

**S. 2381, A BILL TO AMEND THE CON-  
GRESSIONAL BUDGET AND IMPOUND-  
MENT CONTROL ACT OF 1974 TO PRO-  
VIDE LINE ITEM RESCISSION AU-  
THORITY**

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**HEARINGS**  
BEFORE THE  
**COMMITTEE ON THE BUDGET**  
**UNITED STATES SENATE**  
ONE HUNDRED NINTH CONGRESS  
SECOND SESSION

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**May 2, 2006—S. 2381, A BILL TO AMEND THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974 TO PROVIDE LINE ITEM RESCISSION AUTHORITY**



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IMPOUNDMENT CONTROL ACT OF 1974 TO PROVIDE LINE ITEM  
RESCISSION AUTHORITY



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**S. 2381, A BILL TO AMEND THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT OF 1974 TO PROVIDE LINE ITEM RESCISSION AUTHORITY**

**TUESDAY, MAY 2, 2006**

U.S. SENATE,  
COMMITTEE ON THE BUDGET,  
*Washington, DC.*

The committee met, pursuant to notice, at 9:38 a.m., in room SD-608, Dirksen Senate Office Building, Hon. Judd Gregg, chairman of the committee, presiding.

Present: Senators Gregg, Allard, Sessions, Bunning, Ensign, Alexander, Conrad, Sarbanes, Murray, Byrd, and Menendez.

Staff present: Scott Gudes, Majority Staff Director; and Jim Hearn, director of federal programs and budget process.

Mary Naylor, Staff Director for the Minority; and Lisa Konwinski, Counsel.

**OPENING STATEMENT OF CHAIRMAN JUDD GREGG**

Chairman GREGG. We understand that Senator Byrd is on his way, but in order to expedite the hearing, because there is going to be a vote here at 10:45 and we have a number of excellent witnesses, we want to make sure everybody has an adequate amount of time. Why don't Senator Conrad and I make our opening statements and then hopefully Senator Byrd will be here by then.

This hearing today is about the proposal of the Administration relative to what I call fast track rescission. Some people have called it line item veto. I do not think that is a proper title for it. Some people have called it impoundment. That certainly should not be the proper title for it. It should not be impoundment.

But rather it is a proposal where basically the executive branch would say to the legislative branch here are some spending items, take another look at them and see whether or not you want to go forward with them.

It is a proposal which, in concept, is an excellent idea. The fact is we need as a Government, to have different avenues to review spending and how we are spending the taxpayers dollars and be sure that we are doing it correctly and that those dollars are being spent appropriately.

We know that as a Government we have a very serious problem with the deficit. We have a very serious problem with spending too much money, money that we do not have. And so anything that inserts into the process an opportunity to take another look at how

much money we are spending, where we are spending it, and how we are spending it, and gives us an opportunity to review that in a constructive way is something that we should seriously consider.

Obviously, the main issue here is the balance of power between the executive branch and the legislative branch. The legislative branch correctly has tremendous concern and a desire to maintain its authority over the purse. That is the key authority of the legislative branch, and transferring that authority to the executive branch in any significant way would be inappropriate.

However, the proposal as it has come forward, if it were adjusted, in my opinion, in a number of substantive but not dramatic ways, does not represent, in my opinion, a dramatic shift in authority away from the Legislative to the Executive but rather, as I say, gives the Executive the chance to ask the legislative branch do you really want to spend this money and gives us the opportunity in the legislative branch to say either yes or no. And there are ways to do that which I think avoid the issue of impoundment, which is not appropriate, or the issue of line item veto which, although appropriate, is not constitutional unless the Constitution were amended.

And so this fast track rescission proposal which the Administration has sent up is something we need to take a very serious look at. And I happen to think we should be able to put it in a form that the legislative branch will be comfortable with.

We have excellent witnesses today on this point. Of course, Senator Byrd, when he arrives, is the leading authority in the Senate, if not in the country, on the issue of the prerogative of the Senate. I am sure he will have some very strong views on this proposal and we will look forward to hearing them.

We have the Acting CBO Director here and the acting Deputy Director of OMB here, and a number of experts to give just their thoughts.

So at this point I would yield to the Senator from North Dakota, the Ranking Member, for his thoughts.

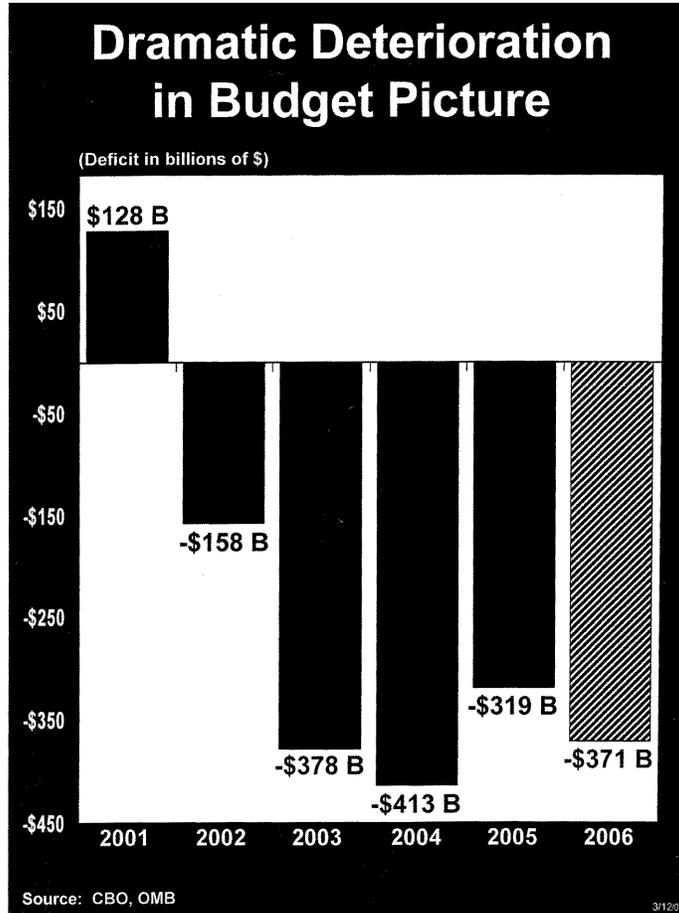
#### **OPENING STATEMENT OF RANKING MEMBER KENT CONRAD**

Senator CONRAD. Thank you very much, Mr. Chairman. And thank you for holding this important hearing.

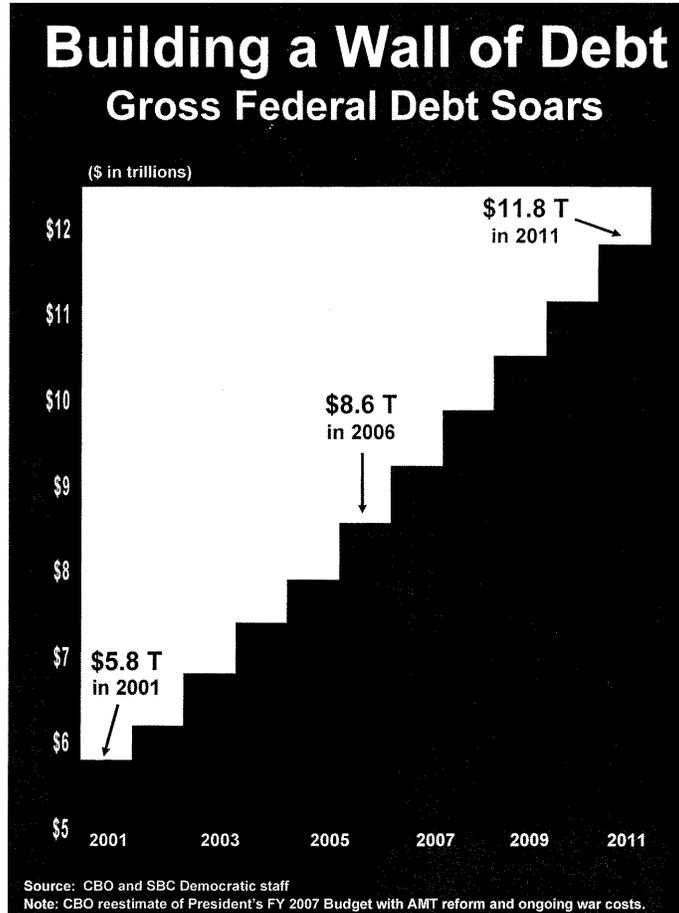
This is an area where we have very different views. I think it would be a profound mistake to adopt this proposal. The proposal that the President has made is not the answer to our budget problems. It would likely have little impact on the deficit but would significantly shift power from the legislative branch to the executive branch.

The fact is under this Administration the deficits have skyrocketed, the debt is exploding. And that is because there simply has not been the will to put a fiscal policy in place to prevent those occurrences.

Let me go to the first chart.



This is what has happened to the budget deficit under this President. We have had three of the largest deficits in our country's history.



The explosion of the debt is even more serious.

Instead of paying down debt in preparation for the retirement of the baby boom generation, which the President promised, the debt has exploded. At the end of his first year, the debt was \$5.8 trillion. It is headed for \$11.8 trillion if the budget that is before Congress now is adopted.

If that five-year plan is endorsed, we now anticipate that the debt will be \$11.8 trillion by the end of 2011.

The debt is increasing by more than \$600 billion a year, every year over the next five years.

The President's line item rescission proposal cannot replace a real commitment to reducing the deficit. Acting CBO Director Marron, who is one of our witnesses today, has noted that the proposal is unlikely to greatly affect the budget's bottom line.

**CBO Director Believes Bush Line Item Veto  
Unlikely to Greatly Affect Bottom Line**

**“Such tools, however, cannot establish fiscal discipline unless there is a political consensus to do so.... In the absence of that consensus, the proposed changes to the rescission process ... are unlikely to greatly affect the budget's bottom line.”**

— Acting CBO Director Donald Marron  
Testimony before House Rules Committee  
March 15, 2006

In testimony before the House Rules Committee he said, and I quote, “such tools, however, cannot establish fiscal discipline unless there is a political consensus to do so. In the absence of that con-

sensus, the proposed changes to the rescission process are unlikely to greatly affect the budget's bottom line."

A recent editorial in USA Today made essentially the same point. The President's proposal is not the answer to our budget problem. The editorial stated, and I quote, "The line item veto is a convenient distraction. The vast bulk of the deficit is not the result of self-aggrandizing line items, infuriating as they are. The deficit is primarily caused by the unwillingness to make hard choices on benefit programs or to levy the taxes to pay for the true cost of Government."

