ornstein made.

This is not something I trust you all are going into blithely. It has been an issue in the country before. Recognizing what David said and what our testimony is too, at some point we really would like to see you reach in and somehow grapple with the entitlements for new entitlement programs, because that really is where much of the major spending problem is.

But if I may respond to an earlier question of yours, you had asked what pork is. Members of Congress have established seven criteria for what constitutes pork. While no one of them is probably sufficient, taken together they really do give an objective test for pork. I will provide your staff with a list of those.

[The information referred to follows:]

A project is pork if it is requested by only one chamber of Congress; not specifically authorized; not competitively awarded; not requested by the President; greatly exceeds the President's budget request or the previous year's funding; not the subject of a congressional hearing; or, serves only a local interest. CAGW calls it pork if it meets only one on these criteria; the porkbusters require three of the seven criteria to be met and have introduced legislation to eliminate pork-barrel items in each of the last two sessions of Congress.

Mr. CLINGER. The gentlelady's time has expired. The gentleman from California.

Mr. HORN. Thank you very much, Mr. Chairman.

I have enjoyed this testimony. The National Taxpayers Union and the Citizens Against Government Waste have done a valuable service, I think, throughout the 2 years I have been here in terms of providing advice on various projects as well as just spending practices generally.

So your testimony has been very helpful. Along with other Members, appreciate the fact that you have honored a number of us in both parties who have tried to think about economy and getting control of this deficit and this unbelievable national debt.

But let me note, I should say, Mr. Winkelmann, I think in your testimony I was fascinated by the list of egregious pork-barrel spending, because when the definition came up on pork barrel, some of my colleagues had defined pork-barrel spending as that spending for a valid project in another Member's district. And it is

usually picking on a particular district, but when you look at it, there is some reason for it historically.

And my friend, Dr. Ornstein, can go back to the times of Thomas Hart Benton, I am sure, and the whole expansion of the West, with transcontinental railroads, roads, canals, you name it. That was called pork barrel by many of our—even friends sitting looking toward Europe, and we could not have opened up the West without some dynamic, ingenious people, the Bud Shusters of that day; namely Thomas Hart Benton, who said we have a future looking West, and we did.

And we in California are grateful they could finally get a railroad to us that would save it from being shot up in covered wagons.

But what I am curious about is in one of my favorite groups, the Citizens Against Government Waste, you list a number of projects. A lot of them do, on the surface, sound like pork barrel, and I wouldn't vote for them. Mr. Steinbrenner can take care of himself, and a few others. But something like the $120 million for a courthouse in Phoenix, AZ, I will say I know absolutely nothing about that project. I don't know if it is good or bad. I have nothing to do with Phoenix or Arizona. But tell me what the criteria is, why that is on the list?

Mr. WINKELMANN. I would be happy to. That made the list because it was either $20 or $30 million over budget, and according to the General Services Administration, the Congress has voted for and the President has signed authorization bills for in excess of, I think it is, $1 billion more office space for the judiciary than they can use.

It is to the point where when we prepared a video on pork-barrel spending this year, two Federal judges, in effect, went on camera for us in this video to lament the fact that they are out of control, the judicial branch is out of control.

And our most recent Supreme Court Justice, the man who designed—helped design and plan the courthouse in Boston, you know, I look around myself at a beautiful, beautiful room here, but you guys look like pikers compared to some of these courthouses being built. They were excessively spent. And the criteria used really address the question about the westward expansion. That is a good point to make.

Representative David Skaggs, yesterday when we testified before Interior Appropriations, raised this issue very well. He asked, are there externalities that demand of us, action by the Congress to increase spending for the national good? We had the first intellectual debate that I have heard before that committee for a long time. For 20 minutes they talked about the need for jobs that cannot be done except by the Federal Government.

Yesterday Bob Samuelson in the Post and today Bill Murchison in the Washington Times, not exactly two sister publications, made the same point, that we have confused the difference between our wants and our national needs. And so I would say to you that the courthouse itself was needed. In that particular case, in Phoenix they needed a courthouse. But from the start of the authorization to the last piece of marble from Italy being put in place, it went 25 percent over budget.

And this Congress went along with it. And those reauthorizations and those extensions of the appropriations are precisely what we want a President to be able to get at.

And in respect to projects that come to a specific district, one of the criteria that Members of Congress of the Pork Busters Coalition has set up as a criterion is if it serves a purely local interest, why in the world are we spending the money?

And I apologize for dominating your time. If I may add, when the budget is balanced, we are going to be out of business, and I pray for that day that I will not have to have a job, you know, knocking Congress around for the way you spend money.

But we have budget caps in place and they have done a very, very good job. They have provided discipline and cover for Members of Congress, and I think that is very important, but you see the job is not done yet. When the budget is balanced, it won't be pork-barrel spending. It will return to some other description.

Mr. HORN. That is a very good example and I am glad to hear what the problem was. The problem was not the whole $120 million. The problem was the excesses going into that courthouse that ran up the costs. And I believe, Mr. Chairman, that would be permissible, would it not, for the President to cut that figure down to a reasonable figure, to try and control excesses and force the judiciary to rethink the——

Mr. WINKELMANN. That is the genius of the enhanced rescission as opposed to a real line-item veto.

Mr. HORN. As far as my friend, Dr. Ornstein, I agree with a lot of what you say, certainly on the constitutional amendment point.

I don't know if you were in the room when our colleague, Mr. Moran of Virginia, cited the fact that there were four Presidents, and we kidded on this side that none of the people who were for this constitutional amendment had ever heard of Lyndon Johnson or Richard Nixon. You are absolutely correct. I would favor this only in its statutory form, because it gives Congress the right to pull it back.

It would take a two-thirds vote if a feisty President vetoed the pullback or to sunset it to see how it worked.

I remember during the Reagan administration I suggested to them that they ask Congress, use his persuasive abilities, as long as we have a national debt, as long as we—a substantial proportion, and then it was only a trillion, and as long as we have an annual deficit, the President of the United States ought to be given the authority to go through appropriation bills by Congress, bill by bill. If he misuses it for partisan reasons, that authority will go until you get a President that doesn't misuse it for partisan reasons.

So that would give us at least the flexibility when, you are right, a shift of power would be under way.

Mr. CLINGER. The gentleman's time has expired.

Mr. ORNSTEIN. With indulgence, could I make a brief comment to my good friend and former colleague in political science. I don't worry about whether a President would use it for partisan reasons but for policy reasons. I think President Clinton would have tried to use it to get leverage over Democratic votes, at least as much, if not more, than for Republican votes.

I agree with Bob Reischauer. I do not think that all procedural changes are meaningless in this process. I don't think that Gramm-Rudman worked. It left off far too many opportunities for pernicious mischief, but I do believe the pay-go caps have worked remarkably well. If you look at what restraint we have put on the discretionary budget, the discretionary budget was $535 billion in 1991; $536 in 1992; $533 in 1994; and it is projected to be $544 and right around that range for the next 4 years. Those are real numbers. That doesn't involve phony budgeting. That process has worked.

We need to look very much more carefully at why that worked and other attempts or gimmicks did not work. But what is also clear from this is that the problem now is not in this discretionary portion of the budget, including most of what we would call pork. We can bring more restraint. And the fact is that the political process has now elected a Congress that is intent on bringing dramatically more restraint to the process, and it will work.

We do have to find a far better way of bringing entitlement programs which are outside this process under control. I don't think we have done it here. I wish we had. It has got to work in a different way. But that is where we ought to be devoting our time and attention, because that is where the problem is in terms of the lack of restraint now.

Mr. HORN. You are absolutely right. We have to cap some of the entitlement, not social security, we have all agreed that is off the table, and there are a few others similar to it, certain trust funds that are off. But Congress ought to have the right to set a goal, give the executive the power to achieve that goal.

Mr. CLINGER. The time of the gentleman has expired.

Those of us who also serve on the Committee on the Infrastructure and Transportation get very nervous when you talk about pork barrel, because one man's pork barrel has been described as another man's economic development.

But I take the point. I would now like to recognize the gentlelady from the State of New York.

Ms. SLAUGHTER. Thank you, Mr. Chairman.

Good afternoon. I have been in Congress now for 8 years. I have been concerned, frankly, with the blurring of the lines between what is congressional responsibility and what is executive responsibility. And I think we have seen a considerable whittling away of that. And I keep reminding myself that those of us who serve in the House of Representatives are the ones who are closest to the people. We are the ones who go home on weekends, meet with our constituents; we are the ones who talk to them on the street and know what they need.

I am very concerned that we give away what is basically their power to act through us. And I do think that there could be many occasions where Presidents could be vindictive, where they might think it is smart. For example, let's say that some of our States only have one Representative in the House, and that is not a great body of people to go and push for any issue. And the Governor of that State might be an enemy of some sort of that Representative, and he will just say, "As long as I am President of the United

States, nothing will go there." That is really not beyond the realm of possibility.

But the more important thing that I want to ask, because I know you spend a lot of time on this: since 1974 to 1992, the Congress of the United States has cut $17 billion more from the rescissions than the President asked for. And given that fact that we were $17 billion more frugal than whoever was sitting in the White House, what evidence do you have that it would be better if we gave that up and sent it down to Pennsylvania Avenue?

Mr. WINKELMANN. May I respond? I think that part of the testimony that I delivered, and I apologize you weren't here, Presidential pork is no better than congressional pork. And I think the rescissions that you talk about, and in all of this respect we are always talking about policy decisions being made, even if it is on a single water project somewhere, that is a policy decision.

I think the evidence that it is necessary is that there is still in the budget, at least as of your last budget, $6.2 billion in funding, which represents no national needs, or in most cases was not authorized, or was not requested by the President, or was slipped into conference reports in the middle of the night and meets any number of criteria, objective criteria for what pork is.

I met this morning with staff of the Agriculture Appropriations Subcommittee and they think they have done a wonderful job of reducing all the spending right down to the last nickel that can be taken out of the Department of Agriculture. I not, so, respectfully disagreed with them, but I told them that the job is not done until the deficit is eliminated.

In that respect, we have to look everywhere, if it is for $6 billion.

Ms. SLAUGHTER. That is true, and I have been very proud watching this deficit drop, and we have been very disciplined about that cap. I think that has made a major difference. But there isn't any evidence—perhaps none of it will be perfect so that we will get out every jot and tittle of it, but there is simply no evidence anywhere that I know of that the President would be more frugal than we are.

We have indeed been far more cost conscious and done more cutting than the White House has in almost 20 years. I know our subject is not budget today, but I can tell you that for the last number of years, the Congress has given back to the Presidents much less money than they have asked in budget proposals.

The process we go through here, committee by committee, trying to really do the best that we can for the people we represent, has been, I think, a time honored way of doing this. I don't like to just throw more and more over to the President, and the party doesn't matter to me. I think I am—I don't want to say cynical. Maybe I am more of a realist. I would not trust anybody with that enormous amount of power all alone, if they were a person, again, who went to the public to do what they wanted to do.

As a State legislator and as a Federal legislator, I have watched many times things we thought were good projects that we have tried to work in that really—and I am sure my colleagues have too—that the executive went out and took control and command of it, because they go all over the country and run for reelection, and

we never get mentioned. There has been many a ribbon cutting where I wasn't around.

The point I want to make with you is that none of us should spend a penny more than we have to. That is one of the reasons—we are not in this business to declare a dividend or make a profit. But I think that you are barking up the wrong tree if you have just bought into the fact that a President will do a better job than the people's Representatives. I just don't see—we have no evidence for that.

Mr. WINKELMANN. It is not that we believe the President will do a better job. We believe the rescissions you all ought to congratulate yourself for, from 1974 to 1992, were necessary. The country hasn't fallen apart because of those rescissions. We are climbing up one side of the tree and you are talking about climbing up the other side of the tree. President Reagan had some very specific recommendations not honored by this country with regard to rescissions. You all chose to take a different route.

Our point is that the power should be shared, both—and through the line-item veto.

Ms. SLAUGHTER. Let me say something, too. The country is not falling apart. Sixty-five percent of the bridges of the State of New York are substandard and we don't have any money to fix them with. And some of them are even dangerous. We have only built one airport in the United States since 1972, and that is Stapleton, and of course it doesn't work.

But we have neglected ourselves pretty dreadfully. We have cities with water projects that are 200 years old. I guess some of them probably go back to wooden sewers and all of that. And it is not that we are living in high cotton in this country, that we don't need help. I think it is a harsh judgment. When people don't have drinking water—in my previous district I had a little town called Le Roy, New York. They had no water to drink. People were carrying water to drink. There was not a drop of money here or in Albany that we could give those people to help them build that water project. Nothing.

I am sure that is multiplied all over the States. People from Texas will tell you that on the border, where they have taken all the junk from Mexico, and where the sewage runs, from the San Diego sewage plant, and where babies are born with no brains, and all the awful problems that they have there with pollution, it may look like a colossal waste, but you could make a case here that the country, the infrastructure here is in very bad taste.

If I can take one more second, Mr. Chairman, I am very interested in high-speed rail. I think that is really the way we need to go. I don't want to build a lot more airports. I know we keep paving over everything. Fastest train in the United States of America was in 1892. And the New York Central Railroad was owned by a man from my part of the country, Mr. Richman. And he wanted to see just how fast a train could go. And over wooden track he got his best steam engine and off they went. And achieved 103 miles an hour. And today, a hundred years later, we go half that fast.

So I always think that shows we are just not really on high cotton here. The people we have supported for years are flitting

around on high-speed rail in Europe. We have neglected ourselves terribly.

Mr. WINKELMANN. Citizens Against Government Waste does not disagree with anything you have just said at all.

Mr. CLINGER. I just have one comment. We have alluded to the *Chada* decision here, which I happen to think is not a very good decision, but it is the law of the land. I am wondering, Norman, you referred to it, as did John Spratt. Do any of these—you suggest, I think, that these proposals, one or perhaps all of them, would run afoul constitutionally out of the *Chada* decision. Is that basically——

Mr. ORNSTEIN. I fear that is the case, Mr. Chairman. You know, the discussion of the judiciary, you may want to get a little—do a little gaming here as well.

Mr. CLINGER. It has occurred to me.

Mr. ORNSTEIN. They might find a little more constitutional merit if they are exempted from it than they would otherwise.

Mr. ORNSTEIN. But I think if you look at *Chada* and then you look at enhanced rescission as a piece of legislation, I am skeptical.

You can never predict this court, especially, on almost anything. An expedited rescission, which itself has never been challenged, and basically says you are simply guaranteeing a vote, you are shifting the process in that way. Probably makes it an enhanced rescission. I am skeptical. We are probably going to come back to the drawing board.

Mr. CLINGER. Anybody have a different opinion than that?

Mr. KEATING. Personally, I think there is a good chance it would be upheld, because you can think of it as sort of a delegation of power to the President not to spend this money. It goes back to the Congress. Congress would have to pass it through two Houses and it would have to be presented as a piece of legislation to the President for his signature. Chada was one House veto of rules and such.

In fact, I know a lot of Republicans are interested in getting more control over the rulemaking procedure. Perhaps a revolutionary idea but I think one that holds a lot of common sense to it is to require that regulations proposed by the executive branch go back to the Congress for their ultimate approval.

Too many laws are too vague. They give too much authority to the executive branch to come up with all kinds of strange interpretations. And if they had to be passed into law by the Congress, perhaps the costs and benefits of regulations would be more carefully weighed by the executive branch as well as by Members of Congress who would be ultimately responsible for them.

Mr. CLINGER. So we are going to start down that path next week when we consider in this committee a moratorium on——

Mr. KEATING. This is one way. You can say instead of a moratorium, let them issue rules, but they wouldn't take effect until Congress approves them in both Houses.

Mr. ORNSTEIN. Mr. Chairman, apropos of Mrs. Slaughter's comments, I might recall that you spent a lot of time and did a lot of very good work on a capital budget a few years ago

Mr. CLINGER. Appreciate the plug.

Mr. ORNSTEIN. And which, unfortunately, never got very far. And now as we talk about priorities, as much as spending it is a question of priorities, where we are using more and more of our money as taxpayers to transfer from one group of people to another, and not to try to build or invest, that we might very well—and you might, in this new role, vigorously pick up that cudgel again, and it might get us in a very fruitful debate about what the priorities of the country are, and whether, even if we decide we want to spend a whole lot less, we should be shift the priorities in them.

One of the difficulties I see is we are going to focus intensively, and the appropriations process now is going to be the real center of the cutting, but that is a third of the budget. And we are going to make some cuts that are probably counterproductive, under the enormous pressure and under the zero sum game we are going to get into there, and, unfortunately, in many cases, that we will move away from investment even more.

We have to try to bring that balance back and you can probably serve a very, very useful role here.

Mr. CLINGER. I appreciate the plug, and I will tell you that the bill is going to be reintroduced. It is going to be referred solely to this committee. And I have already discussed the possibility with Chairman Horn of the subcommittee of jurisdiction, and he has assured me that he will hold hearings on that, and I am very anxious, after 16 years, to really see something.

Gentlemen, we thank you all very, very much for your——

Mr. WINKELMANN. Before we go off the record, I want to, on behalf, I hope, of every American, to congratulate you and the Senate, the other body, in deciding to join your decision last Wednesday. And I believe the Congressional Accountability Act is on its way to becoming a law. And as a group that worked long and hard to get that, and I wish Chris Shays were in the room, I want to thank you very much. We appreciate it.

Mr. CLINGER. Mr. Solomon's statement will be included in the record.

[The prepared statement of Hon. Gerald B.H. Solomon follows:]

PREPARED STATEMENT OF HON. GERALD B.H. SOLOMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman and Members of the Committee: I appreciate the opportunity to testify before the new Government Reform and Oversight Committee in strong support of giving the President a legislative line item veto.

Mr. Chairman, as we sit here today the federal debt hovers above $4.6 trillion, the annual deficit is projected to top $200 billion every year this century, and government spending is adding $10,000 to the debt every second. Furthermore, everyman; woman and child carries a public debt burden of $13,500 and the federal government will pay over $2 trillion in interest payments on the debt between now and the year 2002. This nation faces a real fiscal crisis which, I believe, can only be averted by fundamental changes in the way Congress authorizes, appropriates and obligates the taxpayer's money. H.R. 2, "The Line Item Veto Act", provides this fundamental change.

As the members of this Committee are well aware, I have, along with many others, pushed unsuccessfully for many years to pass a true legislative, line item veto. It is refreshing to finally see such a proposal a the base bill for floor debate and consideration of this important issue.

Having fight twice in the 103rd Congress to pass a true line item veto substitute to reported "expedited rescission" legislation, I commend the Committee for its wise and prompt consideration of this legislation in the 104th Congress. This will be, to my knowledge, the first time a House Committee has reported a true line item veto

bill. Our first attempt occurred on April 29,1993, when Representative Castle and I offered a substitute to H.R. 1578 to subject presidential rescissions to a Congressional disapproval process. However, this amendment was rejected by a vote of 198 to 219. On July 14, 1994, I tried again by offering with our former Minority Leader Bob Michel a substitute to H.R. 4600 to make presidential vetoes of both budget authority and targeted tax benefits subject to a congressional disapproval process. This, however, also lost, but by a much smaller margin of 205 to 218.

As most members of the Committee are familiar with the details of this legislation, I would like to take this time to highlight two specific area of H.R. 2 which I believe make very substantive reforms to current law.

H.R. 2, as introduced by the Chairman, is virtually identical to the amendment I offered last July. As a true line item veto, this bill provides that, unless the Congress acts within a specified period to disapprove the President's rescissions, those rescissions will automatically take effect and the identified spending or targeted tax benefit will be cancelled. Moreover, inclusion of the veto authority over targeted tax benefits will grant the President the ability to assure that tax changes and benefits are broadly dispersed throughout all taxpayers. Those benefit proposals affecting a small number of taxpayers, whether individuals or corporate, will be given extra scrutiny. This is the proper response to spending reduction and tax benefit rescission proposals from the Executive Branch. By placing the burden of action on Congress to disapprove spending cuts and tax benefits, the system is biased toward spending restraint.

This bias is in direct contrast with current law. For example, according to GAO, since 1974, Presidents have requested 1,019 individual rescissions of appropriations. Congress has "approved" only 354—34.5 percent—of these, amounting to thirty percent of the dollar volume of the proposed rescissions. Excluding 1981, Congress has approved less than 20 percent of the dollar volume of rescissions proposed by Presidents. Furthermore, Congress has simply ignored $48 billion in rescissions proposed under Title X of the 1974 Budget Act, refusing to take a vote on the merits. The current process requiring Congressional approval of rescissions tilts the process toward increasing spending and not toward spending reduction.

Mr. Chairman, I am also reminded of the difficulty involved in utilizing the expedited procedures in current law. My colleagues may recall the hardships our colleague from Illinois, Mr. Fawell, encountered while trying to obtain votes on ninety-six of President Bush's rescissions in April of 1992. While attempting to invoke sections 1012 and 1017 of the Budget Act, members of the House were blocked in their efforts by a waiving of the rules. Section 904 of the Budget Act makes these provisions "an exercise of the rulemaking power of the House of Representatives and the Senate," meaning that they can be waived by the vote of a simple majority. A true, legislative line item veto such as H.R. 2 is not superseded by the rulemaking authority of the House and subsequently vetoes could not be obstructed by a manipulation of the rules of the House .

H.R. 2 would greatly change the rescission process by maintaining both legislative and executive accountability while preserving the constitutional framework of the separation of power. Forty-three of the nation's governors exercise line item veto authority and it is time to give the President similar veto authority.

Mr. Chairman, in the past few months President Clinton has voiced his support for this bill, actually asking Congress to send it to his desk. I applaud him for his latest decision, after having supported it in his Presidential election campaign and switching to support an enhanced rescission process over the past two years. Whether Democrat or Republican, I strongly believe the President must be granted this authority. Special interest spending, the deficit and the debt are bipartisan dilemmas which must be resolved through bipartisan measures.

Having been first introduced in the House of Representatives in 1876 and with Congress' record of only balancing twenty-seven federal budgets since 1901, this fiscal tool is fundamentally important to all efforts to regain control of the budget. Again, I commend the Committee for holding this hearing and urge prompt and unanimous support for this true line item veto.

I thank the Committee for its time and consideration.

Comptroller General
of the United States
Washington, D.C. 20548

B-258826

November 17, 1994

To the President of the Senate and the
Speaker of the House of Representatives

In order to keep the Congress apprised of the amount and frequency of rescissions proposed and enacted we have updated our previous compilation of historical information and statistics regarding rescissions proposed by the executive branch and rescissions enacted by the Congress through the close of the fiscal year. These statistics were prepared in accordance with the same scope and methodology used in compiling our previous tables.

I trust you will find this information useful.

Comptroller General
of the United States

Enclosures

SUMMARY OF PROPOSED AND ENACTED RESCISSIONS
FISCAL YEARS 1974 - 1995

(All legislative action through October 7, 1994)

Fiscal year	Rescissions proposed by president	Dollar amount proposed by president for rescission	Proposals accepted by Congress	Dollar amount of proposals enacted by Congress	Rescissions initiated by Congress	Dollar amount of rescissions initiated by Congress	Total rescissions enacted	Total dollar amount of budget authority rescinded
1994	9	838,400,000	3	55,375,000	7	2,188,589,000	10	2,244,064,000
1993	21	1,569,000,000	0	0	11	310,805,000	11	310,805,000
1992	32	7,907,400,000	5	4,365,466,000	5	48,432,000	10	4,413,918,000
1991	133	16,361,900,000	101[1]	10,880,935,550	43	3,736,490,600	144	14,617,426,150
1990	59	1,818,100,000	34	777,686,446	33	3,238,206,100	67	4,015,902,546
1979	11	908,700,000	9	723,609,000	1	47,500,000	10	771,109,000
1978	12	1,290,100,000	5	618,655,000	4	67,164,000	9	685,819,000
1977	20	1,026,930,000	9	613,690,000	3	172,722,943	12	966,412,943
1976	50	3,582,000,000	7	148,331,000	0	0	7	148,331,000
1975	87	2,722,000,000	38	386,295,370	1	4,999,704	39	391,295,074
1974	2	495,625,000	0	0	3	1,400,412,000	3	1,400,412,000
Subtotal: 1974- 1994	439	$38,018,185,000	211	$18,570,073,366	111	$11,315,221,347	322	$29,885,294,713[2]

1. Thirty-three rescissions proposed by President Carter and totalling over $1.1 billion are not included in this table. These rescission proposals were converted to deferrals by President Reagan in his Fifth Special Message for Fiscal Year 1981 dated February 13, 1981.

2. The total estimate of budget authority rescinded is understated. This table does not include rescissions which eliminate an indefinite amount of budget authority.

SUMMARY OF PROPOSED AND ENACTED RESCISSIONS
FISCAL YEARS 1974 - 1998
(continued)
(All legislative action through October 7, 1994)

Fiscal year	Rescissions proposed by president	Dollar amount proposed by president for rescission	Proposals accepted by Congress	Dollar amount of proposals enacted by Congress	Rescissions initiated by Congress	Dollar amount of rescissions initiated by Congress	Total rescissions enacted	Total dollar amount of budget authority rescinded
1995	0	0	0	0	12	$572,190,000	12	$572,190,000
1994	85	$3,172,180,000	45	$1,293,478,546	81	$2,374,415,284	126	$3,667,894,830
1993	7	$356,000,000	4	$206,250,000	74	$2,205,336,643	78	$2,411,586,643
1992	128	7,879,473,690	26	2,067,546,000	131	22,526,953,054	157	$24,594,499,054
1991	30	4,859,251,000	8	266,419,000	26	1,420,467,000	34 [3]	1,706,886,000
1990	11	554,258,000	0	0	71	2,304,986,000	71	2,304,986,000
1989	8	143,100,000	1	2,053,000	11	325,913,000	12	327,966,000
1988	0	0	0	0	61	3,866,663,000	61	3,866,663,000
1987	79	5,835,900,000	2	36,000,000	52	12,359,390,675	54	12,395,390,675
1986	83	10,126,900,000	4	143,210,000	7	5 409 410,000	11	5,552,620,000
1985	245	1,956,087,000	88	173,999,000	12	5,458,621,000	110	5,632,320,000
Subtotal: 1985- 1998	**848**	**$34,763,049,690**	**188**	**$4,208,855,546**	**538**	**$58,846,345,358**	**726**	**$63,055,002,202 [4]**
Subtotal: 1974- 1984	**436**	**$38,018,166,000**	**211**	**$16,870,073,366**	**111**	**$11,215,221,347**	**322**	**$28,085,294,713 [4]**
Grand Total: 1974- 1998	**1,084**	**$72,681,214,690**	**399**	**$22,078,728,912**	**649**	**$70,061,566,603**	**1,048**	**$92,940,296,915 [4]**

3. The Military Construction Appropriations Act of 1991 approved certain rescissions proposed by the President in 1990 41 days after the funds were released for obligation under the Impoundment Control Act. Presidential rescission proposals R90-4, R90-5, and R90-10 totalling about $41 million were not approved.

4. The total estimate of budget authority rescinded is understated. This table does not include rescissions which eliminate an indefinite amount of budget authority.

ENCLOSURE II

RESCISSIONS BY PRESIDENTIAL ADMINISTRATION
UNDER THE IMPOUNDMENT CONTROL ACT

Fiscal Year	Rescissions proposed by President Clinton		Presidential proposals accepted by Congress			Rescissions Initiated by Congress During Clinton Administration	
	Number	Dollar Amount	Number Accepted	Dollar Amount	Percent Accepted	Number	Dollar Amount
1995	0	0	0	0	0	12	$572,190,000
1994	65	$3,172,180,000	45	$1,293,476,546	69	61	$2,374,416,284
1993	7	$356,000,000	4	$206,250,000	57	66	$1,962,511,000
TOTAL	**72**	**$3,528,180,000**	**49**	**$1,499,726,546**	**68**	**159**	**$4,909,117,284**

Fiscal Year	Rescissions proposed by President Bush		Presidential proposals accepted by Congress			Rescissions Initiated by Congress During Bush Administration	
	Number	Dollar Amount	Number Accepted	Dollar Amount	Percent Accepted	Number	Dollar Amount
1993	0	$0	0	$0	0	8	$242,825,643
1992	126	7,879,473,690	26	2,067,546,000	20	131	22,526,953,054
1991	30	4,859,251,000	8	286,419,000	27	26	1,420,467,000
1990	11	554,258,000	0	---	0	71	2,304,986,000
1989	0	0	0	---	0	11	325,913,000
TOTAL	**169**	**$13,292,982,690**	**34**	**$2,353,965,000**	**20**	**247**	**$ 26,821,144,697**

RESCISSIONS BY PRESIDENTIAL ADMINISTRATION
UNDER THE IMPOUNDMENT CONTROL ACT
(continued)

Fiscal Year	Rescissions proposed by President Reagan		Presidential proposals accepted by Congress			Rescissions initiated by Congress During Reagan Administration	
	Number	Dollar Amount	Number Accepted	Dollar Amount	Percent Accepted	Number	Dollar Amount
1989	6	$143,100,000	1	$2,053,000	17	0	$0
1988	0	0	0	0	0	61	3,888,663,000
1987	73	5,835,800,000	2	36,000,000	3	52	12,359,390,675
1986	83	10,126,900,000	4	143,210,000	5	7	5,409,410,000
1985	245	1,856,087,000	98	173,699,000	40	12	5,458,621,000
1984	9	636,400,000	3	55,375,000	33	7	2,188,689,000
1983	21	1,569,000,000	0	0	0	11	310,605,000
1982	32	7,907,400,000	5	4,365,486,000	16	5	48,432,000
1981	133	15,361,900,000	101	10,880,935,550	76	43	3,736,490,600
TOTAL	**602**	**$43,436,587,000**	**214**	**$15,656,758,550**	**36**	**196**	**$33,400,301,275**

RESCISSIONS BY PRESIDENTIAL ADMINISTRATION
UNDER THE IMPOUNDMENT CONTROL ACT
(continued)

Fiscal Year	Rescissions proposed by President Carter		Presidential proposals accepted by Congress			Rescissions Initiated by Congress During the Carter Administration	
	Number	Dollar Amount	Number Accepted	Dollar Amount	Percent Accepted	Number	Dollar Amount
1981	33	$1,142,364,000	0	$0	0	0	$0
1980	59	1,618,100,000	34	777,696,446	58	33	3,238,206,100
1979	11	908,700,000	9	723,609,000	82	1	47,500,000
1978	12	1,290,100,000	5	518,655,000	42	4	67,164,000
1977	7	791,552,000	2	96,090,000	29	3	172,722,943
TOTAL	**89**	**$4,608,452,000**	**50**	**$2,116,050,446**	**56**	**41**	**$3,525,593,043**
Note: The 33 rescissions proposed in 1981 by President Carter were converted to deferrals by President Reagan in his Fifth Special Message of Fiscal Year 1981, dated February 13, 1981.							

Fiscal Year	Rescissions proposed by President Ford		Presidential proposals accepted by Congress			Rescissions Initiated by Congress During Ford Administration	
	Number	Dollar Amount	Number Accepted	Dollar Amount	Percent Accepted	Number	Dollar Amount
1977	13	$1,135,378,000	7	$717,600,000	54	0	$0
1976	50	3,582,000,000	7	148,334,000	14	0	0
1975	87	2,722,000,000	38	386,295,370	44	1	4,999,704
1974	2	495,635,000	0	0	0	3	1,400,412,000
TOTAL	**152**	**$7,935,013,000**	**52**	**$1,252,226,370**	**34**	**4**	**$1,405,411,704**

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December 30, 1994

TO : Hon. Gerald B. Solomon
Committee on Rules, U. S. House of Representatives
Attn: Don Wolfensberger

FROM : American Law Division

SUBJECT : Constitutionality of Granting President Power to Reduce Discretionary Budget Authority and to Revoke Certain Targeted Tax Benefits

This memorandum responds to your request for constitutional analysis of a draft bill to be introduced into the 104th Congress. The draft, entitled by § 1 thereof as the "Line Item Veto Act," would empower the President to rescind all or part of any discretionary budget authority or to veto any targeted tax benefit, as defined by the bill, within any revenue bill.