### ***“Sleight of Hand on Spending”***

**“...[T]he line-item veto is a convenient distraction. The vast bulk of the deficit is not the result of self-aggrandizing line items, infuriating as they are. The deficit is primarily caused by unwillingness to make hard choices on benefit programs or to levy the taxes to pay for the true costs of government.”**

**– USA Today  
March 23, 2006**

Many analysts have noted that the primary result of the President’s proposal would be to shift power from the Legislative to the executive branch. Columnist George Will wrote the following in a recent column in the Washington Post, and I quote, “It would aggravate the imbalance in our Constitutional system that has been growing for seven decades: the expansion of executive power at the expense of the Legislature.”

**Conservative Columnist George Will Believes  
Bush Line Item Veto Proposal Shifts Too  
Much Power to Executive Branch**

**“It would aggravate an imbalance in our  
constitutional system that has been  
growing for seven decades: the expansion  
of executive power at the expense of the  
legislature.”**

– George F. Will  
*Washington Post*, “The Vexing  
Qualities of a Veto”  
March 16, 2006

Let me just conclude by saying here are the problems that I see with the President’s proposal. One, it fundamentally shifts the balance of power between the Legislative and executive branches.

Two, it requires Congress to vote on the president’s proposal within 10 days.

Three, it provides no opportunity to amend or filibuster proposed rescissions.

Four, it allows the president to withhold funds for 180 days even if Congress disapproves of the rescission with a vote.

Five, it allows the president to propose an unlimited number of rescissions at any time.

Six, it allows the president to resubmit the same rescission again and again.

Seven, it allows the president to cancel or modify mandatory spending proposals passed by Congress. If that is not an egregious, egregious expansion of executive power, I do not know what is.

And eighth, the tax provisions are narrowly drawn, allowing the president to rescind only those tax measures affecting fewer than 100 people, while the spending provisions are broadly drawn, allowing the president to rescind any spending increase.

## **Problems with Bush Line Item Veto Proposal**

- **Fundamentally shifts balance of power between Legislative and Executive branch**
- **Requires Congress to vote on President's proposals within 10 days**
- **Provides no opportunity to amend or filibuster proposed rescissions**

## **Problems with Bush Line Item Veto Proposal**

- **Allows President to withhold funds for 180 days even if Congress disapproves of rescission with vote**
- **Allows President to propose unlimited number of rescissions at any time**
- **Allows President to resubmit the same rescission again and again**
- **Allows President to cancel or modify (i.e., rewrite) mandatory spending proposals passed by Congress**
- **Tax provisions are narrowly drawn, allowing President to rescind only those tax measures affecting fewer than 100 people; spending provisions are broadly drawn, allowing President to rescind any spending increase**

Instead of this proposal, the President should be focused on fundamentally changing the failed fiscal policies he has embraced since taking office. That is the only way we are going to put our fiscal house back in order.

With that, I very much look forward to the testimony of our witnesses, especially the testimony of our esteemed colleague, Senator Byrd, who is one of the most knowledgeable individuals in the country on the Constitution and the rules of the U.S. Senate.

I thank the Chair.

Chairman GREGG. Thank you, Senator.

We will now turn to Senator Byrd. We appreciate his testimony today. As was mentioned by the Senator from North Dakota and myself, in my opening statement, Senator Byrd is the leading authority on the Senate's prerogative and the balance of power, one of the leading authorities in the country, certainly the leading authority in the Senate. His reputation for defending the prerogative of the Senate is second to none.

We are interested in hearing his thoughts and know they will be very insightful and give us something to consider as we move forward.

Senator BYRD.

**STATEMENT OF THE HON. ROBERT C. BYRD, A UNITED STATES SENATOR FROM THE STATE OF WEST VIRGINIA**

Senator BYRD. Mr. Chairman, Plato thanked the gods for having been born a man, and for having been born a Greek, and for having been born during the ages of Sophocles.

I thank the gods for having been born at a time when I could serve on the distinguished Committee and under such a distinguished and able Chairman, who always presides with a dignity that is as rare as a rose in June. And I am very privileged to appear before this Committee and this Chairman. That is what I have been talking about—

I very much appreciate this opportunity to present my views on this in iniquitous act, the Legislative Line Item Veto Act, as proposed by the President.

This is a subject that I view with the gravest concern. The Senate, to its eternal shame, once before approved a line item veto that would have eviscerated Congress's hold on the power of the purse, the power of the purse. The framers gave Congress the power over the purse. The power of the purse rests here.

We are fortunate that the Supreme Court intervened to correct that egregious abominable error. We cannot count on the Court's being willing or able to do that again. This time around the Congress, and more particularly the Senate, may be the first, last and only line of defense.

S. 2381 is an offensive slap at the Congress. It embodies a reckless disregard for the fundamental and sacred Constitutional principle of three separate and equal branches of Government. This bill, S. 2381, is anathema to the lawmaking powers granted to the Congress in Article I of the Constitution. As currently drafted, it would allow the president to roll over the procedures outlined in the presentment cause of Article I, Section 7 and effectively cancel individual tax and spending items in legislation by impounding such items indefinitely.

Without exercising a veto, the president could effect the repeal of a law passed by the Congress, and then resist subsequent efforts by the Congress to ensure that law is carried into effect. S. 2381 is a thinly veiled attempt to circumvent the Constitutional test outlined in *Clinton v. city of New York*.

S. 2381 would authorize the president, and all future presidents, to propose rescinding any item of mandatory spending, any item of

discretionary budget authority, and certain targeted tax benefits enacted after the passage of S. 2381, if it is enacted. It would require the Congress to vote on Presidential rescission requests within 13 days, without amendment.

It would give the president complete control over the packaging and submission of rescission bills. It would empower the president to bundle hundreds of rescission proposals together or, if he chose, to submit them individually. A president could propose to rescind funds immediately after they are enacted into law, or decades after they are enacted into law.

A president could even resubmit rescissions already rejected by the Congress.

As proposed, S. 2381 would prohibit Members of Congress from offering amendments to the president's request. The Congress could not substitute its ideas for the president's ideas. Under S. 2381, members could only vote up or down on a measure of the president's choosing and they would effectively have to do so at a time of the president's choosing.

This heinous proposal represents a complete and total abdication to the president of the legislative agenda with regard to rescissions.

If a Republican or a Democratic president should decide to target an individual Member of Congress, this proposal would allow him to do that. The president could exert enormous, enormous pressure on individual members by targeting their spending and targeted tax items. Or he could curry favor by promising not to target those items. The president could submit and require votes on sensitive issues for members whenever he determined that such votes would be to his political advantage. The president could use this new leverage, be he Democrat or Republican or Independent, he could use this new leverage to squeeze, squeeze members. He could play election-year politics. It is a weapon that the president could use to threaten or to reward. And with the threat of that Damocles sword hanging over each member's head, the president could expect to have his way, his way on many issues.

By permitting the president to package rescission proposals as he deems appropriate and prohibiting the Congress from amending the package, under S. 2381, Senators would be precluded from seeking a vote on individual items marked for rescission.

If the president chose to send up a package containing 10 rescissions the Senate would have to vote up or down on that package as a whole. Take it or leave it. Members would be denied their right to determine whether an individual item is an appropriate use of Federal funds and whether such an item deserves a vote.

In a bizarre and grotesque twist of the presentment clause, it would be the Congress, the Congress that would have to accept or reject in toto a legislative package of the president's choosing, instead of the other way around.

A Senator's right, a Senator's right to debate and to amend is what protects this body as a forum for dissent. And it is in this forum, and this forum alone, that a minority of Senators can put a bridle on a majority, at least for a little while until the country can be awakened to the mistakes that might otherwise be visited upon the people.

We have no idea what kind of rescissions this or any future president will submit under the expedited procedures of this bill. Without the right to debate and amend, the Senate is inviting all future presidents to force their views and ideas, no matter how extreme, upon this body.

Once proposed for rescission, under S. 2381, the president could impound funds for up to 180 days. That would quadruple the 45 day limit allowed for impoundment under current law.

Given that the legislation simultaneously requires the Congress to act on the president's rescission proposals within 13 days of their submission, this 180 day empowerment time limit is especially menacing and pernicious. Even if the Congress disapproves of the president rescission proposal, under S. 2381 the president is not obligated to release those funds for 6 months. The president could submit the same rescission proposal again and again, regardless of prior Congressional disapproval and thereby impound items indefinitely.

In the case of discretionary budget authority, the president could impound funds until the pertinent appropriations law expires at the end of the fiscal year, effectively eliminating funding for any discretionary items which the president chooses.

For the fiscal year 2006, \$445 billion, \$445 billion of the discretionary funds appropriated by the Congress are 1-year appropriations that will expire at the end of the fiscal year. This bill would allow the president by himself to effectively eliminate any of those funds by proposing to rescind, and then impounding them for 180 days at a time. By himself, with no legislative action whatsoever, the president could even eliminate a discretionary program supported unanimously by the Congress by simply deferring it and deferring it and deferring it to death.

Our Constitution is based on a delicate balance of power between separate and coequal branches of Government, with the power of the purse in the hands of the people's representatives in the Congress, just as it should be. Under S. 2381 the keys to the U.S. Treasury would undeniably belong to the president, thereby eliminating the people's most effective tool to oppose a power hungry executive.

Last year the President proposed terminating or reducing funding for 154 Federal programs and eliminated funding in his budget for discretionary items that were supported by both Republicans and Democrats. The Congress rejected 65 of the President's recommendations and restored funds in the annual appropriations bill for such items as Job Corps, essential air service, and Federal prison construction. Under S. 2381, the President could target those items for rescission and impound the funding indefinitely, without regard to a Congressional thumbs down on his rescission request.

Under S. 2381, the president could also submit proposals to modify any item of direct spending, whether for Social Security and Medicare entitlements or veterans benefits, and those modification proposals would have to be considered under these same expedited procedures limiting debate and prohibiting all amendments. At any point after the enactment of this Act this or any future president could reach back and require the Congress to vote up or down,

without amendments, on Presidential changes to entitlement benefits which are enacted after passage of S. 2381.

Such broad authority could mean the loss of Social Security benefits. It could mean the loss of Medicare and Medicaid assistance. It could mean sweeping cuts in veterans benefits. Who knows what benefits may be targeted for rescission by a president not subject to the checks of the regular legislative process?

This legislation, with its broad authority for the president to effectively cancel spending and tax items by indefinitely impounding them, despite Congressional disapproval, is clearly unconstitutional.

This legislation, with its broad authority for the president to craft legislation and then force it down the throats of the Members of Congress without modification, is a gross, a gross distortion of the lawmaking powers granted to the Congress in Article I.

If the Congress, God forbid, God forbid, were to approve this legislation as presented by the President and cosponsored by 29 Senators, it would forever put the Congress firmly under the thumb of a president.

As every member of this Committee knows, the legislative process requires compromise and negotiation. Often legislation is enacted only because of a series of cooperative agreements that hold the bill together, that hold the bill together as a package. By empowering the president to pick those agreements apart and to modify or eliminate spending or targeted tax provisions, S. 2381 would allow the president to effectively create legislation that would probably never garner enough votes to pass the Congress.

S. 2381 would fundamentally alter the legislative process forever and make the president legislator-in-chief.

S. 2381 includes no sunset provision, none, no trial period to judge whether this new empowerment and rescission power is abused. It therefore leaves any future president the easy recourse of vetoing an attempt by the Congress to reclaim its previous authority. Without a sunset, it could require a two-thirds vote of the Congress to override a Presidential veto and repeal this law. Even the equally ill-conceived and unconstitutional 1996 Line Item Veto Act had an 8-year sunset.

Historically it is the Congress, not the president, which has achieved real savings through rescissions. Since the Budget Act was passed in 1974, the Congress has proposed and enacted \$143 billion in rescissions compared to the \$76 billion proposed by the president. Since 2001 the president has not proposed a single item for rescission under Title 10 of the Budget Act.

This is a point that deserves our attention. President Bush has never proposed the rescission of any funds through the current Budget and Impoundment Act processes. He has never vetoed an appropriations or direct spending bill. The Congress has approved more than half of the \$15.7 billion of the cancellations included in the President's budget submissions. In proposing changes to his rescission authority, the President cannot claim to have used his current authority to the fullest extent possible, nor has he even tried.

I caution Senators, I caution Senators not to buy this tripe that the Administration is peddling, whereby the President's proposals are always good and the Congress's proposals are always bad.

Presidents certainly enact their own earmarks, many of which may not withstand public scrutiny, while the Congress has been many earmarks that are critical and valuable investments of the taxpayer's money.

Let me say just two examples. Senator Domenici initiated the Genome Mapping Project, a Congressional earmark that has resulted in extraordinary medical and scientific progress.

Another Congressional earmark is now one of the most effective tools in the wars in Afghanistan and Iraq, known as the Predator Unmanned Aerial Vehicle. That program was initiated by Representative Jerry Lewis, now Chairman of the House Appropriations Committee.

We must not allow the president to subjugate the priorities of the legislative branch to those of the Executive. The president has every right to protect his interest in the legislation before the Congress. Likewise Congress enjoys the same prerogative.

The Constitution prescribes a system of Government that requires much more of the Congress than simply accepting or rejecting the president's proposals. The framers of the Constitution developed a system of Government that has sustained the Nation for centuries based upon the delicate balancing of power between the three branches. The power of the purse is the preeminent, the preeminent power in the Congressional arsenal. It guards against an all-powerful king, an all-powerful executive.

U.S. Senators serve with, with I say, with, hear me, not under any president. The framers crafted a system that depends upon each branch defending its powers. The checks and balances come from that defense. There is no check, no balance if the Congress can be blackmailed and threatened by any chief executive to get his way.

The power of the purse, entrusted to the Congress, is the ultimate, the ultimate check against the tyranny of an overreaching executive. It is the strongest bulwark of the people's liberties. If S. 2381 is passed as currently drafted, this unfortunate Congress will be remembered, yes remembered, yes remembered ignominiously as the Congress that gave away its mightiest weapon of protection for the people's liberties.

In 1832, at the public dinner in Washington, D.C. on the centennial anniversary of George Washington's birthday, Daniel Webster spoke these words, this is what he said: "If disastrous war should sweep our commerce from the ocean, another generation may renew it. If it exhaust our treasury, future industry may replenish it. If it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen into future harvests. It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these might be rebuilt. But who, who shall reconstruct the fabric of demolished Government? Who shall rear again the well-proportioned columns of constitutional liberty? Who shall frame together the skillful architecture which unites national sovereignty with state rights, individual security, and public prosperity? No, no if these columns ever fall, they will be raised not again. Like the Coliseum and the Parthenon, they will be destined to a mournful and melancholy immor-

tality. Bitterer tears, however, will flow over them than were ever shed over the monuments of Roman or Grecian art; for they will be the remnants of a more glorious edifice that Greece or Rome ever saw, the edifice of constitutional American liberty.”

[The prepared statement of Senator Byrd follows:]

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## United States Senate

COMMITTEE ON APPROPRIATIONS  
WASHINGTON, DC 20510-6025  
<http://appropriations.senate.gov>

May 8, 2006

Dear Colleague:

I have attached a copy of my testimony before the Senate Budget Committee on the S. 2381, the Legislative Line-Item Veto Act.

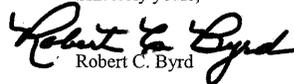
S. 2381 is a dangerous bill. This legislation, with its broad authority for the president to effectively cancel spending and tax items by indefinitely impounding them, is clearly unconstitutional. It is a gross distortion of the law-making powers granted to the Congress in Article I of the Constitution, and an impermissible shifting of the power of the purse to the Executive Branch. It would allow the President to set the legislative agenda by forcing votes on his proposed rescissions and would prohibit the Congress from amending the legislation. The Congress should not allow itself to be a rubber stamp for any President.

I understand concerns about the alarming rise in deficits, but a failure of political will does not justify unconstitutional remedies, as Justice Kennedy sagely remarked in voting to nullify the last effort to enact a Line-Item Veto.

I urge all members to resist this attack on the independence of the Senate.

With kind regards, I am

Sincerely yours,

  
Robert C. Byrd

TESTIMONY OF U.S. SENATOR ROBERT C. BYRD

ON S. 2381, THE LEGISLATIVE LINE-ITEM VETO ACT OF 2006

BEFORE THE SENATE BUDGET COMMITTEE

MAY 2, 2006

Mr. Chairman and Senator Conrad,

I very much appreciate this opportunity to present my views on S. 2381, the Legislative Line-Item Veto Act, as proposed by the president.

This is a subject I view with the gravest concern. The Senate, to its eternal shame, once before approved a Line-Item Veto that would have eviscerated the Congress's hold on the power of the purse. We are fortunate that the Supreme Court intervened to correct that egregious error. We cannot count on the Court's being willing or able to do it again. This time around, the Congress, and more particularly the Senate, may be the first, last, and only line of defense.

S. 2381 is an offensive slap at the Congress. It embodies a reckless disregard for the fundamental and sacred Constitutional principle of three separate and coequal branches of Government.

S. 2381 is anathema to the law-making powers granted to the Congress in Article I of the Constitution. As currently drafted, it would allow the president, to roll over the procedures outlined in the presentment clause of Article I, Section 7, and effectively cancel individual tax and spending items in legislation by impounding such items.

indefinitely. Without exercising a veto, the president could effect the repeal of a law passed by the Congress, and then resist subsequent effort by the Congress to ensure that law is carried into effect. S. 2381 is a thinly-veiled attempt to circumvent the Constitutional test outlined in *Clinton v. City of New York*.

S. 2381 would authorize the president, and all future presidents, to propose rescinding any item of mandatory spending, any item of discretionary budget authority, and certain “targeted tax benefits” enacted after the passage of S. 2381, if it is enacted. It would require the Congress to vote on presidential rescission requests within 13 days, without amendment.

S. 2381 would give the president complete control over the packaging and submission of rescission bills. It would empower the president to bundle hundreds of rescission proposals together, or, if he chose, to submit them individually. A president could propose to rescind funds immediately after they are enacted into law, or decades after they are enacted into law. A president could even resubmit rescissions already rejected by the Congress. As proposed, S. 2381 would prohibit Members of Congress from offering amendments to the president’s requests. The Congress could not substitute its ideas for his. Under S. 2381, Members could only vote up or down on a measure of the president’s choosing, and they would effectively have to do so at a time of the president’s choosing.

This heinous proposal represents a complete and total abdication to the president of the legislative agenda with regard to rescissions.

If a Republican or Democratic president should decide to target an individual Member of Congress, this proposal would allow him to do that. The president could exert enormous pressure on individual Members by targeting their spending and targeted tax items, or he could curry favor by promising not to target those items. The president could submit and require votes on sensitive issues for Members whenever he determined that such votes would be to his political advantage. He could use this new leverage to squeeze Members. He could play election-year politics. It is a weapon that the president could use to threaten or reward, and with the threat of that Damocles sword hanging over each Member's head, he could expect to have his way on many issues.

By permitting the president to package rescission proposals as he deems appropriate, and prohibiting the Congress from amending the package, under S. 2381, Senators would be precluded from seeking a vote on individual items marked for rescission. If the president chose to send up a package containing ten rescissions, the Senate would have to vote up or down on that package as a whole. Take it or leave it. Members would be denied their right to determine whether an individual item is an appropriate use of federal funds, and whether such an item deserves a vote. In a bizarre and grotesque twist of the presentment

clause, it would be the Congress that would have to accept or reject in toto a legislative package of the president's choosing, instead of the other way around.

A Senator's right to debate and amend is what protects this body as a forum for dissent. It is in this forum, and this forum alone, that a minority of Senators can put a bridle on the majority, at least for a little while until the country can be awakened to the mistakes that might otherwise be visited upon the people. We have no idea what kind of rescissions this or any future president will submit under the expedited procedures of this bill. Without the right to debate and amend, the Senate is inviting all future presidents to force their views and ideas – no matter how extreme – upon this institution.

Once proposed for rescission, under S. 2381, the president could impound funds for up to 180 days. That would quadruple the 45-day limit allowed for impoundments under current law. Given that the legislation simultaneously requires the Congress to act on the president's rescission proposals within 13 days of their submission, this 180-day impoundment time limit is especially menacing and pernicious. Even if the Congress disapproves of the president's rescission proposal, under S. 2381, the president is not obligated to release those funds for six months. The president could submit the same rescission proposal again and again, regardless of prior Congressional disapproval, and, thereby, impound items indefinitely. In the case of discretionary budget authority, the

president could impound funds until the pertinent appropriations law expires at the end of the fiscal year, effectively eliminating funding for any discretionary items which the president chooses.

For the Fiscal Year 2006, \$445 billion of the discretionary funds appropriated by the Congress are one-year appropriations that will expire at the end of the fiscal year. S. 2381 would allow the president, by himself, to effectively eliminate any of those funds by proposing to rescind, and then impounding them for 180 days at a time. By himself, with no legislative action whatsoever, the president could even eliminate a discretionary program supported unanimously by the Congress by simply deferring it to death. Our Constitution is based on a delicate balance of power between separate and coequal branches of Government, with the power of the purse in the hands of the people's representatives in the Congress, just as it should be. Under S. 2381, the keys to the U.S. Treasury would undeniably belong to the president, thereby eliminating the people's most effective tool to oppose a power-hungry Executive.

Last year, the president proposed terminating or reducing funding for 154 federal programs, and eliminated funding in his budget for discretionary items that were supported by both Republicans and Democrats. The Congress rejected 65 of the president's recommendations, and restored funds in the annual appropriations bills for

such items as Job Corps, essential air service, and federal prison construction. Under S. 2381, the president could target those items for rescission, and impound the funding indefinitely, without regard to a Congressional thumbs-down on his rescission requests.