Enactment of this bill, as it is more fully described below, would raise several interrelated constitutional issues. Conceptually, the bill appears to be a delegation of authority to the President to decline to enforce all or part of a congressional enactment providing budget authority for some purpose(s) or to enforce all of a certain kind of tax benefit. The questions highlighted by this approach would be: (1) May Congress delegate this power with regard to spending and taxing authority? (2) Must Congress elaborate standards to guide and inform presidential execution of the delegated authority, and, if so, are the standards contained in the bill sufficient? (3) Would it violate the doctrine of separation of powers to delegate to the President the power, under these conditions, to invalidate all or part of a law enacted by Congress and signed by the Chief Executive? Additionally, (4) is there a separate constitutional problem raised by giving the President the power to "repeal" a law, in effect, the supersession problem? And, (5) would a time constraint placed upon Congress' opportunity to reconsider a vetoed bill impinge upon the Constitution?

This memorandum, following a description of the draft designed to highlight the provisions giving rise to constitutional questions, is in six parts. First, we describe generally the provisions of the draft bill. Second, we provide the necessary background for evaluation of the constitutional issues, by briefly discussing the impoundment controversy of the 1970s and the congressional and judicial responses thereto and the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985. Third, we analyze the delegation doctrine and its application to the proposed bill in respect both to spending and taxing authority. Fourth, more specifically, we treat the standards requirement

of the delegation doctrine and assess the likelihood of the bill meeting this requisite if it should be enacted. Fifth, we address the question whether there are limits on the power of Congress to authorize the President to set aside an act of Congress. Sixth, we consider the veto reconsideration question in terms of its time limit.

In sum, we generally conclude that the bill is an exercise of delegation, which, under the precedents, is permissible. We conclude that the standards included in the draft are sufficient to meet the requirements that have been judicially proposed. Further, we conclude that the precedents establish no constitutional barrier to delegation of a power to the President, or in fact to any other permissible recipient of delegated authority, to set aside or void an act of Congress. Finally, we evaluate briefly the draft bill in the context of an overall separation-of-powers analysis and conclude that the precedents do not support any appreciable likelihood of success of a challenge based on this ground. We do suggest that one provision of the draft, specifically the setting of a time limitation within which Congress must act on an override of a presidential veto of a bill to restore rescinded budget or taxing authority, may raise a serious question about its comportment with Article I, § 7 of the Constitution, although no definitive resolution of that issue is possible.

The Provisions of the Draft Bill

The bill authorizes the President, when he makes certain prescribed determinations, to rescind all or part of any discretionary budget authority or veto any targeted tax benefit within any revenue bill. The President is directed to submit to Congress separate messages for each appropriation bill or revenue bill detailing the rescissions or vetoes that he has made in the particular bill. Each message must be sent to Congress within 20 calendar days (not including Saturdays, Sundays, or holidays) after the date or enactment of the bill. Thereafter, the rescission or veto is effective unless Congress, within the period prescribed in the bill, enacts legislation restoring the budget authority or the targeted tax benefit.

The time period consists of (1) twenty calendar days of the congressional session during which Congress must complete action on a disapproval bill and present it to the President, (2) ten days (not including Sundays) during which the President may sign or veto the disapproval bill, and (3) five calendar days of session during which Congress may override the President's veto of the disapproval bill. The draft also contains detailed procedural provisions for consideration of disapproval bills.

With that bare sketch of the draft bill, we can turn to questions of constitutionality.

Preliminarily, however, we must address a matter of terminology. The draft bill styles itself the "Line Item Veto Act," and that characterization appears frequently in the draft. The power that is conferred in the proposed bill, though, is not line-item-veto authority; rather, it is, expressly, in the bill's text insofar

as it refers to spending authority, the power to rescind all or part of any discretionary budget authority. Although the text, when it refers to tax benefits, uses "veto" language, it is evident that the President's action is to strike these provisions following his signing of the relevant bill into law. See § 2(a)(2)(the President is to notify Congress of a rescission or veto not later than twenty days "after the date of enactment" of an appropriation bill or a revenue bill containing either the budget authority or the targeted tax benefit). The line-item veto, the "true" line-item veto, would enable the President, upon presentment of an enactment, to sign part of a bill and to veto part of it, rather than, as now, having to consider the whole bill and either signing or vetoing it in its entirety. To attempt to confer this power on the President would raise difficult, and possibly insuperable, constitutional objections.[1]

Constitutional analysis is concerned with substance, instead of terminology.[2] To denominate enhanced-rescission authority as line-item veto authority violates no applicable principle of constitutional law, and, indeed, inasmuch as the practical effect of the two different approaches would be largely similar, to use one descriptive term to identify the other alternative does not

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[1] In a previous memorandum, Killian, *Constitutionality of Empowering Item Veto by Legislation*, CRS, Jan. 4, 1984, reprinted in *Line Item Veto*, Hearings Before the Senate Committee on Rules and Administration, 95th Cong., 1st Sess. (1985), 13-20, the author concluded that such authority could not be delegated but that Congress could achieve the same result, in effect, by the device of separating appropriations bills, after passage by both Houses, into separate bills containing one item of budget authority and "deeming" all the bills to be passed for presentation to the President. The efficacy of this approach would, for very many reasons, be limited. The memorandum also appears, in essentially the same form, in *Item Veto: State Experience and Its Application to the Federal Situation*, House Committee on Rules, 99th Cong., 2d Sess. (Comm. Print)(1986), 164.

[2] *Crowell v. Benson*, 385 U.S. 22, 53 (1932)("In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority . . . , regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required").

seem unreasonable or misleading.[3] In any event, we analyze specifically what the draft bill provides.

The Constitutional and Legal Background

I

Expenditure of federal funds is a matter committed to congressional control and discretion.[4] Pursuant to Art. I, § 8, cl. 1, Congress is empowered "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States[.]" It is the general welfare clause that provides Congress the basis for the plethora of spending programs enacted over its history. What Congress determines to be in the general welfare is dispositive. *United States v. Butler*, 297 U.S. 1, 66 (1936); *Helvering v. Davis*, 301 U.S. 619, 640, 645 (1937); *Buckley v. Valeo*, 424 U.S. 1, 90-91 (1976); *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). Moreover, the power of the purse is made clearer by Article I, § 9, cl. 7, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]" Thus, every expenditure of federal moneys must be in consequence of enacted congressional authority.[5] The history of

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[3] "This comparison [of line-item veto and enhanced rescission] is sensible because enhanced rescission authority would enable the President to reduce or eliminate 'lines' in appropriations." Devins, *Budget Reform and the Balance of Powers*, 31 WM. & M. L. REV. 993, 1003-1004 n. 63 (1990). There is much precedent for this view. For example, in 1989, the Senate debated and defeated an amendment to an appropriations bill, which was in the form previously introduced as S. 1553, 101st Cong., containing provisions similar to the proposed draft bill and which was called the "Legislative Line Item Veto Authority." 135 CONG. REC. 28081 (Nov. 9, 1989). Senator Coats, who offered the amendment, stated that, while it was called a "legislative line item veto" bill, "[i]t could just as easily be called rescission process." Id., 28082. Senator McCain, a co-sponsor of this amendment and author of an earlier rescission bill, remarked that it and similar bills "could be called a line-item veto or enhanced rescission." *The Line-Item Veto*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 101st Cong., 1st Sess., 195, 197, 198 (1989).

[4] Consideration of the question of tax benefits is saved to subpart II *infra*.

[5] Although Congress must appropriate each dollar before it may be spent, before, that is, cash outlays may occur, Congress has historically authorized the obligation of future withdrawals, through such devices as "contract authority," the power to borrow from the Treasury and spend, and the creation of entitlements. Congress must still approve *withdrawals* from the Treasury, but the focal point of importance is the creation of "budget authority," of spending authority. See United States House Committee on the Budget, *The Whole and the Parts: Piecemeal and Integrated Approaches to Congressional Budgeting*, 100th Cong., 1st Sess. (Comm. Print; A. Schick), 12-19; Stith,

congressional control, or lack of control, over authorization, appropriation, and expenditure constitutes a long and complex story.[6]

Actual expenditure of funds pursuant to congressional authorization is, of course, an executive function, *Buckley v. Valeo*, supra, 424 U.S., 140-141, which is ordinarily subject to the obligation imposed upon the President by Art. II, § 3, that he "take Care that the Laws be faithfully executed[.]"[7] Historically, the President, from at least an instance in Thomas Jefferson's time, has exercised some discretion in spending or not spending money Congress has appropriated. Generally, Presidents have argued that Congress has left them some liberty of decisionmaking in determining whether certain spending might, because of changed circumstances or more informed, or perhaps a later informed, judgment about effectuation of purpose, be deferred, usually to give Congress an opportunity to review the situation. But other Presidents have argued for the existence of an inherent, constitutionally-based power, grounded in the conferral of the "executive Power" to the President in Art. II, § 1, to decline to enforce a congressional decision to spend. The issue came to a head in the administration of President Nixon, and it resulted in enactment of significant legislation.[8]

Broad assertions of constitutional power and statutory authorization to impound, both for reasons of economy and prevention of waste and of policy

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Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 CALIF. L. REV. 593, 603-609 (1988). While the bill includes the broadest term "budget authority," as to which see 2 U.S.C. § 622(2), it appears to limit it to that provided in a "regular or supplemental appropriations act or a joint resolution making continuing appropriations." § 2(a)(2). And see the final sentence of § 2. If you desire, consideration might be given to extending presidential authority to other than appropriations bills, although to do this could increase policy difficulties.

[6] See, e.g., A. SCHICK, CONGRESS and MONEY: BUDGETING, SPENDING and TAXATION (1980); L. FISHER, PRESIDENTIAL SPENDING POWER (1975). The best constitutional/legal analysis of congressional power and practice is Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343 (1988).

[7] We say "ordinarily" because Congress may repose in legislative branch agencies authority to spend to carry out the purposes for which they are created, e.g., 2 U.S.C. § 475 (Office of Technology Assessment), and the judicial branch spends its appropriated money free of executive direction, but the great amount of federal funds is expended by executive branch agencies subject to presidential control.

[8] See, e.g., L. FISHER, op. cit., n. 6, 147-201. The most thorough study of the legal and constitutional issues, informed through historical analysis, remains Abascal & Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L. J. 1549 (1974); Abascal & Kramer, *Presidential Impoundment Part II: Judicial and Legislative Response*, 63 id. 149 (1974).

judgments contrary to congressional spending decisions, were rebuffed in the lower federal courts. E.g., *State Highway Comm. v. Volpe*, 479 F.2d 1099 (8th Cir. 1973)(highways). A few courts did, however, find discretion to decline to spend all that was appropriated within the confines of the congressional authorization/appropriation acts themselves. E.g., *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C.Cir. 1974)(housing). All in all, by 1974, impoundments had been vitiated in more than 50 cases and upheld in only four.[9] When the Administration carried the issue to the Supreme Court, it abandoned its constitutional arguments and defended impoundments solely on the basis of statutory authority, a position unanimously rebuffed by the Court on the basis of statutory language and other indications that Congress, in the particular spending program, had intended to leave the executive branch no discretion. *Train v. City of New York*, 420 U.S. 35 (1975)(Clean Water Act); *Train v. Campaign Clean Waters*, 420 U.S. 136 (1975)(same).

In 1974, Congress enacted the Congressional Budget and Impoundment Control Act, P. L. 93-344, 88 Stat. 297, title X of which, §§ 10001-1017, 88 Stat. 332-337, as amended, 2 U.S.C. §§ 681-688, constitutes the regulation of impoundments.[10] The impoundment control provisions reflected a conference committee compromise of differing House and Senate approaches. Generally speaking, the law recognizes two types of impoundments: "routine" or "programmatic" reservations of budget authority to provide for the inevitable contingencies that arise in administering congressionally-funded programs and "policy" decisions that are ordinarily intended to advance the broader fiscal or other policy objectives of the executive branch contrary to congressional wishes in appropriating funds in the first place.

Routine reservations were to come under the terms of the Anti-Deficiency Act. 31 U.S.C. §§ 1341, 1512.[11] Prior to its amendment by the Impoundment Control Act, §1002, 88 Stat. 332, the Anti-Deficiency Act had permitted the

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[9] Staff of Joint Committee on Congressional Operations, *Special Report on Court Challenges to Executive Branch Impoundments of Appropriated Funds*, 93d Cong., 2d Sess. (Comm. Print 1974); Staff of House Committee on Government Operations, *Report on Presidential Impoundment of Congressionally Appropriated Funds: An Analysis of Recent Federal Court Decisions*, 93d Cong., 2d Sess. (Comm. Print 1974); Abascal & Kramer, op. cit., n. 8 (Part II), 63 GEO. L. J., 149-168.

[10] The legislative history and analysis of the impoundment control law is most extensively set out in Abascal & Kramer, op. cit., n. 8, 63 GEO. L. J., 168-185. See also J. PFIFFNER, THE PRESIDENT, the BUDGET, and CONGRESS: IMPOUNDMENT and the 1974 BUDGET ACT (1979); L. FISHER, op. cit., n. 6, 198-201.

[11] Originally passed as the Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48, the provisions of the law as described in the text were added in the General Appropriation Act of 1951, ch. 896, § 1211(c)(2), 64 Stat. 595, 765. On the relevant part of the Act, see Stith, op. cit., n. 6, 97 YALE L. J., 1370-1377.

President to "apportion" funds "to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other developments subsequent to the date on which such appropriation was made available." President Nixon had relied on this "other developments" language as authorization to impound, for what in essence were policy reasons.[12] Congress deleted the controverted clause and retained the other language to authorize reservations to maintain funds for contingencies and to effect savings made possible in carrying out the program, and it added a clause permitting reserves "as specifically provided by law." See 31 U.S.C. § 1512(c)(1)(present version). Congressional intent was to prohibit the use of apportionment as an instrument of policymaking. 120 CONG. REC. 7658 (1974)(Senator Muskie); id., 20472-20473 (Senators Ervin and McClellan).

"Policy" impoundments were to be reported by the President as permanent rescissions and, perhaps, as temporary deferrals. §§ 1011(1), 1012, 1013, 88 Stat. 333-334, 2 U.S.C. §§ 682(1), 683, 684. Rescissions are merely recommendations or proposals of the President and must be authorized by a bill or joint resolution, or, after 45 days of the presidential message, the funds must be made available for obligation. 2 U.S.C. § 683. Temporary deferrals of budget authority for less than a full fiscal year, as provided in the 1974 law, were to be effective unless either the House of Representatives or the Senate passed a resolution of disapproval. § 1013, 88 Stat. 334. Because the Act was a conference compromise between two quite different House and Senate bills, disagreements arose with respect to whether Congress intended rescission to be the sole method of effectuating policy impoundments or whether policy could be implemented as well through deferrals of a year or less. Senator Ervin, a sponsor of the Act, seemed clear that rescission was the only avenue down which to pursue policy disagreements. 120 CONG. REC. 20473 (1974). The Comptroller General, charged under the Act with enforcing the congressional interests under it, issued a formal opinion which reviewed the contending views and decided that policy deferrals were permitted, that the only difference in this respect between rescissions and deferrals lay in the proposed duration of the withholding. 54 COMP. GEN. 453 (1974).[13] Presidents Ford, Carter, and Reagan interpreted the deferral authority as including the power to further their policy choices,[14] although the few court decisions rendered rejected this reading, usually in tandem with ruling that the Act provided no independent impoundment authority. *Arkansas ex rel. Arkansas State Highway Comm. v. Goldschmidt*, 492 F.Supp. 621 (E.D.Ark.), *vacated as moot*, 627 F.2d 839 (8th Cir. 1980); *Maine v. Goldschmidt*, 494 F.Supp. 93 (D.Me. 1980).

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[12] See L. FISHER, op. cit., n. 6, 154-157; Note, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX. L. REV. 693, 699-700 (1984).

[13] The debate is surveyed in R. Ehlke, *Legal Analysis of Proposal to Repeal Deferral Authority Under the Impoundment Control Act* (86-1024 A)(CRS, April 2, 1986).

[14] See Note, *Resurgence*, op. cit., n. 12, 63 TEX. L. REV., 705-708.

With the decision in *INS v. Chadha*, 462 U.S. 919 (1983), voiding, as in violation of the bicameralism and presentment clauses of the Constitution, Art. I, §§ 1, 7, cl. 2, the one-House veto device, it was evident that the veto provision in the deferral section of the Impoundment Control Act was no longer viable. An Administration effort to utilize the section, minus the veto device, was thwarted in *City of New Haven v. United States*, 809 F.2d 900 (D.C.Cir. 1987), applying established severability, or separability, principles, in which the court held that Congress would not have enacted the deferral statute in the absence of power to police its exercise through a veto. Thus, the entire deferral statute was inoperative. Congress in 1987 enacted a more restricted authority, limited to deferrals only for those purposes set out in the Anti-Deficiency Act, as set out above. P. L. 100-119, title II, § 206(a), 101 Stat. 785, 2 U.S.C. § 684.

Loss of the rescission or deferral power, save only to make recommendations, could be seen to diminish greatly the effectiveness of the President's authority to achieve spending reductions. There then developed proposals grouped generally under the heading of "enhanced-rescission" measures, under which the President could make reductions, report them to Congress, and see them become effective unless Congress acted, legislatively, to overcome his actions. These bills are, of course, predecessors of bills like the proposal under consideration.[15]

Of considerable significance is the final legislative piece of the background, enactment of the Balanced Budget and Emergency Deficit Control Act of 1985. P.L. 99-177, 99 Stat. 1037, codified as amended in titles 2, 31, and 42, U.S.C, relevant portions to this memorandum, 2 U.S.C. § 901 *et seq.*[16] Without discussing in detail the law, it should suffice to say that it is intended as a deficit-reduction forcing mechanism. That is, unless Congress and the President cooperate to reduce the deficit by prescribed amounts over each of the several years following its enactment, the Act mandates a "sequestration" order by the President directing a reduction of authorized spending to bring the deficit down to the mandated figure. While certain central details of the execution of the Act were successfully challenged, that is, the powers devolved upon the Comptroller General were found not to be the kind of authority he could be vested with, *Bowsher v. Synar*, 478 U.S. 714 (1986), the concept has not been further disputed on constitutional grounds in the courts. In essence, the statute is a

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[15] Indeed, the present proposal was offered in the House of Representatives, last July 14, 1994, and defeated, as a substitute for a different enhanced-rescission bill that passed the House. 140 CONG. REC. (daily ed.) H 5719 - H 5726. See id., H 5700 - H 5730. The House had previously also passed similar bills twice before. Additionally, similar bills have been offered and defeated in the Senate. See supra, n. 3 (referring to S. 1553, 101st Cong.).

[16] The Act is analyzed in detail in Stith, op. cit., n. 5. Additional amendments were made to the law by the Budget Enforcement Act of 1990, P. L. 101-508, 104 Stat. 1388-573, amending scattered sections of 2 U.S.C. §§ 601-922. See S. COLLENDER, THE GUIDE to the FEDERAL BUDGET, FISCAL 1993 (1992), 21-33, 69-82.

delegation to the executive branch to reduce spending authority by an amount necessary to bring the deficit down to a prescribed level.

Although it will be found, as we proceed, that neither the Impoundment Control Act nor the Deficit Control Act provides much in the way of either constitutional support for or impediment to the provisions of the draft bill, it was necessary to treat in some detail the foregoing review of law, inasmuch as it is nonetheless highly relevant in considering the bill.

II

In terms of the context that we are here considering, the history of congressional and executive procedures relating to the enactment of tax measures need not long detain us. Taxes are constitutionally set off in one respect, in that under Art. I, § 7, parag. 1, of the Constitution, "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills." The provision has occasionally been at issue in adjudication with respect to whether a particular law that originated in the Senate was in fact a revenue bill that should have originated in the House of Representatives.[17]

In the discussion of the spending power above, we noted that the congressional view of what the public welfare is becomes conclusive on the courts; of course, the taxing and spending powers derive from the same clause, Art. I, § 8, cl. 1, which gives Congress the authority to "lay and collect Taxes" to provide for the "general Welfare of the United States[.]" Two great constitutional disputes in our history revolved about this clause. The first concerned whether the "general welfare" part of the clause was an independent grant of power to Congress to legislate for the general welfare, and the answer was concluded in the negative; that is, as Jefferson argued in his opinion on the constitutionality of the First Bank of the United States, the laying of taxes is the power and the general welfare is the purpose of laying taxes.[18] The second concerned whether Congress in laying taxes and in spending was limited to effectuation of the purposes set out in the grants of power in § 8 subsequent to the first clause. There, Madison and Hamilton and their ideological heirs and assigns contended

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[17] See *United States v. Munoz-Flores*, 495 U.S. 385 (1990)(and discussing earlier cases), in which the Court adheres to prior precedent that a statute that creates, and raises revenue to support, a particular governmental program, as opposed to a statute that raises revenue to support the Government generally, is not a bill for raising revenue. The House of Representatives asserts its privileges, Rule IX, CONSTITUTION, JEFFERSON'S MANUAL, and RULES of the HOUSE of REPRESENTATIVES, 102d Cong., 2d sess., §§ 660-662 (1993), to reject bills returning from the Senate that, in its opinion, violate the origination clause.

[18] 3 WRITINGS of THOMAS JEFFERSON (Library ed., 1904), 147-149.

for years, Madison taking the narrow view, Hamilton the broader, but Hamilton was to prevail.[19]

Thus, both the spending power and the taxing power are limited only by the congressional conception of the general welfare, save for specific provisions of the Constitution, such as the establishment-of-religion clause of the First Amendment, which interdicts some occasions of funding. Most of the controversy of recent years has been concerned with expenditures, but taxes, especially limitations on taxes, have been the object of some exercises in constitutional and statutory efforts. For example, there was for a considerable period a drive within state legislatures to call a national constitutional convention to propose a constitutional amendment to limit tax rates to 25%.[20] Some proposals for balanced-budget constitutional amendments have contained either limitations on taxation or limitations upon congressional consideration of tax increases, such as a three-fifths super-majority in each House, and there have been proposals, one likely to be adopted at the beginning of the House of Representatives in the 104th Congress, for a three-fifths supermajority for votes on tax increases.

Therefore, the provision in the draft bill for presidential action to strike targeted tax benefits, as defined, is quite limited. Indeed, it is related closely to the budget-authority rescission authority, at least if one follows the controverted theory of tax expenditures, which would more easily fit tax benefits targeted to individuals or to small groups, inasmuch as they do closely resemble funding to the targets.

In any event, as we discuss in the following section, no difference exists regarding the delegation of authority to alter or strike either budget authority or tax provisions. Both may be delegated, and both are governed by the same rules.

Delegation

"That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Field v. Clark*, 143 U.S.

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[19] Cf. *United States v. Butler*, 297 U.S. 1, 65-66 (1936). "While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of § 8 which bestow and define the legislative powers of Congress. It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." Ibid.

[20] See *Constitutional Convention Procedures*, Hearing before the Senate Judiciary Subcommittee on the Constitution, 96th Cong., 1st Sess. (1979), 978-985. See also Staff of the House Committee on the Judiciary, *Problems Relating to State Applications for a Convention to Propose Constitutional Limitations on Federal Tax Rates*, 82d Cong., 2d Sess. (Comm. Pr. 1952).

649, 692 (1892).[21] All the while, the Court, saying no, approved delegations, although it characterized them more circumspectly. But, at least since 1932, in the same Term as *Shreveport Grain*, *supra*, n. 21, the Court has expressly transformed the nondelegation doctrine into a doctrine permitting delegation within purported limits. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 305 (1933)("What is done by . . . the President . . . is in substance a delegation, though a permissible one, of the legislative process"). See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility"); *Mistretta v. United States*, 488 U.S. 361, 371-379 (1989); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-219(1989); *Touby v. United States*, 500 U.S. 160, 164-165 (1991).

Doctrinally, delegation, or nondelegation, is an element of the separation-of-powers doctrine. The first three Articles of the Constitution appear to vest with no exceptions the law-making power in the legislative branch, the law-executing power in the executive branch, and the law-interpreting power in the judicial branch. E.g., *Wayman v. Southard*, supra, 10 Wheat. (23 U.S.), 42. And, yet, as the Court frequently has had occasion to remind us, the Framers did not mandate a government the three branches of which were hermetically sealed-off from each other. *Buckley v. Valeo*, supra, 424 U.S., 121; *CFTC v. Schor*, 478 U.S. 833, 848, 851 (1986); *Morrison v. Olson*, 487 U.S. 654, 693-694 (1988); *Mistretta v. United States*, supra, 488 U.S., 380-381. When the opponents of ratification of the Constitution charged that the drafters had insufficiently adhered to the principles of separation laid down by Montesquieu, Madison responded that separation of powers "d[oes] not mean that these departments ought to have no *partial agency* in, or no *controul* over the acts of each other," but rather "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution, are subverted."[22]

From the beginning, the Court has approved delegations, although it has been loath so to admit. Early, it held that Congress could legislate contingently, leaving to others the task of ascertaining the facts which bring its declared policy into operation. *The Brig Aurora*, 7 Cr. (11 U.S.) 382 (1813). Chief Justice Marshall, in *Wayman v. Southard*, supra, 10 Wheat. (23 U.S.), 41, distinguished

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[21] The assertion may be found in cases venerable with age, e.g., *Wayman v. Southard*, 10 Wheat. (23 U.S.) 1, 42 (1825)("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative"), to relatively recent ones. E.g., *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932)("That the legislative power of Congress cannot be delegated is, of course, clear").

[22] THE FEDERALIST No. 47 (J. Cooke ed. 1961), 325-326(emphasis in original). Indeed, Madison went on to justify the partial intermixture of the powers of the three branches on the basis of a creation of checks and balances, giving each branch the will and the power to resist the encroachments of the others. Id., No. 48, 332-338.

between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." Filling up the details of statutes was long a popular version of the nature of permissible delegations. E.g., *In re Kollock*, 165 U.S. 526 (1897); *Buttfield v. Stranahan*, 192 U.S. 470 (1904); *United States v. Grimaud*, 220 U.S. 506 (1911).

Modern delegation doctrine may be traced in its inception to *J. W. Hampton, Jr. & Co. v. United States*, supra, in which the Court upheld congressional delegation to the President of the authority to set tariff rates that would equalize production costs in the United States and competing countries. Although avowing that Congress could not delegate "legislative power" to the executive branch, the Court affirmed that a certain amount of interbranch "co-ordination" was necessary to govern effectively. "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Id., 276 U.S., 406. This vague statement was elaborated somewhat in the Court's statement that it would sustain delegations whenever Congress provided an "intelligible principle" to which the President or an agency must conform. Id., 409.[23]

It would be needlessly academic to analyze in any detail the history of the delegation doctrine since *Hampton*. Except for two Depression-era cases in which standards were found to be absent, the Court has never voided as impermissible a congressional delegation. It has sustained the exercise of delegated power by agencies, which exerted authority over industries or subjects not existing at the time Congress acted nor foreseen by it. E.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)(regulation of cable television under the 1934 Communications Act). It has directed a regulatory agency acting under delegated powers to exercise its own judgment about whether competition or restraint would be in the public interest in a particular regulated area rather than to attempt to extrapolate a principle favoring one or the other from the body of congressional law. *FCC v. RCA Communications*, 346 U.S. 86 (1953). It has recognized that when Administrations change, new officials may have been conferred enough discretion so that they can change agency policies, often to a considerable degree, so that both previous and present agency policies may be consistent with congressional delegations. E.g., *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 842-845, 865-866 (1984)("[A]n agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments." Id., 865). See also *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-44, 46-48, 51-57 (1983)(recognizing agency could have reversed its policy but finding reasons not supported on record). And

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[23] The "intelligible principle" test of *Hampton* is the same as the "legislative standards" test of *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935).

it has upheld complex economic regulations of industries in instances in which the agencies had first denied possession of such power, had unsuccessfully sought authorization from Congress, and had finally acted without congressional guidance. *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968); *American Trucking Assns. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967).

Concern in recent years over the scope of delegations has surfaced in the literature,[24] as well as in the Court. Now-Chief Justice Rehnquist has suggested that he was ready to resurrect to some extent a non-delegation doctrine. *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 671 (1980)(concurring opinion); *American Textile Mfgrs. Inst. v. Donovan*, 452 U.S. 490, 543 (1981)(dissenting opinion, joined by Chief Justice Burger). See also *Arizona v. California*, 373 U.S. 546, 625-626 (1963)(Justice Harlan dissenting in part); *United States v. Midwest Video Corp.*, 406 U.S. 649, 675, 677 (1972)(Chief Justice Burger concurring, Justice Douglas joined by three others dissenting). Other Justices have narrowly construed statutes to avoid what they perceived to be constitutional problems with broad delegations. *Industrial Union Dept.*, supra, 645-646 (plurality opinion); *National Cable Television Assn. v. United States*, 415 U.S. 336, 342 (1974). Yet, the Court continues to approve broad delegations. See *Mistretta v. United States*, supra, 488 U.S., 371-379 (approving delegation to commission created within judicial branch to promulgate standards, within congressional guidelines, to bind all federal judges in sentencing convicted offenders, subject to limited deviation); id., 415-416 (Justice Scalia dissenting but agreeing delegation was valid).

Argument may be made that there are some powers Congress may not delegate or that there are some powers which may be delegated only under much tighter standards than other powers. Some modest support for such a principle might once have been drawn from *National Cable Television Assn. v. United States*, supra, 415 U.S., 342, and *FPC v. New England Power Co.*, 415 U.S. 345 (1974), in which the Court appeared to say that delegation of the taxing power was fraught with constitutional difficulties, like those which led to the *Schechter* decision. How this conclusion could be allowable after the many cases sustaining delegations of authority to fix tariff rates, which are in fact and law taxes, *J. W. Hampton, Jr. & Co. v. United States*, supra; *Field v. Clark*, supra, is difficult to discern, see *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976)(delegation to President to raise license "fees" on imports when necessary to protect national security), but in no event does it survive *Skinner v. Mid-America Pipeline Co.*, supra. Before the Court was a congressional authorization to the Secretary of Transportation to establish a system of user fees to cover the costs of administering pipeline safety programs. Plaintiffs contended and the district court held that the fees were really taxes and either could not be delegated or must be delegated with more specific standards than the statute contained.

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[24] E.g., *A Symposium on Administrative Law: Part I - Delegation of Powers to Administrative Agencies*, 36 AM. U. L. REV. 295 (1987); Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Aranson, Gellhorn, & Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

Unanimously, the Court reversed, rebuffing any suggestion that any such rule, in either variation, could be found in its precedents. Moreover, it held that, textually, there was nothing about the placement of the taxing clause in Article I, § 8, that distinguished Congress' power to tax from its other enumerated powers as to which Congress may delegate. Id., 490 U.S., 220-224.

Inasmuch as the spending clause is inextricably part of the same clause as the taxing clause, no reason suggests itself why the same answer would not be or should not be forthcoming. See *Synar v. United States*, 626 F.Supp. 1374, 1385-1386 (D.D.C.)(three-judge court)(rejecting argument that Congress may not delegate appropriations power), *affd. on other grounds sub nom., Bowsher v. Synar*, supra. Cf. *Lichter v. United States*, 334 U.S. 742, 778-779 (1948)("[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes").

Initially, it might be thought surprising that the combined Anti-Deficiency, Impoundment Control, and Deficit Reduction Acts should not be conclusive of the question regarding the power to delegate to the President authority to reduce appropriations. But, in fact, they are of quite limited utility.