Under S. 2381, the president could also submit proposals to modify any item of direct spending, whether for Social Security and Medicare entitlements or veterans benefits, and those modification proposals would have to be considered under these same expedited procedures limiting debate and prohibiting all amendments. At any point after the enactment of this Act, this or any future president could reach back and require the Congress to vote up or down, without amendments, on presidential changes to entitlement benefits which are enacted after passage of S. 2381.

Such broad authority could mean the loss of Social Security benefits. It could mean the loss of Medicare and Medicaid assistance. It could mean sweeping cuts in veterans benefits. Who knows what benefits may be targeted for rescission by a president not subject to the checks of the regular legislative process.

This legislation, with its broad authority for the president to effectively cancel spending and tax items by indefinitely impounding them, despite Congressional disapproval, is clearly unconstitutional. This legislation, with its broad authority for the president to craft

legislation and then force it down the throat of Congress without modification, is a gross distortion of the law-making powers granted to the Congress in Article I. If the Congress, God forbid, were to approve this legislation as presented by the president, and cosponsored by 29 Senators, it would forever put the Congress firmly under the thumb of the president.

As every Member of this Committee knows, the legislative process requires compromise and negotiation. Often, legislation is enacted only because of a series of cooperative agreements that hold the bill together as a package. By empowering the president to pick those agreements apart, and to modify or eliminate spending or targeted tax provisions, S. 2381 would allow the president to effectively create legislation that would probably never garner enough votes to pass the Congress. S. 2381 would fundamentally alter the legislative process forever, and make the president legislator-in-chief.

S. 2381 includes no sunset provisions – no trial period to judge whether this new impoundment and rescission power is abused. It, therefore, leaves any future president the easy recourse of vetoing an attempt by the Congress to reclaim its previous authority. Without a sunset, it could require a two-thirds vote of the Congress to override a presidential veto and repeal this law. Even the equally ill-conceived and unconstitutional 1996 Line-Item Veto Act had a ten-year sunset.

Historically, it is the Congress, and not the president, which has achieved real savings through rescissions. Since the Budget Act was passed in 1974, the Congress has proposed and enacted \$143 billion in rescissions compared to the \$76 billion proposed by the president. Since 2001, the president has not proposed a single item for rescission under Title X of the Budget Act.

This is a point that deserves our attention. President Bush has never proposed the rescission of any funds through the current Budget and Impoundment Act processes. He has never vetoed an appropriations or direct spending bill. The Congress has approved more than half of the \$15.7 billion of the cancellations included in the president's budget submissions. In proposing changes to his rescission authority, the president cannot claim to have used his current authority to the fullest extent possible, nor has he even tried.

I caution Senators not to buy this tripe that the Administration is peddling, whereby the president's proposals are always good and the Congress's proposals are always bad. Presidents certainly enact their own earmarks, many of which may not withstand public scrutiny, while the Congress has many earmarks that are critical and valuable investments of the taxpayer's money. Let me cite just two examples. Senator Domenici initiated the Genome Mapping Project, a Congressional earmark that has resulted in extraordinary medical and scientific progress. Another Congressional earmark is now one of the most

effective tools in the wars in Afghanistan and Iraq, known as the Predator Unmanned Aerial Vehicle. That program was initiated by Representative Jerry Lewis, now chairman of House Appropriations Committee.

We must not allow the president to subjugate the priorities of the Legislative Branch to those of the Executive. The president has every right to protect his interests in the legislation before the Congress. Likewise, Congress enjoys the same prerogative.

The Constitution prescribes a system of government that requires much more of the Congress than simply accepting or rejecting the president's proposals. The Framers of the Constitution developed a system of Government that has sustained the nation for centuries based upon the delicate balancing of power between the three branches. The power of the purse is the preeminent power in the Congressional arsenal. It guards against an all-powerful king. U.S. Senators serve with, and not under, any president. The Framers crafted a system that depends upon each branch defending its powers. The checks and balance come from that defense. There is no check and no balance if the Congress can be blackmailed and threatened by a Chief Executive to get his way.

The power of the purse entrusted to the Congress is the ultimate check against the tyranny of an overreaching Executive. It is the strongest bulwark of the people's liberties. If S.

2381 is passed as currently drafted, this unfortunate Congress will be remembered ignominiously as the Congress that gave away its mightiest weapon of protection for the people's liberties.

In 1832, at a public dinner in Washington, D.C., on the centennial anniversary of George Washington's birthday, Daniel Webster spoke these words:

If disastrous war should sweep our commerce from the ocean, another generation may renew it; if it exhaust our treasury, future industry may replenish it; if it desolate and lay waste our fields, still, under a new cultivation, they will grow green again, and ripen to future harvests. It were but a trifle even if the walls of yonder Capitol were to crumble, if its lofty pillars should fall, and its gorgeous decorations be all covered by the dust of the valley. All these might be rebuilt. But who shall reconstruct the fabric of demolished government? Who shall rear again the well-proportioned columns of constitutional liberty? Who shall frame together the skillful architecture which unites national sovereignty with State rights, individual security, and public prosperity? No, if these columns fall, they will be raised not again. Like the Coliseum and the Parthenon, they will be destined to a mournful, a melancholy immortality. Bitterer tears, however, will flow over

them than were ever shed over the monuments of Roman or Grecian art; for they will be the remnants of a more glorious edifice than Greece or Rome ever saw, the edifice of constitutional American liberty.

Chairman GREGG. I thank the Senator for his insightful thoughts and appreciate especially his ending with a quote from a New Hampshire Senator—actually, it was not a Senator from New Hampshire but a New Hampshire person, Daniel Webster.

Much of what he has said resonates, and I can believe can be addressed and still produce a bill that is reasonable, although it may not be acceptable to the Senator.

But his points are well taken and obviously well presented and we appreciate his time.

Senator BYRD. Thank you, Mr. Chairman. Thank you members of the Committee.

Chairman GREGG. We are now going to hear from the Acting Deputy Director of OMB, Austin Smythe, who used to work for this Committee in his more youthful days, although he is still quite youthful. And we welcome him back to the Committee to testify on behalf of the Administration and present the concepts behind this legislation and look forward to hearing his thoughts.

You might change his nameplate because, as much as he may have great thoughts, he is not Senator Byrd. Can we take that down so that we are not confusing the audience to the extent that they are looking at that.

Thank you.

**STATEMENT OF AUSTIN SMYTHE, ACTING DEPUTY DIRECTOR,  
OFFICE OF MANAGEMENT AND BUDGET**

Mr. SMYTHE. Chairman Gregg, Senator Conrad and members of the Budget Committee, thank you for inviting me to testify on the President's proposed Line Item Veto Legislation.

Let me start by saying that Congress has made excellent progress over this past year on spending restraint. In line with the President's budget request, the Congress sent the President appropriation bills that held the growth of total discretionary spending below the rate of inflation and cut non-security spending.

In addition, Congress adopted 89 of the President-proposed 154 cuts and terminations, saving \$6.5 billion. And Congress achieved nearly \$40 billion in mandatory savings over 5 years, the first time the reconciliation process has been used in 8 years to slow the growth in spending.

This important progress is often overlooked, however, because of the attention paid to specific earmarks or line items that have not been well justified. While some earmarks have significant merit and represent an improvement to the President's budget request, many are wasteful or go to low priority programs.

As the President has noted, he wants the Congress to pass earmark reform. But the Administration believes we can make even greater progress together in restraining spending and focusing taxpayer dollars on a central priority.

As you know, spending legislation usually comes to the president in the form of very large spending bills that frequently amount to tens of billions or hundreds of billions of dollars. The president is left with the choice of either signing bills that contain spending items he does not support or vetoing an entire bill that has many provisions that he agrees with on balance.

In his State of Union Address, the President asked the Congress to give him the line item veto. The need for an effective line item veto has long been recognized by president and Members of Congress from both political parties. In 1996, with strong bipartisan support, the Congress gave President Clinton a very powerful line item veto but the Supreme Court struck down that law as unconstitutional in 1998.

On March 6th the President transmitted to the Congress the Legislative Line Item Veto Act. This legislation is designed to do

two things: first to give the president a tool to reduce unnecessary or wasteful spending; and second, to improve accountability and cast a brighter light on spending items that probably would not have survived had they not been included in a much larger bill.

This line item authority would allow the president to reach into these bills and subject unjustified spending to additional public scrutiny without endangering other priorities. While the line item veto will serve as a tool to remove unjustified earmarks included in enacted legislation, we also hope it will aid in Congress's efforts on earmark reform by fostering additional accountability and transparency.

We are confident that the version of the line item veto proposed by the President will survive any constitutional challenges. A critical difference between this proposal and the 1996 Act is that the President's proposed rescissions would only take effect if Congress passed a new law implementing his proposals.

Specifically, the Legislative Line Item Veto Act would provide the president the authority to single out unjustified discretionary spending, new mandatory spending, or new special interest tax breaks given to a small number of individuals. Under the proposal, the president would send a message with a proposed rescission bill to the Congress. The president's proposal would require the House and Senate to hold an up or down vote on his proposed rescissions within 10 days of introduction. The rescission bill would not be amendable, could not be filibustered in the Senate, and would be sent to the president for his approval with the support of a simple majority in each chamber.

The critical features of this legislation are the fast track procedures that ensure the president gets an up or down vote on his proposed rescission and ensure that they are not nullified by delay or derailed by amendments.

The Act also gives the president the authority to defer spend for up to 180 days the spending he proposes for a rescission to allow the Congress time to consider his proposal.

The Act also gives the president the authority to release these funds prior to the expiration of the 180 days, enabling him to respond if, for example, one of the chambers rejects the president's proposed rescissions.

In President's proposal is consist with current authorities granted to him by the Congress in other contexts, like trade promotion authority, and it addresses the Supreme Court's concern that the enacted 1996 Line Item Veto did not provide a sufficient measure of respect for Congress's primary constitutional role in revenue and spending matters.

We are very pleased with the strong support the President's bill has received in the House and Senate. On March 7th, Majority Leader Bill Frist introduced the Administration's bill which, as of yesterday, enjoyed the support of 29 cosponsors.

We have heard concerns about how the authority provided under this bill would be implemented. We want to work with Congress to address these concerns. But it is important that the ultimate product provides an effective means for the president to get an up or down vote on his proposed package of rescissions. We hope the

Congress will move quickly to pass this legislation and give the president and Congress a tool to reduce unnecessary spending.

With that, Mr. Chairman, I would be happy to respond to any questions the Committee may have.

[The prepared statement of Mr. Smythe follows:]

Testimony of OMB Acting Deputy Director Austin Smythe  
The President's Legislative Line Item Veto Proposal  
Before the Senate Budget Committee

May 2, 2006

Chairman Gregg, Senator Conrad, and members of the Budget Committee, thank you for inviting me to testify on the President's proposed line item veto legislation.