The Anti-Deficiency Act, as it was amended in 1950, indubitably is a delegation to the President to reduce spending through the creation of reserves but only to provide for contingencies, to achieve savings occasioned by changed requirements or greater efficiency, and because of "other developments" occurring after the appropriation. Only the "other developments" language conferred any possible appreciable discretion of note, and the efforts of the Nixon Administration to find in it authority to impound to defeat congressional purposes were unavailing. E.g., *State Highway Comm. v. Volpe*, supra, 479 F.2d, 1118 (funds may be withheld only when not needed to carry out purposes of appropriation; withholding may not violate purposes and objectives of the appropriations statute). Congressional amendment of the Act in 1974 removed any support for a broad delegation argument.

Similarly, the Deficit Reduction statute delegates the power to the President to make reductions, but it cabins that authorization to considerable degree. There is little discretion in where to cut and how much once the deficit figure is determined. That an agency may have to evaluate complex economic factors in determining whether the relevant event, which triggers the exercise of the reduction authority in this instance, has occurred has never disturbed the Court. E.g., *Yakus v. United States*, 321 U.S. 414, 424-425 (1944); *Opp Cotton Mills v. Administrator*, 312 U.S. 126, 144 (1941). The responsible government official under the Deficit Reduction Act, first the Comptroller General, later the Director of OMB, has to assess the likely revenues for the next year and determine whether the budget deficit would exceed the target figure. Hardly a ministerial function, the officer's duties are nonetheless not of the order of

magnitude of policy choice that many sustained delegations have involved. *Synar v. United States*, supra, 626 F.Supp., 1382-1391.[25]

The case of the Impoundment Control Act presents two separate questions, one easily answered, the other disputed. First, it hardly seems possible to contend that the President's rescission *proposal* under § 1012, 2 U.S.C. § 683, is an exercise of delegated power. The President must request affirmative action by Congress to rescind an appropriation; he could ask precisely the same thing had the Act never become law. His action has no effect, unless Congress affirmatively acts.

Deferral action under the original § 1013, the old 2 U.S.C. § 684, looks more like an exercise of delegated power. The President sends a message to Congress that he intends to defer spending a certain amount of money for a period of time, and the deferral is accomplished unless one House of Congress vetoes the action by passing a resolution.[26] Under the 1987-amended version, of course, his authority has no more significance than an action under the Anti-Deficiency Act. As will be recalled from the discussion above about whether the President could propose policy deferrals under § 1013, supra, p. 7, there was disagreement over what Congress had done in enacting § 1013. The consensus was that § 1013 itself conferred no power to impound, that it was not itself a delegation, that it was in fact only a device created by Congress by which it mandated the President to report deferrals, the authority for which had to be found elsewhere, to Congress and under which Congress could disapprove any deferral through use of the one-House legislative veto.[27] The Administrations of Presidents Ford, Carter, and Reagan at various times took the position that § 1013 was an independent grant of impoundment authority, but the courts, with a few exceptions, rejected that argument. *Arkansas ex rel. Arkansas State Highway Comm. v. Goldschmidt*, supra, 492 F.Supp., 626; *Maine v. Goldschmidt*, supra, 494 F.Supp., 98-100; *Dabney v. Reagan*, 542 F.Supp. 756, 767 n. 3

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[25] The Supreme Court did not pass on the delegation arguments, but Justices White and Blackmun in dissent did approve the district court's delegation decision. *Bowsher v. Synar*, supra, 478 U.S., 764 n. 5; 778 n. 1. See also id., 747-748, 753-758 (Justice Stevens concurring).

[26] That a legislative veto was attached to the delegation would not make it any less of a delegation, if it were a delegation. Congress saw the legislative veto as a method of policing delegations, and *Chadha* itself involved a delegation to the Attorney General to except some persons from operation of the immigration laws. The Court's summary ruling that two-House legislative vetoes were invalid along with one-House vetoes came in a case involving a delegation to the Federal Trade Commission. *Consumers Union v. FTC*, 691 F.2d 575 (D.C.Cir. 1982), *affd. sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983).

[27] See Ehlke, op. cit., n. 12; R. Ehlke & M. Rosenberg, *Presidential Impoundment Authority After City of New Haven v. United States* (87-173AL)(CRS, March 3, 1987)(reviewing controversy).

(S.D.N.Y. 1982); *Dubose v. Hills*, 405 F.Supp. 1277, 1281 n. 20 (D.Conn. 1975). But see contra *Public Citizen v. Stockman*, 528 F.Supp. 824, 831 n. 2 (D.D.C. 1981); *Fontaine v. Donovan*, Civ. No. 81-0789 (D.D.C. May 21, 1981)(accepting argument), *affd. in part, vacated in part sub nom. West Central Missouri Dev. Corp. v. Donovan*, 659 F.2d 199, 201-202 (D.C.Cir. 1981) (not passing on question). The Comptroller General, in a previously cited opinion, 54 COMP. GEN. 453 (1974), took the position that the Act was independent authority, but he also subsequently adopted the proposition that the Act did not supersede mandatory spending statutes now in effect or hereafter enacted. B-205053, Opinion of the Comptroller General (March 10, 1982).[28]

In any event, the dispute about the nature of § 1013, combined with its much more narrow replacement in 1987, means that little precedential value may be derived from it.

Nonetheless, as we have described above, nothing in delegation doctrine suggests that Congress may not delegate power over appropriations or taxes, and in fact the breadth of the language and the results in delegation cases provide more than adequate support for the conclusion that delegation in this context is proper under the Constitution.

Contentions might also be made that delegations to the President of so broad a power as to give him control over all federal spending and a significant portion of taxation would so disrupt the balance of the separation of powers as to be unconstitutional for that reason. Although some consideration like this may undergird some of the delegation doctrine's permutations, the breadth of a delegation has never been utilized by the Court as a basis for judging the validity of the congressional action. As the district court in *Synar*, supra, 626 F.Supp., 1386, put it, "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise." (emphasis in original). And even this may overstate what the Supreme Court has done.

In any event, while the Court has applied a balancing test in some separation-of-powers cases, it has never chosen to do so in delegation cases. It has had, at least until recently, two tests by which to adjudicate separation-of-power challenges to the actions of one branch vis-a-vis another: what commentators have denominated a "formalist" test, a quite strict one, and a "functional" test leaving a good deal of leeway. The formalist approach

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[28] Reprinted in House Committee on Education and Labor, *Documents Relating to Impoundment Issues*, 97th Cong., 2d sess. (Comm. Print 1982), 23; House Budget Committee, Task Force on Enforcement, Credit, and Multiyear Budgeting, *Hearings on Oversight of the Impoundment Control Process*, 97th Cong., 2d sess. (1982), 127. See also House Committee on Rules, *Hearings on the Legislative Veto After Chadha*, 98th Cong., 2d sess. (1984), 519-520 (testimony of Milton Socolar, Special Assistant to the Comptroller General).

emphasized the necessity to maintain three distinct branches of government through the drawing of bright lines demarcating the three branches from each other determined by the differences among legislating, executing, and adjudicating. E.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-66 (1982)(plurality opinion); *INS v. Chadha*, supra, 462 U.S., 951. *Bowsher v. Synar*, supra, 478 U.S., 721-727. The functional approach emphasized the core functions of each branch and asked whether the challenged action threatened the essential attributes of the legislative, executive, or judicial function or functions. Under this approach, there was considerable flexibility in the moving branch, usually Congress acting to make structural or institutional change, if there was little significant risk of impairment of a core function or in the case of such a risk if there was a compelling reason for the choice. E.g., *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 442-443 (1977); *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 587, 589-593 (1985); *CFTC v. Schor*, 478 U.S. 833, 850-851, 856-857 (1986). The most immediate difficulty was that the Court never explained when one or the other test was appropriate, using, in fact, on the same day, one test in *Bowsher* and the other in *Schor*, beyond suggesting in the latter case that "[u]nlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch." Id., 856. Aside from aggrandizement, there were inferences that the formalist approach was proper when the Constitution fairly clearly commits a function or duty to a particular branch and the functional approach was proper when the constitutional text was indeterminate and a judgment must be made on the basis of the likelihood of impairment of the essential powers of a branch. E.g., *Chadha*, supra, 944-951. This explanation was problematical, inasmuch as the formalist test was used only to protect executive powers, which, by and large, were deduced as being executive from the structure of the Constitution.[29]

The formalist approach was apparently abandoned in *Morrison v. Olson*, supra, the independent counsel case, and in *Mistretta v. United States*, supra, the sentencing commission case. In *Morrison*, again without explaining why it was choosing the functional test, except that it did stress the statute was no effort by Congress to aggrandize its own power nor did it have that effect, supra, 487 U.S., 694, 695, the Court concluded that the independent counsel law did not "impermissibly undermine" the powers of the executive branch nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." Id., 695-696. See also *Mistretta*, supra, 488 U.S., 382-384 (stressing lack of encroachment and aggrandizement).

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[29] For a review of the case law that emphasizes the importance of checks and balances, in the context of congressional regulation and structuring of the Executive Branch, see Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 G. W. L. REV 627, 636-649 (1989). Under this reading, the functional, balancing test is the appropriate standard respectful of the textual and historical role of Congress in organizing an Executive Branch that is barely hinted at in the text of the Constitution.

Demonstrating the unsettled nature of this area, however, are more recent opinions. In *Public Citizen v. DOJ*, 491 U.S. 440, 467, 482-489 (1989), Justice Kennedy, with Chief Justice Rehnquist and Justice O'Connor joining him, concurred in the Court's decision respecting coverage of the ABA's Standing Committee on Federal Judiciary under the Federal Advisory Committee Act. Justice Kennedy disagreed with the Court's statutory ruling that the Committee was not subject to FACA, but he was of the opinion that the Committee's coverage was unconstitutional, because the appointing power of the President was his and his alone, not being subject to congressional regulation, which FACA was. He explicitly chose the formalist test on the ground that it was the proper one in light of the textual commitment of the appointment power. "[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch." Id., 485 (emphasis in original). This distinction between "explicit" and "implicit" assignment of functions may be questionable in light of some of the cases, especially *Morrison*, but it at least states a debatable principle.

A second case appears to restore the functionalist approach to Article III that a plurality adopted in *Northern Pipeline* but which had been watered down in subsequent decisions. In *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33 (1989), six Justices, in an opinion by Justice Brennan, the author of the *Northern Pipeline* plurality opinion, held that the Seventh Amendment precluded Congress from assigning to an agency or judicial body lacking civil jury trials the resolution of private law claims based on state statutory or common law grounds. The significance of the decision is that, as the Court made clear, the question under the Seventh Amendment and under Article III is answered by the same analysis: it must be ascertained whether Congress may assign the adjudication of a claim to an agency or a court lacking the essential attributes of federal judicial power and without the power to give a jury trial.

In *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), the Court merely applied the holdings of two earlier cases, *Chadha* and *Bowsher v. Synar*. In creating a regional airports authority, to manage National and Dulles Airports, Congress had required the inclusion in the structure of a "board of review," composed of nine Members of Congress and vested with veto power over decisions of the Authority's directors. The Court was unsure whether the review board exercised executive or legislative authority, but the characterization was irrelevant. If the authority was executive, Congress had violated the *Bowsher* line of cases by vesting itself or its Members with executive power; if it was legislative authority, Congress had violated *Chadha* in failing to follow the constitutionally prescribed method of legislating. Id., 271-277. Although both decisions relied on were in the formalist vein, the Court broke no new ground in resting its decision on them.

No exposition of principle of a formalist or functionalist nature emerges from *Freytag v. CIR*, 501 U.S. 868 (1991). There, the Court divided over the proper reading of the appointments clause in order to determine whether Congress had validly placed in the Chief Judge of the Tax Court, an Article I

adjudicatory body, the authority to appoint special tax judges. The appointments clause permits Congress to vest such authority "in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2. In a five-to-four decision, the majority held that "departments" had to be executive divisions, Cabinet or Cabinet-like entities, so that the Tax Court did not qualify under this heading, but that it was a court of law the head of which was capable of receiving appointing authority. Id., 882-892. The dissent denied that the Tax Court was a court of law within the meaning of the appointments clause but argued instead that it was a department, so that its head, the Chief Judge, could be invested with the challenged authority. Id., 892, 901-922 (Justice Scalia concurring).

Two other cases strongly reflect the philosophy of the present Court in applying separation-of-powers standards to protect executive interests, but it remains unclear that the full implications of those decisions, which would go a long way to restoring the formalist method of adjudication, and particularly Justice Scalia's dissenting views in *Morrison* and *Mistretta*, have been considered and adopted by the Court. In *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992), in the course of applying established standing rules to plaintiffs seeking to enforce a congressional requirement imposed on the Executive Branch, the Court also appeared to deny that Congress could impose on the executive a duty of a procedural nature and confer on the courts, in adjudicating citizen suits, the power to enforce that duty. Rather, it was the President on whom the Constitution conferred the obligation to "take Care that the Laws be faithfully executed," Art. II, § 3, and Congress could not delegate this executive power (duty?) to the courts. Id., 2145.[30] And the decision in *Dalton v. Spector*, 114 S.Ct. 1719 (1994), denying judicial review of presidential action on the recommendations of the Defense Base Closure and Realignment Commission, contains an ambiguous discussion of and rejection of an argument that whenever the President exceeds his statutory authority he violates the separation-of-powers doctrine and thus commits a constitutional violation. Id., 1725-1728.[31]

Nevertheless, it is not believed that either the formalist or the functionalist approach is applicable to delegation cases. To be sure, the legislative power is assigned to Congress, but it is established as clearly as something may ever be established in constitutional law that legislative power may be delegated. Moreover, the necessary and proper clause, Art. I, § 8, cl. 18, empowers Congress to carry out its legislative powers by selecting any means reasonably adapted to

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[30] Court adoption of this principle would be a formidable recurrence to formalism, but although they joined the opinion, making this part the opinion of the Court, Justices Kennedy and Souter separately concurred, urging "flexibility" that the Court's opinion would otherwise deny. Id., 2146. It appears, therefore, that Justice Scalia's view lacks the full imprimatur of a majority of the Court.

[31] This part of the decision raises significant questions of constitutional import, *The Supreme Court, 1993 Term*, 108 HARV L. REV 23, 300 (1994), but its relevance to the matter under discussion appears limited.

effectuate those powers. Proper in the context of the clause means within the letter and spirit of the Constitution, and necessary refers to the utility and convenience to Congress of a particular approach. *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 413-415, 420 (1819). Inasmuch as delegation may be a necessary and proper way to carry into execution the powers conferred on Congress, and it is Congress deciding that any particular delegation is necessary and proper, it is hard to see how a formalist test could be applicable. And, as to a functionalist approach, whereas delegation certainly adds to or strengthens executive power (as well as judicial power in some instances), so that there is enhancement, the President has not aggrandized power, it has been conferred on him by the branch having the power in the first place. Rather than attempting to apply some vague balancing test to determine if by a delegation Congress has prevented itself from accomplishing a constitutionally assigned function, it may be argued, it seems far preferable, and consistent with the precedents, to place the emphasis upon the question of standards as the determinative factor in deciding the permissibility of delegations.

However, despite its lack of support in the precedents, it is hard to deny that the interpretation of the delegation doctrine to permit practically unlimited devolution of legislative power upon the Executive Branch, as well as some of the same powers on the Judicial Branch,[32] involves an immense enhancement of presidential power. Executive agencies and the independent commissions regularly legislate rules and regulations that Congress could have enacted; entities in the Judicial Branch follow a similar though more limited course. Executive agencies, independent commissions, and Article I courts regularly exercise adjudicatory power of the same nature as that constitutionally conferred on Article III courts. Congress is limited to the exercise of legislative powers only. Concerned that "legislative 'power is of an encroaching nature,"[33] the Court is careful to confine Congress.