The Congress has made excellent progress this past year on spending restraint. In line with the President's Budget request, the Congress sent the President appropriations bills that held the growth of total discretionary spending below the rate of inflation and cut non-security spending. In addition, Congress adopted 89 of the President's proposed 154 cuts and terminations, saving \$6.5 billion in the process. And Congress achieved nearly \$40 billion in mandatory savings over five years, the first time in eight years reconciliation has been used to slow the growth in spending.

This important progress is often overlooked, however, because of the attention paid to specific earmarks or line items that have not been well justified. While some earmarks have significant merit and represent an improvement to the President's budget request, many are wasteful or go to low-priority programs. As the President has noted, he wants the Congress to pass earmark reforms.

But the Administration believes we can make even greater progress together in restraining spending and focusing taxpayer dollars on essential priorities. As you know, spending legislation usually comes to the President in the form of very large spending bills that frequently amount to tens or hundreds of billions of dollars. The President is left with the choice of either signing bills that contain spending items he does not support or vetoing an entire bill that has many important provisions that he agrees with on balance.

In his State of the Union address, the President asked the Congress to give him the line-item veto. The need for an effective line item veto has long been recognized by presidents and members of Congress from both political parties. In 1996, with strong bipartisan support, the Congress gave President Clinton a very powerful line item veto, but the Supreme Court struck down the law as unconstitutional in 1998.

On March 6<sup>th</sup>, the President transmitted to the Congress the "Legislative Line Item Veto Act." The legislation is designed to do two things: one, to give the President a tool to reduce unnecessary or wasteful spending; and, two, to improve accountability and cast a brighter light on spending items that probably would not have survived had they not been included in a much larger bill. This line item authority would allow the President to reach into these bills and subject unjustified spending to additional public scrutiny, without endangering other priorities. While the line item veto will serve as a tool to remove unjustified earmarks included in enacted legislation, we also hope it will aid in Congress' efforts on earmark reform by fostering additional accountability and transparency.

We are confident that the version of the line item veto proposed by the President will survive any constitutional challenges. The critical difference between this proposal and the 1996 Line Item Veto Act is that the President's proposed rescissions would only take effect if Congress passed a new law implementing his proposals.

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The critical features of this legislation are the fast-track procedures that ensure the President gets a vote on his proposed rescissions and ensure that they are not nullified by delay or derailed by amendments. The Act also gives the President the authority to defer or suspend for up to 180 days the spending he proposes for rescission to allow the Congress time to consider his proposal. The Act gives the President the authority to release these funds prior to the expiration of the 180 days, enabling him to respond if, for example, one of the chambers rejects the President's proposed rescissions.

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We have heard concerns about how the authority provided under this bill would be implemented. We want to work with Congress to address these concerns, but it is important that the ultimate product provides an effective means for the President to get an up-or-down vote on his proposed package of rescissions.

We hope the Congress will move quickly to pass this legislation and give the President and Congress a tool to reduce unnecessary spending.

I would be happy to respond to any questions the Committee may have.

Chairman GREGG. Thank you very much.

Since there are so many Senators here, we are going to limit the rounds to 5 minutes.

There are a whole series of issues which are raised by this proposal. The concept, of course is to put forward the opportunity for the president to send up a series of items which he feels the Congress should take another look at and have the Congress have the authority to vote those items quickly and decide whether or not they should continue without, in the process, undermining what

Senator Byrd has so appropriately pointed out, which is the authority which lies solely with the Congress, which is the power of the purse.

There are specific points in the bill which I think are going to have to be addressed and corrected. For example, 180 days. Clearly that can lead to impoundment. In my opinion it is going to have to be addressed.

The issue of the inconsistency between the way spending is dealt with and tax authority is dealt with. Again, Senator Conrad raised this point and it is a valid point and it is going to have to be addressed.

But in the more specific context, and Senator Byrd made this point I thought rather well and it is something that concerns me, is this question of the ability of the president to send up a rescission which could essentially rescind all of the discretionary accounts, for example, or he could attempt to rescind items again and again and basically control the Congressional calendar under the fast track procedure. Those issues need to be addressed.

But in going to the underlying question, which is whether or not the rescission authority takes from the Legislative and moves to the Executive the power of the purse, I would like to hear the Administration's view as to why that is not the case and what is the defense on that constitutional issue, which is really at the essence of the debate.

Mr. SMYTHE. Mr. Chairman, if you look back in 1996 what the Congress granted to President Clinton, that was an extraordinary tool in terms of what President Clinton had. If he chose to cancel provisions, it required a two-thirds vote of both houses of Congress to overturn his action. There is a span of options that the Administration could look at from what we could do in this area from expedited procedures to unilateral authority by the president to cancel spending.

We chose toward the end of expedited procedures. The authority we are seeking today does not allow the president to act unilaterally. It requires the Congress to approve any rescission proposed by him, and with a simple majority of either the House or the Senate you can reject those proposals. So we do not see it as a dramatic shift.

The other aspect, just to build on that point a bit, up until 1974 presidents frequently withheld funds, what were called impoundments up until 1974. Since 1974, with the enactment of the Budget and Impoundment Control Act, presidents have not had that authority. If they choose not to spend money they must propose a rescission or OMB has to release those funds for obligation to the agencies.

The other thing that is occurred over time as you look at the budget, I think a case can be made that, in fact, the president's power over the budget is being diminished. One of the reasons that is the case is the fact that the budget over time, the budget that he signs into law each year is shrinking over time. Back in 1960 it was about 60 percent of the budget, was subject to the appropriations process. Today the president looks at about 40 percent of the budget in terms of what he must sign into law. The other 60 percent of the budget is entitlement programs and other mandatory

spending that he has no ability to veto. They operate under permanent law.

So we think we have come up with a proposal that is not a dramatic shift in power. It follows other existing procedures like trade promotion authority. And in the end it falls to Congress in terms of whether these are going to be implemented because it requires the Congress to pass a new law to implement the rescissions.

Chairman GREGG. I think that is a good point to make, which is that so much of the budget is now off limits because it is entitlement activity. And I notice that this proposal addresses entitlement as well as discretionary as well as tax policy, but the proposal related to tax policy needs to be adjusted.

Assuming we made the changes, some of which I have outlined and some of which will be, I am sure, discussed here as we go forward, would the Administration resist a prohibition on rescissions that were restatements of prior rescissions which had been rejected? In other words, sort of a one-time shot. And is it appropriate to characterize this more as a BRAC process than as a line item veto process?

Mr. SMYTHE. Probably so. It has fast track procedures to approve the president's proposals.

There have been a number of concerns raised about how this authority could be used. That is not our intent, to use the authority to offer multiple rescissions and indefinitely defer funds. That is not our intent. We want to work with Congress to limit the president's ability to choose to do that such that it could not be used to offer multiple rescissions after Congress had rejected a proposed rescission on an item.

There are a number of other things have been raised. I can go through those. On the 180 days, we chose that period. It is the outer limit. The current Budget Act provides that—it was enacted before a decision called *INS v. Chadha* and provides that the president can defer money but that deferral is tied to the legislative calendar.

We have been advised by the Justice Department that there is a constitutional problem with that under the one house veto approach in *INS v. Chadha*.

But again, if there are concerns with the 180 days, we want to address those concerns. We want this mechanism to operate such that the funds would only be deferred for the period until Congress acts to reject them. And then it would be our intention to release them.

I can go on and on and on. There has been concern about we might propose thousands of bills or hundreds of bills and tie up the legislative calendar. Again, that is not our intent, to tie up the legislative calendar. We want to give the president some discretion in terms of the number of bills and we would be willing to work with Congress to limit the number of bills that he could propose after an appropriations or direct spending or tax bill was enacted because we do think it is important to have some discretion on the number.

But if the Congress is concerned about potential abuse in this area, we want to work with them, with you, pardon me Mr. Chair-

man, to limit the number of bills that could be proposed under this authority.

Chairman GREGG. Thank you. Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman. Thank you, Mr. Smythe. It is good to see you back before the Committee.

Under the Impoundment Act, how many rescissions has this President sent to Congress?

Mr. SMYTHE. We have not sent any rescissions under Title 10 of the Impoundment Control Act. We have proposed to cancel spending, which operates exactly the same way. A cancellation, it is just the wording is, instead of the statutory language saying that the money is rescinded, it has precisely the same legal effect. We propose to cancel funding that has been appropriated.

Senator CONRAD. But under the Impoundment Act there have been no rescissions submitted by the Administration.

Let me just tell you what concerns me, and whether it is this president or another president is not the point to me at all. What concerns me, and I think should concern every one of our colleagues, Republican or Democrat, is this scenario.

The president calls up a member, and I will personalize this, calls up me and says Senator, I have a controversial Supreme Court nominee and I need your vote. And by the way, Senator, you know it is time for rescissions and my staff has just handed me a list of matters in your state that are critically important to you. And my staff is recommending that I rescind these projects in your state. Now Senator, the two are not connected. You understand that. But as I am busy and I have only got the chance for one phone call, can you help me on this Supreme Court nominee?

Now that is an extraordinary leverage that any president would be given under this Act. And when you say well, they would be able to, Congress would be able to overturn it, as I read this, the way you have done this is very clever. But the president would be able to defer spending for 180 days ad infinitum, not once but repeatedly. Even if Congress has voted to overturn the president's rescission.

This looks to me like a power grab of stunning proportion. What would protect the current constitutional power of Congress against a president—and we will not say this president, a future president—who might decide to use his leverage in the way I have described. What would prevent a president from doing that?

Mr. SMYTHE. Two things you raise. First of all, the issue of how Congress can respond. It is important to look back at the 1996 Law where Congress, on a bipartisan basis, gave President Clinton the authority where—

Senator CONRAD. That was unconstitutional. Deal with the question I am asking.

Mr. SMYTHE. But the issue is in terms of what has Congress already chosen to give the president. In 1996 Congress gave the president the authority to allow him—

Senator CONRAD. But that was unconstitutional. Mr. Smythe, I have asked you a very direct question. Please respond to the question I have asked.

Mr. SMYTHE. Under this proposal—it is difficult to respond to it because there were cases where President Clinton's vetoes were

overturned. There was a military construction bill where Congress garnered the votes, two-thirds of both houses—

Senator CONRAD. I am not talking about—you keep wanting to talk about the past. I have given you a very specific situation where a president uses the power conferred by this legislation to leverage a Member of Congress on another matter. And I have asked you very directly what protects against the president using this power in that way? Can you respond to that question?

Mr. SMYTHE. If an individual member gets a simple majority in either house, they can defeat the president's proposals. They are not implemented.

Senator CONRAD. But the president can extend by 180 days—

Mr. SMYTHE. I have already stated that is not our intent. We want to tie this—

Senator CONRAD. But that is in what the proposal is.

Mr. SMYTHE. We want to work with the Committee and with the Congress to make sure if there is a concern about that to limit the deferral of funds and try to find a way to try tie them to Congress's action. We have not been able to come up with a constitutional way to do that but we do not intend to have the deferral extend beyond Congress's action to reject a proposed rescission. We do not intend to, after Congress rejects a rescission, to offer the proposal again and again and again as you have suggested. That is not our intent.

Senator CONRAD. I would just say with this to you, and my time has expired, that may not be your intent but that is precisely what this legislative proposal would allow.

Chairman GREGG. That is true and that will be changed.

Senator ALLARD.

Senator ALLARD. Mr. Chairman, I want to thank you for holding this hearing. I think this is a very important hearing. I think it is also a very important issue that we have before us. And I would agree with you, Mr. Chairman, it is actually an enhanced rescission, not a true line item veto. So in this piece of legislation, we are not granting to the president the same powers as though it was a line item veto, which we provide to a large number of Governors throughout the United States.

I think if we look at what happened in the state legislature, I think that we would find that there is a decent balance between the legislative branch and the Governor, in which case I think that same balance can be established between the legislature and the Congress—I mean the Congress and the president.

I think that the benefit of this particular piece of legislation is that it does bring more accountability to the budget process. I do think we have to have more accountability. I think that spending is out of control. And I think that we need to do more to rein in that spending. If that means that we have more oversight on the spending side, then I am willing to grant the president some limiting powers to do that.

I also agree with the Chairman that we need to have some modifications on the proposal that is before us. For example, we do not want to let the president—the 180 days, I think, is a classic example.

And my question to you, Mr. Smythe, is when this was drafted, was the intent originally was just to limit it 100 days. And the fact

that this could be perpetually extended, was that overlooked by the Administration in putting this proposal forward?

Mr. SMYTHE. There are two aspects about the bill. The 180 days refers to calendar days. The 10 days or 13 days that Congress has to act on legislation refers to days that Congress is in session. So we had a concern that we did not want a situation where the time for deferral would run out and the administration would have to obligate the funds and Congress would not have the opportunity to act because there can be cases where Congress passes an appropriation bill in early October, in election years for example, and then goes on recess until January, sometimes not coming back until late January, where you can have extended periods of time of much more than just 10 days or so.

That was the issue. We view the 180 days as the outer limit in terms of what would be needed for the deferral of funds.

And as I have stated before, our preference would be, our policy preference was too tie the deferral to one house acting to reject it. We could not find a constitutional way to do that. We want to work with the Congress. This concern of the 180 days has come up over again. We want to work with you to find a way that ensures—

Senator ALLARD. So your intent, and the Administration's intent, was just have one shot at the apple, so to speak, the 180 days, and not to have this repeated over and over again?

Mr. SMYTHE. That is correct.

Senator ALLARD. I think that is important for us to move forward in our discussions with the Administration on what might be an appropriate way to amend this piece of legislation.

Was there any intent—on the number of items, do you think it is appropriate to limit the president to the number of items? There has been some questions raised about, do you put the rescission to the whole piece of legislation or do you select sections out of there? What was the intent of the Administration proposing that?

Mr. SMYTHE. Our intent was not to submit a multitude of rescissions and tie the Congress in knots. That is not our case. When you look at appropriation bills, they vary in terms of size. The Labor/HHS appropriations bill is a \$141 billion bill. It covers at least three departments, probably more than that.

Senator ALLARD. I think more appropriately, you ought to look in on omnibus bill.

Mr. SMYTHE. Or even an omnibus bill. So we thought it was useful for the president to have some discretion to send up more than one rescission, to not just limit it to just one rescission per bill.

Again, our intent is if there is a concern that this could be abused by an administration, to set up a multitude of rescission bills and tie up the calendar, that is not our intent. And we want to work with you to provide a limit if you want to do that.

Again, our concern is that the president will be left with some discretion to propose more than one bill.

Senator ALLARD. Mr. Chairman, I see my time is expiring. Thank you.

Chairman GREGG. Senator Sarbanes.

Senator SARBANES. Thank you very much, Mr. Chairman.

Mr. Smythe, I have to judge your intentions by what is in the bill. I have to look at the bill and read the bill. You all drafted this bill, did you not? Who drafted this bill?

Mr. SMYTHE. Yes, sir. We drafted—the Administration drafted—

Senator SARBANES. Who is we?

Mr. SMYTHE. The bill was drafted primarily by the Office of Management and Budget but we worked with other agencies in terms of developing legislation.

Senator SARBANES. OK. Now as I understand this bill, and I just want to go through and make sure I understand it, the president can submit a rescission, for 180 days. If that is rejected by the Congress, can the rescission stand for 180 days?

Mr. SMYTHE. The rescission cannot. The deferral of funds can stand for up to 180 days. The bill does provide—

Senator SARBANES. We could reject it right off the bat and the president could defer the funds for 180 days. Is that correct?

Mr. SMYTHE. That is correct.

Senator SARBANES. Now my next question. He sent up one of these deferrals. It is rejected, 180 days pass. Can he send the same deferral and defer it for another 180 days?

Mr. SMYTHE. Yes, but that is not our intention.

Senator SARBANES. Wait a second. Is that in the bill?

Mr. SMYTHE. The bill provides that authority. That is not our intention to use—

Senator SARBANES. Who drafted this bill?

Mr. SMYTHE. The Administration drafted the bill.

Senator SARBANES. All right. Now how can you come in here, having drafted the bill with these egregious provisions, and then say well, that is not our intention?

What is the level of competence in drafting this legislation if you come to the table, the witness table here this morning, and immediately you start going through a recitation of these things that are obviously very serious problems and say well, that is not our intention, that is not our intention, that is not our intention.

Under this legislation as written, the president could completely negate Congressional action. Is that correct? By just doing one deferral after another. Is that not the case?

Mr. SMYTHE. The president has the authority to offer more than one rescissions. When we drafted this bill—it is important to note that when we drafted this bill, that under the Budget Act, under Title 10, the president can propose a rescission at any time. We looked to Title—the existing authorities in Title 10 in terms of deferral authority and so forth.

Again, I think you could probably look at any statute that provides discretion to an administration and you can point out theoretically there could be enormous abuse under any statute that the president—

Senator SARBANES. No, no, no. Some statutes that are well done do not permit an incredible abuse. That is the whole art of crafting legislation.

You are telling me that you formulated something and then you come in here this morning and say there are all these problems with it. And yet you send it up here that way?

What about the problem of flooding the Congress with these Presidential proposals so that the Congress is completely tied up addressing these deferrals sent by the president? How many deferrals can the president send?

Mr. SMYTHE. There is not a limit in terms—just like under the Budget Act, there is no limit in terms of the number of rescissions that the president can propose under Title 10. He can propose an unlimited number.

Senator SARBANES. For 45 days?

Mr. SMYTHE. No. The period for the funds are deferred for 45 legislative days but he could continue to propose rescissions one after another and tie up the entire amounts appropriated by proposing to rescind under Title 10. We have chosen not to do that.

Senator SARBANES. I thought you listed that as one of the problems you are prepared to concede up front this morning with this proposed legislation. You sat there at the witness table, I was sitting here increasingly astounded at this testimony, and even more so now that I have ascertained that the legislation was drafted in your shop, that you are the supposed craftsman of this legislation.

And I am sitting here this morning and you are down there saying there is this problem but that was not our intention. There is this problem but that was not our intention. There is this problem but that was not our intention.

How am I to read your intentions? I look at the legislation and the legislation is enough to curl your hair.

Mr. SMYTHE. I guess all I can say, Senator, is we want to address those concerns. That is not our intention to use the authority in the manner you have described and we want to address those concerns.

Senator SARBANES. The Budget Act says funds made available for obligation under this procedure may not be proposed for rescission again, with respect to an answer you just gave me a minute or two ago.

Mr. SMYTHE. Pardon me, I may have stated incorrectly. What I intended to say was that the president had authority to offer a multiple number of rescissions. There was no limit in terms of how many rescissions.

Senator SARBANES. Can he offer the same rescission again, under the existing law?

Mr. SMYTHE. Not under Title 10.

Senator SARBANES. Can he offer the same deferrals again under your proposed legislation?

Mr. SMYTHE. Yes, but as I stated, that is not our intent.

Senator SARBANES. Mr. Chairman, my time is up.

Chairman GREGG. The Senator has raised three valid points. And the Senator was not here when I made my opening statement but I listed about five valid points, or six or seven.

Senator SARBANES. The point I want to make is not just the substance of them but the ineptness in the drafting of the legislation, and the witness coming before us. And it was done in his shop. And the first thing he does is start enumerating all of the problems with it. And he tries to explain it away by saying that was not our intention.

They drafted the legislation. What was the intention when you drafted it?

Chairman GREGG. That may be the Senator's point. If that is the Senator's point, I am not on his side.

But on the issue of substance, when we get to a markup of the bill, some of the points the Senator made will be addressed.

Senator SARBANES. It does go to the question of competence, obviously.

Chairman GREGG. Senator Allard. I am sorry, Senator Alexander.

Senator ALEXANDER. Thank you, Mr. Chairman.

Mr. Smythe, as I understand it, you have said here is a proposal from the Administration. The Chairman has suggested some improvements in the legislation, which is what we do in the legislative process, usually with suggestions from the Administration. You have said that you are open to these changes and some additional changes.

I would assume that among those changes are that if there are constitutional ways to say that the president would not intend to make multiple recommendations of the same item or if the 180-day limit seems too long, that those are areas you are open to change. Is that correct?

Mr. SMYTHE. Yes, sir.

Senator ALEXANDER. It seems like I remember that in the U.S. Senate it is often the case that we Senators offer an amendment on the floor and we send to the desk sometimes changes in our own amendments. We have a right to do that. We do that after we learn from other colleagues or other places that what we might have originally thought could be improved.

I know when I was Governor, I found out early in my term that the legislature often changed what I proposed. And I just learned to accept those as improvements in what I had suggested. It kept my blood pressure down quite a bit during the 8 years I was there.

I have this question. Would the Administration still support enactment of this bill if it did not become effective until July 2009, the start of the 111th Congress, and after the next Presidential election?

Mr. SMYTHE. The President made it very clear in the State of the Union and when he transmitted this bill that he wants this authority. We want this authority for this president.

Senator ALEXANDER. Should this legislation include an expiration date so that we give a period to see how it works and then have the option of reauthorizing it, rather than having to repeal it if problems develop?

Mr. SMYTHE. Our very strong preference would be that this legislation be provided not only for this president but for future presidents, as well.

Senator ALEXANDER. Do you consider this a partisan proposal? Or do you know of Democrats who have endorsed the idea?

Mr. SMYTHE. When we were looking at the various proposals of how you can do a line item veto, and there are a number of different ways that this could be crafted. There is something called a separate enrollment. There is a view that you could give the president the authority to defer funds. Again, both would require a two-thirds vote.