If the draft bill is enacted, any congressionally-enacted appropriations authority or targeted tax benefit may be struck by the President; in order to overcome that action, Congress must within twenty days pass a disapproval bill, present it to the President for an almost certain veto, and then within five days override the veto. The confining of Congress in this respect may be compared with the confining of presidential power that the Court divined in *Bowsher*. It will be recalled that the constitutional flaw the Court found in the law under

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[32] *Mistretta*, after all, involved delegation of authority to legislate extensive and intricate guidelines and rules with respect to sentencing persons convicted of crimes in the federal courts. And the Supreme Court, under the Rules Enabling Acts, has been delegated the authority to promulgate expansive rules of procedure for the federal courts.

[33] *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, supra, 501 U.S., 277 (quoting THE FEDERALIST, No. 48 (J. Cooke ed.: 1961), 332 (Madison)). "The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex." Id., 333.

consideration was that executive power was vested in the Comptroller General, who, though appointed by the President, was, pursuant to 31 U.S.C. § 703(e)(1), removable by Congress for cause through passage of a joint resolution, which, of course, had to be presented to the President for his signature or veto before it became effective. *Bowsher*, supra, 478 U.S., 727-732, 732-734; but see id., 759, 764-768 (Justice White dissenting). That is, the erosion of Congress' power under the draft bill is evidently foreseeable; the erosion of presidential power, under the statute in *Bowsher*, was highly speculative.

In the end, however, we must return to the point that the Supreme Court has applied no such separation-of-powers test to congressional delegations.[34]

Standards

Critical to the Court's explanations of the permissibility of legislative delegations has been the necessity of "intelligible principles" or of standards to guide the agency or official in the performance of the task Congress has set. The only instances in which delegations have been found wanting involved the absence of standards. In *Panama Refining Co. v. Ryan*, supra, the President was authorized to prohibit the shipment in interstate commerce of "hot oil," that is, oil produced or withdrawn from storage contrary to state law, as a means of raising prices by restricting the supply coming to market. The statute was silent with regard to when and under what circumstances he should exercise the power, and the Court, only Justice Cardoza dissenting, found the delegation unlawful because it did not provide legislative criteria to guide the President's discretion, while the stated policy of the statute contained conflicting directives. Three months later, in *A. L. A. Schechter Poultry Corp. v. United States*, supra, the Court unanimously voided a sweeping devolution of power upon the executive branch, utilizing trade associations, to formulate codes of "fair competition" for all industry, in order to promote "the policy of this title." The policy was "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, . . . and otherwise to rehabilitate industry . . . ." Though much of the opinion is written in terms of the failure of these policy statements to provide meaningful standards, the Court was in fact as concerned with the "virtually unfettered" discretion conferred on the President of "enacting laws for the government of trade and industry throughout the country." Id., 295 U.S., 541-542. See also *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)(primarily a commerce clause analysis but also informed by considerations of delegation to private associations in the industry).

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[34] It cannot be that the fact that Congress has enacted the law providing for the delegation precludes a separation-of-powers analysis. The same fact would then also preclude a traditional delegation analysis. And in a number of the cases finding infringement of executive powers, the President had signed the bills into law, a fact of no significance to the Court. In the *Airports Authority* case, not only had the President signed the law but the Administration defended the validity of the Authority in the courts against separation-of-powers challenges brought by private parties. Id., 501 U.S., 264 n. 12, 270 n. 16.

Although often repeating the *Schechter* pronouncement that "sweeping delegation[s] of legislative power" are unconstitutional, e.g., *Industrial Union Dept. v. American Petroleum Inst.*, supra, 448 U.S., 646, the Court since has upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta v. United States*, supra, 488 U.S., 373.[35] In fact, the "intelligible principle" adequate to constrain executive discretion has included such formulations as "just and reasonable," *Tagg Bros & Moorhead v. United States*, 280 U.S. 420 (1930), "public interest," *New York Central Securities Corp. v. United States*, 287 U.S. 12 (1932), "public convenience, interest, or necessity," *Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933), and "unfair methods of competition." *FTC v. Gratz*, 253 U.S. 421 (1920). Acceptance of these standards continued after *Panama Refining* and *Schechter*. Thus, in *NBC v. United States*, 319 U.S. 190 (1943), the Court found that the discretion conferred on the FCC to license broadcasting stations to promote the "public interest, convenience, or necessity" conveyed a standard "as complete as the complicated factors for judgment in such a field of delegated authority permit." Id., 216. Yet, the regulations upheld were directed to the contractual relations between networks and stations and were designed to reduce the effect of monopoly in the industry, a policy on which the statute was silent. See also, under the same standards, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969)(promulgation of "fairness doctrine" and "right to reply" rule); *United States v. Southwestern Cable Co.*, supra (regulation by FCC of CATV).

The draft bill authorizes the President to act if he

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

As we have noted, while insisting on standards, the Court has contented itself with the most minimal of policy direction and statement of goals. It has emphasized practicality. In *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904), a case preceding the development of the doctrine of standards, the Court justified a delegation with highly elastic policy goals by saying: "Congress legislated on

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[35] Indeed, the Court has frequently deprecated the broader holdings of the two cases by pointing out that *Panama Refining* criminalized acts not previously punishable offenses and that *Schechter* involved delegations to private individuals. *Mistretta v. United States*, supra, 655 n. 7. See *Fahey v. Mallonee*, 332 U.S. 245, 249-250 (1947)(reversing a lower court ruling based squarely on the two cases and sustaining a *regulatory* statute concerning one industry, banking, and containing no standards, no declaration of policy, no guidance, remarking that "discretion to make regulations to guide supervisory action" in such narrow matters is "allowable" whereas it would not be as to broader delegations); *Yakus v. United States*, 321 U.S. 414, 424 (1944).

the subject as far as was reasonably practicable." That practicality survived the 1930s promulgation of the principle of standards, or of an "intelligible principle," is evident in *Carlson v. Landon*, 342 U.S. 524 (1952).

Congress had delegated to the Attorney General, as the executive head of the Immigration and Naturalization Service, the authority to grant or deny bail to aliens, or to continue them in custody without bail, at his discretion, pending determination as to their deportability. The statute contained no standards to guide the Attorney General's discretion, although overall the law contained numerous instructions to the Attorney General and other executive officials with respect to other aspects of treatment of aliens. Said the Court: "Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose. Congress need not make specific standards for each subsidiary executive action in carrying out a policy. . . . A wide range of discretion in the Attorney General as to bail is required to meet the varying situations arising from the many aliens in this country. The policy and standards as to what aliens are subject to deportation are, in general, clear and definite. . . . This is a permissible delegation of legislative power because the executive judgment is limited by adequate standards." Id., 542-543.

That the law contained no standards to guide the Attorney General's decision on bail was, therefore, unimportant, inasmuch as the statute did contain statements of "policy and standards" on the deportability of aliens generally. Apparently, general statements of policy that Congress hopes to see effectuated will suffice. But the Court has gone further than that. In *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), Congress had authorized the Commission to fix "just and reasonable" rates for natural gas. What the phrase "just and reasonable" means in the abstract is difficult to comprehend; the Court over a long period had applied constitutional due process and taking analysis to rate regulation to prevent government from depriving regulated companies of some measure of "fair return" on the investment of the shareholders, a standard which itself has varied in intensity and scope of review. See *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989). The phrase "just and reasonable" probably adds little if anything to the constitutional standard, but, in the context of the Act and its legislative history, it was evident to the Court that Congress wanted the FPC to follow the traditional theory of rate-making then in general use. However, the Court stated that the Commission need not follow that approach; it could, in fact, follow any approach that reached a "just and reasonable" result. Rate-making involves the making of "pragmatic adjustments," and the question on review should be whether the order "viewed in its entirety" complies with the statute. "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end." Id., 602. See also *American Trucking Assns. v. United States*, 344 U.S. 298 (1953).

In short, the Court freed the FPC of the modicum of guidance provided by Congress, its understanding that the factors customarily used in rate-making would lead to a "just and reasonable" figure, and authorized the Commission to follow any method to any rate result, so long as the figure finally determined did not violate the Constitution by depriving the utility of its property.

We have dwelt on the regulatory cases, because in them can be seen the paucity of standards that actually guide the agencies and the equability of the Court in approving them. But these examples do not constitute the whole body of delegations. Most of them, to be sure, do not encompass such a breadth of delegation as empowering the President to reduce any item of budget authority as he chooses, subject only to the exercise of lawmaking power by Congress, but some indeed do.

Broad regulation of large segments of the economy has been permitted under delegations which generally merely pointed in a particular direction. In *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939), the Court sustained a delegation to the Secretary of Agriculture of the power to fix the prices of six commodities, if and when he chose to exercise the authority with regard to some or all of the commodities. The Act provided that the price to be fixed should afford farmers purchasing power equivalent to that they had enjoyed in a base period, but the Secretary was also to protect the interest of the consumer by a gradual increase in prices in accordance with the public interest and current consumption. The Court thought the Act stated the purposes which Congress had hoped to achieve and set out standards by which it hoped the purposes could be realized.

In *Arizona v. California*, supra, a divided Court sustained a delegation of total discretion to the Secretary of the Interior to apportion water among the southwestern States in time of shortage. The statute prescribed no formula or standards, and the majority agreed that he was entirely free "to choose among the recognized methods of apportionment or to devise reasonable methods of his own," the Secretary being required only to reach "an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation." Id., 373 U.S., 593, 594.

Delegation during wartime for the War Department to recover "excessive profits" earned on war contracts was upheld in *Lichter v. United States*, 334 U.S. 742 (1948). The first law contained no definition, but the second defined "excessive profits" as meaning "any amount of a contract or subcontract price which is found as a result of renegotiation to represent excessive profits." The definition was essayed in the light of standards for determining "excessiveness" worked out by the War Department, which had been subsequently adopted by Congress. But the Court approved the validity of the delegation as to proceeds earned prior to this adoption. "The statutory term 'excessive profits,' in its context, was a sufficient expression of legislative policy and standards to render it constitutional." Id., 783.

Another wartime delegation, giving OPA extensive powers to fix commodity prices, was validated in *Yakus v. United States*, supra. The specified purposes were as broad and general as those condemned as standardless in *Schechter*, but the Act also provided that OPA should consider "prices prevailing between October 1 and October 15, 1941" and that the Administrator should set forth a "statement of the considerations" used in prescribing prices. The Court enunciated criteria for evaluating legislative standards that have been extremely influential since.

> The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct. . . . These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. . . . Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the condition . . . of its legislative command. . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose. . . . The standards prescribed by the present Act, with the aid of the "statement of considerations" required to be made by the Administrator, are sufficiently definite and precise . . . to ascertain whether the Administrator . . . has conformed to those standards. Id., 321 U.S., 424-426.

That the principles are not limited to wartime delegations is evidenced by *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F.Supp. 737 (D.D.C. 1971)(three-judge court), which upheld President Nixon's imposition of controls on prices, rents, wages, and salaries, pursuant to congressional delegation "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries." Relying on *Yakus v. United States*, which it construed, correctly in the view of the numerous occasions it has been cited for non-war-time and non-emergency fact situations, as not resting only on the war powers or the existence of a declared national emergency, the court, in an opinion by the late-Judge Leventhal, found adequate, though general, standards supporting the delegation. Judge Leventhal's opinion establishes a mode of analysis which may be helpful in evaluating the sufficiency of the standards proposed for the draft bill.[36]

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[36] See also Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66 (1974).

Thus, he stated, generally, "Congress is free to delegate legislative authority provided it has exercised 'the essentials of the legislative function' -of determining the basic legislative policy and formulating a rule of conduct . . . . The key question is not answered by noting that the authority delegated is broad, or broader than Congress might have selected if it had chosen to operate within a narrower range. The issue is whether the legislative description of the task assigned 'sufficiently marks the field within which the administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.'" Id., 337 F.Supp., 746 (quoting *Yakus*, supra,321 U.S., 424, 425). The essence, continued Judge Leventhal, is whether "there has been sufficient demarcation of the field to permit a judgment whether the agency has kept within the legislative will," that is, that "compatibility with the legislative design may be ascertained not only by Congress but by the courts and the public." Ibid.

Congress had set out standards and goals sufficient for the purpose of the delegation doctrine, the court concluded. In the Act, passed in 1970, it had provided that the President could not stabilize prices and wages at levels lower than those prevailing on May 25, 1970, so that there was a floor. Moreover, in 1971, Congress had amended the law to preclude the President from imposing controls in a particular industry or sector of the economy alone, in response to the President's effort to limit wage negotiations in the building and construction industry. Thus, Congress had told the President to use the delegated power to achieve broad stabilization of the entire economy. Additionally, the legislative history, evidenced in the committee reports and floor statements of key Members, indicated the President was to be guided, but not controlled, by the experiences with earlier controls, which had displayed elements of "freeze" and "hold-the-line" approaches, subject to relaxation for hardships in inequities under the implementation. Standards, the court said, could be gleaned not only from the statute but from its factual background and its statutory context, preeminently from legislative history. Id., 747-750.

Continuing, the court rejected the contention that the delegation was bad because it left to the President's sole discretion when, and if at all, to impose controls. This absence of a "timing standard" was permissible, said the court, because it "was not an abdication by Congress, but the product of a reasoned analysis that only such delegation as to timing would further the legislative purpose of stabilization." Id., 750. That is, "Congress was acting in a setting where all were agreed on the need to control inflation but opinion was sharply divided on the optimum measures for the Government to use." Ibid. What this means is that Congress, a majority thereof, wanted controls, but the President thought an "incomes policy" was the proper approach and did not think the imposition of direct controls was either desirable or efficacious. "The issue whether the delegation before us is excessive must be considered in the light of the unique situation, with the President not in accord with the conclusion of Congress as to the need or desirability of the power entrusted to him." In view of the policy differences between the President and Congress, "Congress could advise but not mandate his diagnosis. It sought in the national interest to have the right remedy available on a standby basis, if the President should wish to

adopt that prescription, following his further reflection and taking into account future developments and experience." It was in this context that the court could deny "that this delegation was unreasoned, or a mere abdication to the President to do whatever he willed. It conferred an authority that Congress concluded, with reasons, had a substantial likelihood of being required." Id., 750-751.

The court also noted that the statute was limited in duration and that the freeze imposed by the President's order was similarly limited, facts which emphasized the permissible scope of the delegated powers. And Congress had refused to extend the life of the statute upon the expiration of the last extension, despite the President's request for another extension. "Congress established a 'close control.'" Id., 754.

Also, the court reasoned, Congress had evinced a desire that controls be promulgated and implemented in accordance with principles of fairness and avoidance of gross inequity. A freeze is always arbitrary in some senses, but Congress did not mandate that the President must be uniformly severe; rather, it allowed him to remove inequities as they were revealed. Id., 754-758.

Significant to the court was the fact that Congress had required the President to develop additional standards as he went along by which he would be bound in subsequent executive action. That is, drawing on the experience of the controls upheld in *Yakus* and the Court's holding there, Congress had obligated the President to develop subsidiary administrative policy, that would "enabl[e] Congress, the courts and the public to assess the Executive's adherence to the ultimate legislative standard." This requirement furthers "the purpose of the constitutional objective of accountability. . . . [T]here is an on-going requirement of intelligible administrative policy that is corollary to and implementing of the legislature's ultimate standard and objective." Id., 758-759.

Finally, there was assurance of meaningful judicial review, so that the exercise of delegated power could be kept in proper channels and unfairness could be avoided. Id., 759-762.

We do not offer this perhaps overlong description of *Connally* as setting forth the absolute minima which must accompany a delegation of broad powers. Rather, it is a model of analysis, a guideline that gets us away from a simplistic reliance upon the words of a statute that purport to set forth standards. It emphasizes a necessity to view a delegation in full context: text, legislative history, factual background, and the laws and judicial decisions that have preceded this particular law, among many factors. What is evident in the cases, and particularly so of *Connally*, is that the courts look not so much for objective, quantifiable standards, so that administrators are to implement a statute in accordance with legislative instructions. What they look for, despite what they may say, is legislative prescriptions of goals, of the policies Congress wishes to see furthered, of the general direction executive action should proceed in.

That we take to be the paramount lesson of the Sentencing Commission case. *Mistretta v. United States*, supra. There, the Court exhaustively treated the

standards, goals, purposes, and the like, that Congress had included in the legislation. But enormous discretion remained, and the Court was not bothered by that.