We took a look at what Senator Kerry had proposed during the campaign which, was more of a fast track type procedure. So he supported this proposal in the past.

The line item veto in general has enjoyed broad partisan support in the past from Democratic and Republican presidents alike.

Senator ALEXANDER. Is it not true that 43 states now have so-called line item authority?

Mr. SMYTHE. Yes, sir.

Senator ALEXANDER. And would the line item veto authority that these states have be broader than the kind of authority that you are proposing that the president have?

Mr. SMYTHE. It ranges a great deal in the states. But I think as a general matter the Governors have a more powerful tool in terms of what the line item veto authority has, as compared to this proposal.

Senator ALEXANDER. Is it true that in most states, if not all states, budgets are balanced?

Mr. SMYTHE. They do their budgets differently but yes, they balance their budgets.

Senator ALEXANDER. Why would a budget reform that works well in 43 states to help provide balanced budgets not be worth trying at the Federal level?

Mr. SMYTHE. We very much want this authority as a tool to help reduce spending.

Senator ALEXANDER. I agree with the comment of the Chairman at the beginning that we have a great many forces on the Congress that encourage spending. I think we need some more forces that encourage restraint in spending.

One such opportunity is a line item veto or some version of it such as the one you have suggested. Another might be 2-year budgets or 2-year appropriations which would give Members of Congress an opportunity to use the odd year, every other year, devoted primarily to oversight, when we might consider the laws we passed, consider repealing them, reducing them, changing them, improving them. Has the Administration given any thought to the idea of 2-year budgets or 2-year appropriations?

Mr. SMYTHE. Each of the President's budgets have proposed that the 2-year appropriations and budget process, moving to that change. I would note however that on this proposal the President, during his State of the Union, asked for the line item veto bill. We submitted a separate bill on that proposal. And we are very much interested in getting this bill enacted into law and the line item veto authority enacted into law.

We do support biannual budgeting, though.

Senator ALEXANDER. Thank you, Mr. Chairman.

Chairman GREGG. Senator Menendez.

Senator MENENDEZ. Thank you, Mr. Chairman.

I, having listened to both Senator Byrd and the answers to some of the questions, and to my original review of the bill, it just seems to me that what you pursue here on behalf of the Administration moves us closer and closer to this theory of a unitary president and makes it extremely dangerous.

Let me ask you, in Section 1021 of the bill, what do you mean by the language of modify?

Mr. SMYTHE. Regarding direct spending?

Senator MENENDEZ. Yes. On Section 1021, in the definitions under rescind the decision, are defined to mean to “modify or repeal a provision of law to prevent A, budget authority from having legal force or effect; B, in the case of entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect; and C, in the case of the Food Stamp Program, to prevent the specific provision of law that provides such benefit from having legal force or effect.”

Mr. SMYTHE. In the case of discretionary spending, discretionary appropriations, it would have the effect of either reducing or eliminating the appropriation, changing the statute to either reduce the appropriation or zero out the appropriation if we were to propose to rescind the entire amount.

Direct spending is a different case because direct spending bills, we will measure the impact relative to a baseline. This authority does not apply to current law. So all existing entitlement programs with respect to Medicare, Social Security and Food Stamps and so forth, this does not apply to any existing law.

If however, Congress passed a new law that expanded mandatory spending then the president would have the authority to come back and propose that that spending, that additional spending, be either eliminated or reduced.

Senator MENENDEZ. It seems to me that the way that that whole section is structured, that authorizing the president to propose the rescission of any dollar amount of discretionary budget authority, in whole or in part, and then later looking at the definitions of rescinding or rescission as defined to mean to modify or repeal a provision of law under those sections that I cited before ultimately appears to be something much more than repeal.

It seems to me that it would be contemplating giving the president authority to rewrite mandatory programs defined by the Congress.

Are you not having language that is broad enough to go beyond the question of how much is actually spent in changing the legislative intent of the Congress under that power of modifying?

Mr. SMYTHE. The way we would interpret the law in terms of applying it is that we would only be allowed to propose changes that eliminated the new spending that was created in a mandatory bill. We would not have the authority to go back and change the underlying law. We would only be able to go back and change what new spending was added.

Senator MENENDEZ. Could the president potentially change various and specific provisions of a new entitlement program under your modifications?

Mr. SMYTHE. If it created new mandatory spending, yes.

Senator MENENDEZ. So then ultimately it—

Mr. SMYTHE. To reduce, reduce or eliminate.

Senator MENENDEZ. It seems that modify, in this regard, it seems to me to be so broadly defined that you could change various and specific provisions of a program that the Congress itself decided to have that goes far beyond the questions of how much money will be spent but goes to the very essence of the legislative intent of what Congress intends to have as it relates to an entitle-

ment of an American to a specific set of services and/or privileges. And that is a broad expansion, beyond what has already been mentioned here.

Mr. SMYTHE. In the case of entitlement programs, and the Director of CBO could speak to this, they do cost estimates on bills all the time. But frequently, with respect to direct spending or mandatory spending, you can have cases where you have interaction between different provisions of bills.

Mandatory spending bills usually do not provide a lump sum or an amount like an appropriation bill. They usually deal with changes in terms of eligible populations, the nature of benefits and so forth, the timing of those benefits. And as a result, the estimates, in terms of their budget impact and what their actual budget impact is, is based on the interaction of those provisions.

Senator MENENDEZ. I think you need some really greater tightness in your definitions. Because while the president would like to have unfettered power, that is not the essence of the constitutional democracy we have enjoyed in this country. And the language in this bill, as presently defined, is so broad, you might argue that it is both your intention—we know that the road of good intentions sometimes lead us very often far from where the good intentions meant us to go to as a goal.

But I have to be honest with you, this modify provision, in addition to the others, are just so broadly defined that it allows for enormous potential power which would really be, in my mind, a violation of the very underpinnings of what is the check and balance between the Congress and the executive branch.

Thank you, Mr. Chairman.

Chairman GREGG. Senator Bunning.

Senator BUNNING. Thank you, Mr. Chairman.

Mr. Smythe, I have long supported giving the president, regardless of party affiliation, line item veto authority. S. 2381 would allowed the president to withhold budget authority proposed for rescissions for up to 180 days even if the House and Senate objected.

Why do you believe that the president's 180 days discretionary authority in this legislation is constitutional?

Mr. SMYTHE. The Congress has granted the president the authority to defer funds in the past, so we do not think there is a question—

Senator BUNNING. I know that. I voted for it.

Mr. SMYTHE. We do not think that there is a constitutional issue with respect to deferring the funds for up to 180 days. I have already responded to the question about the concern of the 180 days. We view that as the outer limit, in terms of the amount of time, that money would be deferred. And our intention—and the bill actually provides clear authority to the president, to release funds prior to that if either house were to reject the president's proposed rescissions.

Senator BUNNING. I was here when the last line item veto was passed and given to William Jefferson Clinton at the time. And I do not know of one instance that Bill Clinton, as President of the United States, ever made a phone call to somebody and threatened them with rescissions or with line items scratched out of their state

or their district—I was in the House at the time—in regards to the power of the president having line item veto.

Do you know of any case like that?

Mr. SMYTHE. I cannot speak to what the Clinton Administration did. I am not aware of how they arrived at their decision. My impression was that they did their best to put forward proposals. That is not our intent, to use it in that manner. We would use it to go after spending that we felt was not justified, was not a high priority, that in the context of our fiscal situation that the Congress should look at rescinding.

Senator BUNNING. How does this legislation provide the president and Congress another tool to address the problem of large increases in the number of earmarks that Congress has added to the bills?

Mr. SMYTHE. According to CRS, there has been a large growth in earmarks, I think on the order from about 4,000 in 1994 up to about 14,000 in 1995. Again, as I stated in my testimony, earmarks are not necessarily bad or wrong that Congress provides.

Senator BUNNING. I will agree with you 100 percent on that.

Mr. SMYTHE. But there are cases where there are earmarks that are added to bills that we feel may not be well justified, that they may have been added late in the process. In those cases where we feel an earmark does not have full justification and is not a priority, it would be something that we would look at and possibly propose for rescission.

Senator BUNNING. Does this line item legislation allow the president to propose the repeal of language in a bill that does not explicitly provide funding? For example, a bill that contains language stating that none of the funds may be used for specific purposes?

Mr. SMYTHE. It does not provide that authority.

Senator BUNNING. It does not?

Mr. SMYTHE. Correct.

Senator BUNNING. In other words if—

Mr. SMYTHE. We could not use this authority to strike a funding limitation.

Senator BUNNING. Does S. 2381 provide the president with a wide range rescission authority that includes the ability to cancel or modify mandatory spending items? If so, why does the authority for mandatory spending need to be broader than any for discretionary provisions?

Mr. SMYTHE. The authority for mandatory spending is only for new mandatory spending.

Senator BUNNING. I understood what you said to Senator Menendez.

Mr. SMYTHE. It would not apply to existing entitlement programs. And even programs that expire, like the Food Stamps, when they are extended it would apply to the extension of existing mandatory programs.

It would, however, apply to an expansion in existing mandatory program or the creation of a new mandatory program. We think it is important that this authority apply not only to the appropriation side of the budget, which is 40 percent of the budget, but also apply to new mandatory or expansions in mandatory spending.

Senator BUNNING. Well, I can tell you this. There are some of us that sit on this side, away from the great office of OMB, that think that this legislation is off to a bad start because of the language in the legislation, 180 days, 13 days, and things like that. But we want to clean it up. But we want your cooperation if we clean it up because we want to pass it when it gets to the floor of the U.S. Senate. And the way it is written is never going to get past the U.S. Senate.

Thank you.

Chairman GREGG. Senator Ensign.

Senator ENSIGN. Thank you, Mr. Chairman.

This is a very important hearing and discussion. The reason we are here is because we have huge annual budget deficits and a huge national debt that we are passing on to future generations. Members of Congress complain about it but with each year that goes by we do nothing and things just get worse.

I listened to Senator Conrad talk about the scenario with the President exercising considerable power and influence. I think that is a legitimate concern.

But consider our current practice in the Senate and House with respect to the appropriations process. If you do not vote for the appropriations bills, the appropriators threaten that they will not put any projects in the bill for your state.

So when Congress is looking at reforming the spending process, I hope we will truly consider earmark reform. The spending process is broken because of the imbalance of power that exists right now between the authorizing committees and the appropriations committee in the House and the Senate.

I believe, and have always thought, that if earmarks are considered in the light of day, if there can be transparency, if you can stand on the floor of the U.S. Senate and justify your earmark, fine. It is the earmarks that get put in without scrutiny, that are done as a little favor, that people do not want to have subjected to the light of day are problematic.

The other problem relates to the number of earmarks, which result in increased spending. Often that spending is not in the budget. Supplementals have not kept down the level of spending set in the budget. They further drive up spending. The use of supplementals is out of control.