> We cannot dispute petitioner's contention that the Commission enjoys significant discretion in formulating guidelines. The Commission does have discretionary authority to determine the relative severity of federal crimes and to assess the relative weight of the offender characteristics that Congress listed for the Commission to consider. . . . The Commission also has significant discretion to determine which crimes have been punished too leniently and which too severely. . . . Congress has called upon the Commission to exercise its judgment about which types of crimes and which types of criminals are to be considered similar for the purposes of sentencing.
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> But our cases do not at all suggest that delegations of this type may not carry with them the need to exercise judgment on matters of policy.
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> . . .
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> Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate. Although Congress has delegated significant discretion to the Commission to draw judgments from its analysis of existing sentencing practice and alternative sentencing models, "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." Id., 657-658 (quoting *Yakus*, supra, 321 U.S., 425-426).

It is true that Justice Scalia has ventured the opinion that "the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise." *Synar v. United States*, 626 F.Supp. 1374, 1386 (D.D.C.)(three-judge Court)(emphasis in original), *affd. on other grounds sub nom., Bowsher v. Synar*, supra.[37] Nonetheless, there are his remarks in *Mistretta v. United States*, supra, 488 U.S., 415-416 (dissenting opinion), doubting that the

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[37] Although the district court opinion is labeled *Per Curiam*, it is evident from the language and the style of reasoning that Justice Scalia, then a judge of the Court of Appeals for the District of Columbia Circuit, wrote it.

standards requirement of the delegation doctrine can be judicially enforced. Moreover, in contrast to the *Synar* suggestion, there is the *Yakus* opinion of the Supreme Court sustaining the delegation of price controls, although the ultimate standard in the statute was only that maximum prices be "generally fair and equitable." Supra, 321 U.S., 420, 427.

Applying Delegation Principles

Turning, then, to the provisions of the draft bill, and considering them in light of the precedents, especially following the analytical construct of the *Connally* opinion, we discern little reason to doubt that, if the bill were passed and challenged in court, it would be sustained as a permissible delegation.

The scope of the delegation is broad indeed. The President would be enabled to reduce the budget authority provided in any regular or supplemental appropriations act. Power over money is a central one to a legislative body, power which the English Parliament used to subdue the King and which the colonies used to curtail the authority of royal governors. The Constitution expressly mandates that no money may be drawn from the Treasury except pursuant to an appropriation. Art. I, § 9, cl. 7. Moreover, the President would be authorized to strike out of revenue laws provisions that are determined to be "targeted tax benefits," that is, sections of revenue law that have the "practical" effect of giving a benefit in the form of differential treatment to a particular taxpayer or a limited class of taxpayers. The Constitution specially treats tax laws by requiring their origination in the House of Representatives, which, under the Constitution as then written was the only elective body directly responsible to the people. Art. I, § 7, cl. 1.

Yet, there appears no reason to doubt that the power over appropriations, the decision not to spend funds appropriated or to reduce funds for a particular object, or over taxes, the decision not to carry out particular provisions conferring targeted benefits, may be delegated. The Court has not indicated that there are any powers that may not be delegated, however denominated, and in fact has pretty clearly indicated that all congressional powers may be delegated. Congress in fact in the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, 99 Stat. 1037, 2 U.S.C. § 901 *et seq.*, delegated to the President the power to reduce appropriated funds and return the money to the Treasury, though the delegation is more circumscribed than that proposed in the draft bill. Moreover, under one view of the Impoundment Control Act, P.L. 93-344, 88 Stat. 332, 2 U.S.C. §§ 681-688, some power to refuse to spend appropriated funds was delegated to the President.

Thus, the delegation being proper, it is the scope of the delegation that may be of concern. While it may be difficult to compare such disparate public policy actions, it is difficult to assert that the delegation in the draft bill is any broader than the power to control the economy through freezes and other devices that was sustained in *Yakus* and in *Connally*. And, to be sure, the Court has never invalidated a delegation as too broad.

Standards as a guiding factor, or rather goals and purposes as indicating considerations, seem to be critical. The bill sets forth three guidelines. If the President determines a rescission will help to reduce the federal budget deficit, he may rescind appropriations or veto certain tax benefits, if he finds that essential governmental functions will not be impaired and that the national interest will not be harmed. These guides are quite general, of course, but they do point in a specific direction. The President is directed to avoid two specific detriments, and he is directed to consider whether reductions will actually have the desired effect of reducing the deficit, rather than merely postpone an expenditure to a point when an action may cost more than it will now. While general, these standards have more specificity than some delegations the Court has sustained. E.g., *New York Central Securities Corp. v. United States*, 287 U.S. 12, 24 (1932)(permitting consolidation of carriers when "in the public interest"); *FPC v. Hope Natural Gas Co.*, supra, 320 U.S., 600 ("just and reasonable" rates for natural gas); *NBC v. United States*, 319 U.S. 190, 225-226 (1943)(licensing of radio communications "as public convenience, interest or necessity requires"); *Lichter v. United States*, supra, 334 U.S., 785-786 (1948)(recovery of "excess profits" earned on war contracts). Certainly, the standards of the draft bill, though not as prolix as those set out in the Sentencing Commission statute, probably constrain the President's discretion about as much as the Commission's discretion was cabined.

It must not be forgotten that, in addition to the statute, if one emerges from consideration of the draft bill, the legislative history created by its passage through Congress would present an elaboration of standards. The courts have had difficulty with legislative history as a device of affirmatively directing executive action rather than as background to assist courts in construing doubtful and ambiguous provisions. Without digressing to a discussion of that thorny topic, we can say that courts regularly look to legislative history, as Judge Leventhal did in *Connally*, to discern what goals, motives, purposes, and standards Congress wants observed in the exercise of delegated powers. And, further, there is always the background provided by the experience of the deficit control and impoundment control laws, on which Congress and the President could draw, in implementing and in evaluating the implementation of the delegation.

Certainly, if the extra-statutory standards are not judicially enforceable, as would be the case, doubtlessly, with respect to an enacted law in the form of the draft, Congress will be aware of the President's deviation from those standards, whether he "has kept within the legislative will," so that a considerable measure of accountability is possible. The public, too, will be able to evaluate the President's observation of standards and will be able to bring political pressures upon the President and Congress.

Thus, Congress could legislatively alter the delegation if it finds the President's effectuation to be beyond its desires. This action would, of course, be as subject to the President's veto as would passage of legislation within the prescribed time to countermand his rescission. But Congress is not limited to these two, difficult actions. The "close control," of which Judge Leventhal spoke

in *Connally*, may be exercised by Congress in every subsequent action on an appropriations or a revenue bill. Because when two statutes conflict, the later in time prevails, Congress is always free to exempt parts of a bill or the whole bill from the provisions that the proposed bill would enact into law. Checks and balances, accountability, in other words, would continue to function. Duration of delegation, an important factor for Judge Leventhal, is also implicated by this element of congressional power; that is, while the delegation of the draft bill is not of limited duration, the relative ease with which Congress could withdraw or curtail it through provisions in appropriations or revenue bills comes close to being, in effect, a flexible "sunset" provision. We recognize that this state of things is not within your desire, but it might provide, in the event of a challenge, one significant pillar of support for validation. On the other hand, inasmuch as the absence or presence of none of these elements is determinative with respect to validity, if you should choose, through, perhaps, a rules entrenchment format, to make more difficult this possible congressional ease of evasion, doing so would not seem alone to raise any serious question.

The ability of Congress and the public to appreciate and to appraise the standards governing the President's actions would be facilitated by the provision in § 5 of the proposed bill requiring the President, as part of each rescission message, to specify "the reasons and justifications for the determination to rescind budget authority or veto any provision[.]" Judgments could be formed about the motivations of the President and the degree to which, if at all, rescissions reflected solely decisions about the necessity to cut funds for the purposes of reducing the budget, the deficit, or the public debt, or to which, if at all, policy disagreements with Congress' priorities were important. Nothing in the proposal would preclude the President from utilizing rescissions as a device to implement policy disagreements, and he could be expected to do so, but the importance of the statements, to the extent they are forthright, is that they would lead to the creation of a "common law" body of precedents illustrating the President's guiding principles.

Nothing in the bill would bind the President to the "common law" he thus created, as the *Yakus* and *Connally* decisions viewed the congressional obligations there imposed to develop and follow administrative standards in stabilizing prices and wages. But the more limited device in the draft bill would facilitate congressional and public scrutiny of the President.

Neither is there anything in the bill which would constrain the President to be relatively evenhanded in the effects of rescissions of appropriations or the striking of tax benefits, as there was in the statute authorizing price and wage controls requiring economy-wide treatment. The purported standards of broad fairness and avoidance of gross inequity, which the *Connally* court discerned in the stabilization law, are not expressly set out in the proposal, although they may, to some extent, be an element of the standard that rescissions or vetoes not harm the public interest. But, again, the presence or absence of any particular factor seems irrelevant in what is, after all, a highly fact-particularistic analysis.

Finally, if it is argued that Congress is abdicating its responsibility to reduce the deficit by delegating power over appropriations or certain taxes, the *Connally* opinion contains some useful rebuttal. It will be recalled that it was contended that by delegating to the President total discretion about when, or even if, to impose controls, Congress had abdicated legislative power. The court reasoned "that this delegation was not an abdication by Congress, but the product of a reasoned analysis that only such delegation as to timing would further the legislative purpose of stabilization." The court reached this conclusion, because of the fact that Congress had wanted controls imposed, whereas the President did not, and it was only by giving him standby authority that Congress could empower him and hope he would act in the light of further experience. The court emphasized that Congress, in one of the reports on the bill that became the statute, said that the bill "reflects a sincere congressional willingness to do its part - and to share the consequences - in a meaningful attack" on inflation. Congress thus had a reason to delegate; it was not merely abdicating.

Though there is an element of the fictional in this rationalization, it does indicate that the courts are inclined to see a reasoned judgment, rather than a shrug or a shake of the head, an abdication, if Congress carefully considers all its options and determines that delegating away power is the best way to realize its goal. Especially may this be the case if, in the reports on the bill and in the floor statements of the chief sponsors, it is said, in some form, if not *in haec verba*, that the bill "reflects a sincere congressional willingness to do its part - and to share the consequences - in a meaningful attack" on the size of the deficit. Pledges on the part of Congress, when enacting such a bill, to do its best to reduce appropriations bills or not to reduce revenues by particularistic targeted benefits to some, combined with a standby authorization for the President to *supplement* the effort, would no doubt bespeak not an abdication but a "reasoned analysis" that the existence of the delegation would better enable Congress to carry out its pledges as well as give the President power to reduce the excess which somehow is passed.

It seems not to be an element of the delegation doctrine that accountability through judicial review be provided, although in the absence of express preclusion of such review in the bill, we do not address the question of whether review could be had, if not under the Administrative Procedure Act,[38] then under some other statute, and if so to what extent.[39] Due process would seem, in any event, to require judicial review of the constitutionality of the law itself.

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[38] Reviewability of presidential action is not provided for under the APA. *Dalton v. Spector*, 114 S.Ct. 1719 (1994); *Franklin v. Massachusetts*, 112 S.Ct. 2767 (1992). The fact that it would be the President's actions to be challenged would probably preclude resort to the waiver of sovereign immunity under § 702 of the APA, 5 U.S.C. § 702, which would otherwise be a great boon to plaintiffs under *Bowen v. Massachusetts*, 487 U.S. 879 (1988).

[39] As was noted supra, many suits challenging impoundments were successfully pursued in court by potential recipients of federal funds.

Suit could perhaps be brought by some individual or entity, a recipient of funds or of a targeted tax benefit, under a program rescinded in whole or in part, or by someone otherwise claiming injury because of the President's action. Of course, the President would not be named, but another officer could certainly be substituted.[40]

Supersession

The proposed bill operates in such a fashion that after the President signs into law an appropriations bill or a revenue bill, he may within ten days from the date of enactment reduce or totally vitiate an appropriation or strike a targeted tax benefit. May the President be delegated authority to "nullify" or "override" a law? To present the question in this fashion seems to pose a dilemma, in which the official charged with executing the law may instead legislate it out of existence.

It was argued at the time of consideration of the Deficit Reduction Act that Congress could not delegate the power to rescind a law.[41] Again, it was an issue not passed on by the Supreme Court, but in the district court the argument was rejected, although on the questionable basis that the delegation was legislation in the form of a contingency, the old theory that Congress had repealed or altered the law, with the executive merely finding a fact or condition that activated the congressional action. *Synar v. United States*, supra, 626 F.Supp., 1387.[42] Whatever the explanation, it is evident that a sequestration order under the Act *cancels* the funds, rather than defers them or some other lesser action; the President's order repeals that portion of the appropriation. See

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[40] E.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)(suit brought against Secretary of Commerce to challenge presidentially-ordered seizure of steel mills).

[41] "While under the Constitution Congress *can* delegate the authority to implement laws, it *cannot* delegate the authority to repeal laws." Letter of Hon. Peter Rodino, Chairman, House Judiciary Committee, to Hon. Dan Rostenkowski, Chairman, House Ways and Means Committee, 131 CONG. REC. 30159 (1985)(emphasis in original). And see id., 30160 (letter from Professor Tribe to Congressman Synar).

[42] The usual contingency form of delegation is directed toward a law coming into effect upon the determination of the occurrence of an event or of a fact. E.g., *United States v. Rock Royal Co-Operative*, supra, 307 U.S., 577-578; *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939). The fiction of repeal or alteration on this basis has been used by the Court in validating a presidential action, but these decisions predate the Court's admission that legislative powers can indeed be delegated. See *Field v. Clark*, supra, 143 U.S., 693(when President ascertained a fact, the existence of discriminatory duties on certain United States products, he would order the suspension of free importation of certain goods, a result Congress, not the President, had ordained).

National Association of Counties v. Baker, 842 F.2d 369, 377-382 (D.C.Cir. 1988), *cert. den.*, 488 U.S. 1005 (1989).[43]

As the late Judge Leventhal stated in reviewing the elements of the delegation doctrine, there is "no analytic difference, no difference in kind, between the legislative function - or prescribing rules for the future - that is exercised by the legislature or by the agency implementing the authority conferred by the legislature. The problem is one of limits." *Amalgamated Meat Cutters*, supra, 337 F.Supp., 745. Enactment of laws and repeal of laws by a recipient of delegated authority have long been permissible. Only the Court's explanations have changed. Thus, in *The Brig Aurora*, 7 Cr. (11 U.S.) 382 (1813), Congress had imposed an embargo upon French and British shipping, which was to expire within the year. But Congress also provided that the embargo statute would be revived unless there was a determination by the President that either France or Great Britain had ceased to violate United States neutral commerce. Presidential revival through factfinding, the determination of the occurring of a contingency, was deemed acceptable by the Court.

In *J. W. Hampton & Co. v. United States*, supra, the case in which the "intelligible principle" standard of modern delegation was formulated, Congress had authorized the President to adjust tariff rates up to 50% above the statutory maxima in instances in which he found that existing rates did not equalize differences in costs of production in the United States and the principal competing countries, and the Court found this to be a valid delegation. "The President, thus, could in effect make a tax rate and by so doing repeal the existing one. The general policy of the Act is fairly certain but an analysis of the act and even more the history of its administration shows a tremendous scope for manipulation."[44]

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[43] A subsidiary argument, raised in the case of the Deficit Reduction Act by Chairman Rodino and Professor Tribe, was that delegating authority to repeal a law violated *Chadha*, inasmuch as the Court had there held that lawmaking could be accomplished only through bicameral passage and presentation to the President. Supra, n. 23. But in *Chadha* itself the Court had distinguished congressional lawmaking from delegated lawmaking, by noting that the Constitution required bicameralism and presentment only in the instance of congressional action, not administrative action. Supra, 462 U.S., 953 n. 16. Before and after *Chadha*, the Court recognized that when Congress delegated to agencies power to prescribe substantive rules, the rules have the force and effect of law. E.g., *Batterton v. Francis*, 432 U.S. 416, 425 (1977); *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *United States v. Morton*, 467 U.S. 822, 834 (1984); *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 843-844 (1984); *Atkins v. Rivera*, 477 U.S. 154, 162 (1986); *City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

[44] L. JAFFE, JUDICIAL CONTROL of ADMINISTRATIVE ACTION (1965), 59.

Congress has not often addressed itself to the issue of repeals or of the superseding effect on statutes of rules promulgated under delegations. But in authorizing the Supreme Court to promulgate, under the Rules Enabling Acts, rules of civil and criminal procedure, it directed that such rules are to supersede previously enacted statutes with which they are in conflict. 18 U.S.C. §§ 3771, 3772 (criminal procedure); 28 U.S.C. § 2072 (civil procedure); id., § 2076 (evidence).[45] There appears to be no history of constitutional challenge to displacement of statutes by rules. In *Davis v. United States*, 411 U.S. 233, 241 (1973), the Court referred in passing to the supersession of statutes, without evincing any doubt about the validity of the result but, of course, not approving the validity either. Justices Black and Douglas, in dissenting from the promulgation of rules, voiced constitutional objections to supersession, e.g., 374 U.S. 865 (1963); 383 U.S. 1032 (1966), but as is well known they were doubtful as well of the constitutional propriety of the Court promulgating the rules at all.

Commentary on the operation of the clauses is not extensive, but it does note that numerous federal statutes were modified or superseded by rules.[46] The cited treatise also observes that, in the 1948 revision of the Judicial Code, Congress eliminated many of these superseded statutes, but the absence of constitutional challenge is nonetheless suggestive. Especially is this the case because there have been scholarly challenges,[47] and bills have been pressed in Congress to repeal the supersession provisions, as part of a revision of the Rules Enabling Acts, at least in part from constitutional concerns. While the House of Representatives twice passed bills which, *inter alia*, repealed the superseding effect of rules, the Senate did not accept them, and the revisions that were most recently adopted retained supersession provisions.[48]

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[45] On the background of this supersession provision, see Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1050-1054 (1982).

[46] 2 J. MOORE'S FEDERAL PRACTICE (2d ed. 1988), § 1.02[5].

[47] Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 64-77 (1977). See also House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice, *Hearings on the Rules Enabling Act of 1985*, 99th Cong., 1st sess. (1985), 3, 11-12 (Professor Burbank); and see id., 265-271 (letter of Chairman Kastenmeier).

[48] In the 99th Congress, the House passed H. R. 3550, but the Senate did not act. See H. Rept. No. 99-422, 99th Cong., 1st sess. (1985), 22-23; 131 CONG. REC. 35190-92. In the 100th Congress, amendments of the Rules Enabling Acts, including repeal of supersession provisions, were included in an omnibus bill, H. R. 4807, see H. Rept. No. 100-889, 100th Cong., 2d sess. (1988), 27-29, that passed the House, 134 CONG. REC. 23573-23584 (1988), but the Senate refused to accept the repealer, id., 31051-31052 (Senator Heflin), and the House acquiesced. Id., 31872 (Representative Kastenmeier). P. L. 100-702, 102 Stat. 4642, 4648, amending 28 U.S.C. § 2072. The matter was debated in *The Rules Enabling Act*, Hearing before the Senate Judiciary Subcommittee on Courts and

for Congress. Nothing in the Constitution mandates a particular time frame for congressional consideration of legislation generally; it might be that a vetoed bill was considered for several months before being passed and sent to the President. Must Congress act immediately or within two or four days, perhaps, on repassage over the President's veto. Only the second reading seems strained, in that, in the absence of express language, it seems odd that the Framers would have inserted a protection for (perhaps) lengthy congressional reconsideration, or least we might reasonable conclude so in the absence of some clear language.

Nothing in the debates of the Convention proceedings, as collected in Farrand, gives us a clue as to the intentions of the Framers on this point. Some guidance may be gleaned from the understanding and practice of the early Congresses.[50] During the first fifty years under the Constitution, Congress usually turned to reconsideration of a vetoed bill within two or three days, sometimes on the same day the President's message was placed in the Record. Members sometimes disputed whether any time should elapse between reporting the message and reconsidering the bill, but the practice was to take a day or two. Senator Daniel Webster, calling for a few days of consideration of Jackson's veto of the United States Bank bill, read the Constitution as permitting the practice.[51] The time frame was from July 10 to July 13. In 1841, a debate erupted between Senator Benton, who argued that the Constitution required the Senate immediately to turn to reconsideration, whereas Senator Clay denied that the Constitution prevented the exercise of senatorial discretion befitting the importance of the question, but also noting that respect for the President required reconsideration within a reasonable time. Senator Calhoun concurred with Clay.

In terms of length of time before reconsideration, Dr. Fisher reports that, in one instance, 14 days elapsed, in another nine. Most took place within three or four days. He alludes to instances subsequently in which longer delays occurred. In 1854, a period of more than two months ran, in 1854 nearly four months ran (but part of the time was occasioned by an adjournment), and in

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[50] See Fisher, *When Must Congress Reconsider Vetoes?*, Congressional Research Service, Sept. 14, 1988, reprinted in *Pocket Veto Legislation*, Hearings before the House Judiciary Subcommittee on Economic and Commercial Law, 101st Cong., 2d Sess. (1990), 95. The material in this and the next paragraph is summarized from this memorandum.

[51] "The constitution prescribes that the House shall proceed to this decision thereupon. It was the practice of Congress to give a proper time for the transcript of the message, and for a respectful consideration of the subject. In cases of lesser importance, it was the custom to proceed immediately to the decision. But, in this case, it was respectful to the President, to the length of the paper which had been read, to the high character of the various topics which it embraced, and to the general importance of the subject, that the Senate should assign such day and hour for taking the message into consideration, as would be agreeable under the existing circumstances." CONG. DEBATES, 22d Cong. 1st sess. 1220 (1832).

That administrative or executive action consistent with delegated authority can repeal or alter a congressional statute is also evidenced by the cases holding that agency regulations may preempt state laws. "Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. [citations omitted] When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited." *Fidelity Federal Savings & Loan Assn v. de la Cuesta*, 458 U.S. 141, 153-154 (1982). See also *United States v. Shimer*, 367 U.S. 374, 383 (1961); *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981); *Blum v. Bacon*, 457 U.S. 132, 145-146 (1982); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699-700 (1984); *Hillsborough County v. Automated Medical Labs*, supra, 471 U.S., 715-716. Preemption by federal statutory law takes place under the supremacy clause, Art. VI, cl. 2, which gives "the Laws of the United States which shall be made in Pursuance" of the Constitution precedence over state laws. "The phrase 'Laws of the United States' encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization." *City of New York v. FCC*, 486 U.S. 57, 63 (1988). The same standard applies to the question of preemption whether by statute or by administrative regulation. *Louisiana PSC v. FCC*, 476 U.S. 355, 368-369 (1986).

Thus, if a statute and a regulation have the same identity under the supremacy clause for purposes of preempting state laws, they must have the same identity under the supremacy clause, both being laws of the land, for purposes of the rule that when two laws conflict the later in time prevails. There appears to be no principled basis upon which one could distinguish a regulation having the force and effect of law for preemption purposes from one that supersedes an existing statute.

Time Constraints on Congressional Override of the President's Veto

Under the draft bill, § 3(b)(3), if the President vetoes the disapproval bill passed by Congress to reverse the rescission or tax veto, Congress has five calendar days of session after the date of the veto to act to override. If Congress fails to override or if it does not act within the five-day period of session, the President's action becomes final. That is, the budget authority or targeted tax benefit is repealed. § 3(a). The question arises whether legislation may prescribe a time certain within which Congress must act on a presidential veto in order to overcome it.

The question is difficult because the constitutional provision is ambiguous with respect to the time period, if any, within which congressional action must

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Administrative Practice, 100th Cong., 2d Sess. (1988).

take place.[49] The section provides that if the President vetoes a bill, he shall return it with his objections to the originating House. That body "shall enter the Objections at large on their Journal, *and proceed to consider it.*" Art. I, § 7, cl. 2 (emphasis supplied). If two thirds of that body approves the bill, it is sent to the other House, "by which it shall likewise be reconsidered[.]" Thus, unlike the provision giving the President ten days (Sundays excepted) within which to consider a bill, the clause is silent with respect to whether Congress must consider the President's objections within a particular time, unless the passage italicized above carries the import of a requirement of immediate reconsideration.

One may read the pertinent clause for any of three propositions. First, the clause requires that Congress promptly if not immediately turn to reconsideration of the vetoed bill and vote on it. Second, the clause, by specifying no time limitation, unlike the ten-day period mandated for presidential consideration, gives Congress a protected period of time extending throughout the life of that Congress. Third, the clause does not set a time for congressional consideration, leaving to Congress in its discretion to fix or not to fix a period, which may be uniform or which may vary from instance to instance.

The consequences of adopting one of these possibilities is obvious. If the first reading is the valid one, then Congress is already bound by time constraints, ameliorated only by the necessity that it take such time as to evaluate the President's objections, and the five-day period would represent a congressional judgment, adopted by enactment of the draft bill, that this particular period is all the time Congress needs. If the second reading is correct, congressional time cannot be limited, and the five-day provision in the draft bill would be invalid. If the third reading is found to represent most faithfully the meaning of the clause, then, as with the first reading, Congress could fix a five-day period as a way of binding its discretion.

The text of the clause, as we have stated, is ambiguous. It simply provides that when the President returns a bill with his objections, the originating House is to enter the objections in the Journal "and proceed to consider" the vetoed bill. This language is certainly susceptible of being read as peremptory, as mandating immediate reconsideration or, at least, very prompt, reconsideration. But this reading is hardly compelling. The fact that a specific ten day period (Sundays exception) is provided the President, while the clause lacks a time setting for Congress, suggests that the clause might better be read as conferring discretion upon Congress. The Framers included a time constraint for the President, none

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[49] The Constitution is not ambiguous with regard to the time period within which the President must act. He has ten days (Sundays excepted) after the bill is presented to him. The draft bill has the same time limit. § 3(b)(2). The Court has clearly held that Congress could not curtail the time the President has to consider a bill. *The Pocket Veto Case*, 279 U.S. 655, 677-678 1929); *Edwards v. United States*, 286 U.S. 482, 486, 493-494 (1932); *Wright v. United States*, 302 U.S. 583, 596-597 (1938), and id., 606 (separate opinion of Justice Stone).

1856, another period of two months without an intervening adjournment. He reports a veto by President Grant of a bill on January 11, 1870, with the Senate overriding on May 31, 1870 (four-and-a-half months) with the House of Representatives sustaining the veto the next day.

Thus, there was a gradual evolution from the early days in which reconsideration was prompt but not immediate to later times when, in some instances, there was a lengthy period intervening.[62] As with any legislative precedent, it is difficult to essay any consistent reading of the veto clause from the practice, but practice does suggest that ample congressional discretion does exist with respect to time.[63]

What this history suggests is that the reading of the veto clause that recognizes some measure of congressional discretion probably best accords with the text and purposes of the clause. That is, Congress has a reasonable time to reconsider, but it does not have an unlimited time. This reading would accord Congress, or either House thereof, the discretion to embody in its rules procedures for consideration of vetoes, or simply the vetoes following from the exercise of presidential power delegated in the proposed bill, which would curtail and channel the discretion Congress has.

Under Art. I, § 5, cl. 2, "[e]ach House may determine the Rules of its Proceedings, ..." As the Supreme Court long ago remarked:

> The Constitution empowers each house to determine its rules of proceedings. It may not by its

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[62] The precedents of the House of Representatives on the question of postponing to a day certain, which is a permissible motion, or to postpone indefinitely, which is not, are collected in 24 L. Deschler's PROCEDURE, §§ 16.1 - 16.3, 16.6 (1982); 4 A. HIND'S PRECEDENTS, 3542-3547 (1907); 7 C. CANNON'S, §§ 1101, 1103, 1112-1113. A motion to postpone indefinitely is, as stated, not in order. HIND'S, supra, 3548. But the power to postpone to a date certain is broad. For example, on December 17, 1985, the House, by unanimous consent, postponed further consideration of a veto message until August 6, 1985. 131 CONG. REC. 37477-37478 (1985). See for summary of practice *Item Veto: State Experience and Its Application to the Federal Situation*, House Committee on Rules, 99th Cong., 2d Sess. (Comm. Print, 1986), 177-196.

[63] No judicial precedents are available. In dicta, in cases dealing with other issues, such as the pocket veto and the effect of the President signing a bill after Congress adjourns, the Court has stated that the clause has two purposes. First, it is to ensure promptness and to safeguard the opportunity of Congress for reconsideration of bills that the President disapproves, as reflected in the limited period of time the President has to sign or veto and not to hold a bill indefinitely. Second, it safeguards the opportunity of the President to have the full time provided to consider whether to sign or veto. *Edwards v. United States*, 286 U.S. 482, 486 (1932); *Wright v. United States*, 302 U.S. 583, 596 (1938).

> rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method or proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just. . . . 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. *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Any regulation or rule governing procedure curtails discretion of a legislative body in some way. The "fast track" provisions, just expired, of legislation to implement trade agreements contain time deadlines and bar amendments that could otherwise be offered. The rules legislated under the various deficit control and budget statutes mandate actions within a certain time and, in the Senate, require a three-fifths vote in certain instances to consider amendments that otherwise could be freely presented. Other examples could be multiplied.

These rules are, of course, to be enacted into statutory law by the proposed bill, but this is not uncommon now, inasmuch as several laws, the legislative reorganization statutes, the trade laws with their "fast track" procedures, and the budget and deficit reduction laws, and others, set out rules in statutory form. But these are commonly acknowledged to be exercises of the rule-making power and subject to change by either House without resort to statutory amendment, as sometimes, but not always, set out in the statute.

If, therefore, Congress should adopt the permissive reading of the presentment clause in this respect, no barrier would be raised to the provision in the proposed bill. If a different reading, a view that the Constitution requires either an indefinite time or at least a period longer than that contained in the proposal, is adopted, then a serious problem would be presented. As we have noted, the text of the Constitution is, at best, ambiguous, and the Convention debates are silent. Congressional practice over the years seem to be in accord with a discretionary view of the time required or permitted under the clause. But, in the last analysis, it is the view of the enacting Congress that would impress on the provision a constitutional determination. Whether this reading could be challenged in the courts is a difficult question. Some rules have been challenged in cases that reached the merits, as in *Ballin*, in which the Court upheld the rule, or in *United States v. Smith*, 286 U.S. 6 (1932), in which the Court interpreted the rule differently than the Senate had.

Thus, the question cannot be dispositively answered, but the weight seems to run heavily in favor of the validity of the draft's provision.

Conclusion

It seems, therefore, on the basis of textual analysis and precedent that it would be constitutionally permissible for Congress to delegate to the President the power to reduce or omit various items from appropriations acts under the terms set out in the draft bill. The power to delegate encompasses the inclusion within delegations of presidential power over appropriations and tax provisions. The standards contained in the draft appear to fall within the unconfining scope of judicial precedents. And the delegation doctrine permits the overturning of statutes by the recipients of the delegation. Only the issue of the five-day period within which the President's veto must be overridden presents an unsettled question, but this matter seems amenable to a solution supportive of the bill.

One important point may need to be considered, although this memorandum is not the place for more than a brief mention. Once a bill like the draft becomes law, it is within the power of Congress thereafter to include within appropriations bills provisions that exempt certain budget authority or all budget authority or tax benefits in revenue bills from the delegation contained in the draft bill from operation of the enhanced rescission authority. It is simply an example of the law later in time governing, although general rules against legislation on appropriations bills might impose some limits on the practice. In any event, there may be ways, through entrenchment of the rules of the House of Representatives and other devices to restrict the practice, which we can assess for you at your request.

Johnny H. Killian
Senior Specialist
American Constitutional Law

Mr. CLINGER. Thank you, gentlemen. The committee stands adjourned. I haven't learned how to wield this thing yet.

Mr. ORNSTEIN. Oh, you will.

[Whereupon, at 3:15 p.m., the committee was adjourned.]

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