The Chairman had a great op-ed in the Wall Street Journal addressing the second budgets that occur with supplementals. It is a serious, serious problem that we have to get under control.

There are problems with your legislation. I support the intent of your legislation. Several other members of this committee do as well. We want this bill as a tool to control spending. That is the bottom line.

I do not have to reiterate some of the problems. They have been clearly laid out. Some of the problems with the legislation can easily be fixed.

The idea that 302(a) allocations have to be adjusted within 5 days by the Budget Committee, is the intent to make sure that that money is not taken from one program and spent someplace else?

Mr. SMYTHE. That is correct.

Senator ENSIGN. So the intent is not just to rearrange spending. The intent is actually to bring some kind of fiscal sanity into the budget process, into the appropriations process?

Mr. SMYTHE. Yes, sir.

Senator ENSIGN. Thank you.

Mr. Chairman, I think that as part of the whole budget reform, and getting spending under control, we have to look at this proposal. And I am glad that we are having this hearing today. But there are a lot of other problems. I mentioned the earmark reform as being part of it. The way that we treat taxes versus the way that we treat entitlements is another aspect that should be addressed. We need to consider biannual budgeting.

I think that all of those reforms need to be on the table when we are talking about reform because some Senators think that spending is out of control. Unfortunately, legislators are thinking more about reelection than they are thinking about the future and the future consequences of this debt they we are leaving to our children.

I support the Administration's effort and I look forward to working with you and with the Budget Committee on these reforms.

Thank you, Mr. Chairman.

Chairman GREGG. Thank you, Senator.

There is a vote on relative to cloture.

Senator SESSIONS.

Senator SESSIONS. Thank you, Mr. Chairman. Thank you for your leadership and your concern for integrity in the budgeting process.

Mr. Smythe, let me just ask with regard to what goes on in your office and in every Federal agency every year as we do an annual budget and have you explain something to the American people about the number of hours and effort that goes into presenting that budget and what difference that would make if you had a 2-year budget. Would you share some thoughts on that?

Mr. SMYTHE. Yes. I would like to say that the budget really is—we are juggling three budgets at any point in the year. Right now we are in the process of executing the 2006 budget. We are in the process of—including trying to get a supplemental enacted that is being debated on the Senate floor.

We are in the process of trying to seek enactment of the 2007 budget and the proposed changes that we proposed in the 2007 budget.

And we are just starting the 2008 budget, in terms of the process of giving guidance to the agencies. The agencies are starting their initial work on the 2008 budget.

So it involves an incredible amount of time in terms of putting together these three budgets and working on them and so forth.

A biannual budget, we believe, would provide for better planning, more planning, and free up time to focus actually on the management of programs from the Administration's standpoint and hopefully the oversight of programs from Congress's standpoint.

Senator SESSIONS. When you cited the agencies, if you would explain for the American people how this works. In other words, the president proposes a budget. But he does not go down to every single one of the programs and the subprograms and the sub pro-

grams and agencies and subagencies that exist. That filters up through them and then through to you? Is that correct?

Mr. SMYTHE. That is correct. They submit to us—in September they will submit to us their proposed budget submissions. We put that into a stack of five volumes that represents the \$2.8 trillion Federal budget.

That is only the aggregated amounts for the budget. Each of the agencies then submit very detailed justifications that detail the spending down to the line items that are well below the actual budget that the president transmits. So there is an extraordinary amount of detail in terms of the items and so forth that fit into that budget that are developed by the agencies.

Senator SESSIONS. And they have, within each one of these agencies I presume, teams that work virtually year-round preparing budgets. And they are left in some degree of uncertainty because, since it is just a 1-year budget, there is some degree of uncertainty in certain programs I assume that probably calls for inefficiencies because you are not sure it will be appropriated the next year. Is that a problem that you face?

Mr. SMYTHE. Yes, it is an annual process. If we had 2-year budgets it would provide more certainty.

Also, Congress does not always get the appropriations enacted by the beginning of the fiscal year, by the October 1st deadline. Our fiscal year begins on October 1 of the calendar year. And frequently bills are enacted after that. That generates additional uncertainty about what the funding level is going to be for a particular program.

Senator SESSIONS. Just finally, the number of hours that go into this, has anyone calculated how much it is within the agencies? I will not mention how many in the Senate and how much time and effort and grief we go through to try to move individual appropriations and budgets every year. But what about the agencies? Has there been any calculation of how much work has to go into that?

I have heard from the Defense Department it is just an incredible effort in the Defense Department as they prepare their annual budget.

Mr. SMYTHE. The budget has some big numbers in it. I have not calculated how many numbers go into it, but that would be a big number, as well. It is an extraordinary effort that goes into the annual budget, both the formulation, the development of the budget and then the execution of it.

Senator SESSIONS. Thank you very much.

Senator ALLARD [presiding]. Mr. Smythe, I want to thank you for your testimony. And that concludes the number of members that we have here. And we now have a vote going on on the floor of the Senate, so most of the members have left to make that vote. But I want to continue with the hearing and we will continue with the next panel.

Before you leave Mr. Smythe, I just want to thank you for your testimony. There are a number of issues that have been raised by members of this Committee during your testimony. Obviously there are some areas we need to work on, and we look forward to working with you to move this piece of legislation forward.

Mr. SMYTHE. The issues that were identified and so forth are something that have been brought to our attention on a number of concerns about the way this legislation would operate. And if there are concerns about that, we very much want to work to address those concerns in the bill that hopefully the Committee will mark up.

Thank you, Mr. Chairman, for allowing me to testify today.

Senator ALLARD. Thank you very much.

Now I will call the next panel, which is Don Marron, who has become our CBO's Deputy Director in October of last year and began serving as Acting Director as of the end of last year. Dr. Marron was the Executive Director and Chief Economist of the Congressional Joint Economic Committee, and we are looking forward to hearing your comments on the proposed piece of legislation which the Chairman has referred to as an enhanced rescission.

Dr. Marron, you may proceed with your testimony.

**STATEMENT OF DONALD B. MARRON, ACTING DIRECTOR,  
CONGRESSIONAL BUDGET OFFICE**

Mr. MARRON. Thank you, Acting Chairman Allard. It is a pleasure to be here today to discuss S. 2381, which would create an expedited process for considering rescission proposals by the president.

To help put this proposal in context, it is useful to start with an overview of how the existing rescission process has been used. As is discussed in my written testimony, the existing process appears to have had relatively little impact on the overall budget. There are several reasons for this.

First, presidents have made relatively little use of the authority to recommend rescissions. From 1976—

Senator ALLARD. Dr. Marron, let me interrupt you. I think Dr. Fisher is supposed to be part of this panel. Dr. Fisher, why don't you come up.

Mr. MARRON. I believe we have a third member, as well.

Senator ALLARD. And then Mr. Cooper.

Thank you, I am sorry. Now our panel is complete. Go ahead, Dr. Marron. Sorry to interrupt you, but I wanted to get the other panelists up there.

Mr. MARRON. No problem. Thank you.

So from 1976 to 2005, for example, proposed rescissions totaled only about half of 1 percent of discretionary budget authority. Those are the rescissions proposed by Presidents. Congress, in turn, enacted only about one-third of those proposed rescissions into law.

Rescissions initiated by Congress were substantially larger but still totaled less than 1 percent of discretionary budget authority on average. Thus, the average amount of rescissions has been relatively small.

Second, the rescissions that have been enacted have often been used to offset new spending rather than to achieve actual spending reductions.

Third, the rescissions that have been proposed and adopted have often been focused on budget authority that is not being spent or

that would not be spent for several years. That, too, limits the budgetary impact of rescissions.

And finally, the existing rescissions process is limited to discretionary spending, which currently makes up about 38 percent of Federal spending, a share that may decline even further if mandatory spending continues its rapid growth.

All these factors have limited the budgetary impact of the current rescissions process and suggest that rethinking the process may be beneficial. S. 2381 would address some of the reasons for the limited impact of the current process. Perhaps most importantly, it would require the Congress to act on the President's rescission proposals. The current process does not require the Congress to act, so rescission proposals may simply be ignored. That, in turn, may have reduced the President's incentive to use the rescission authority in the past.

Second, the proposal would prevent rescinded funds from being used to offset additional spending. This would increase the odds that rescissions result in actual budgetary savings. In addition, the proposal would expand the rescission authority to certain items of new mandatory spending and targeted tax benefits not just discretionary spending.

In evaluating the potential impacts of the proposed legislation, it is essential to consider not only its visible direct effects, but also its indirect effects. The visible direct effects of the legislation would, of course, be the rescissions proposed and adopted under the new procedures.

At least as important, however, would be the indirect ways that the procedures might affect the legislative process. Proponents argue, for example, that the existence of expedited rescissions would deter legislators from pursuing some projects that would appear to benefit only a small constituency. Such deterrence could lead to a different mix of projects and spending bills and conceivably even a lower level of overall spending.

However, the proposed rescission authority would also shift power to the President, as has been discussed at length in the two previous panels. By requiring Congressional action on proposed rescissions and by allowing the president to choose how to package those rescissions, it gives the President greater influence over the Congressional agenda. By allowing the President to defer funds for up to 180 days, it gives the President greater control over the execution of spending programs. By placing no time limits on when the president must submit rescission proposals, it gives him as much flexibility as possible in exercising his powers under the proposal.

For all these reasons, expedited rescission, as proposed, may give the President greater leverage to pursue his agenda. The ultimate impact on spending in fiscal outcomes would then depend on whether spending discipline is a presidential priority.

It is difficult to predict how S. 2381 would affect the legislative process and consequently whether the changes proposed in the bill would actually improve fiscal discipline or would simply shift spending priorities to those favored by the President. Experience at the state level, however, suggests that the overall budgetary effect may be minor.

Moreover, as this Committee is well aware, our primary fiscal challenges in coming years will come from spending programs that are already on the books. Existing mandatory spending programs, in particular Social Security, Medicare and Medicaid, will comprise a growing share of the budget in coming years. They are permanent programs, so expedited rescissions would likely have no effect on them.

Just to wrap up, our posture and view is that budget rules can be very beneficial, they can be very helpful. But it is important to go in with a suitable humility about what they can actually accomplish. Experience suggests that budget rules are most effective when they help the Congress and the President implement a consensus about budget policies and budget outcomes. Absent such a consensus, the rules may only have limited impact on actual budget outcomes.

Thank you. I would be happy to answer any questions.  
[The prepared statement of Mr. Marron follows:]

**CBO  
TESTIMONY**

Statement of  
**Donald B. Marron**  
Acting Director

**CBO's Comments on S. 2381,  
the Legislative Line Item Veto Act of 2006**

before the  
**Committee on the Budget**  
**United States Senate**

**May 2, 2006**

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**CONGRESSIONAL BUDGET OFFICE  
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WASHINGTON, D.C. 20515**

Mr. Chairman, Senator Conrad, and Members of the Committee, I am pleased to appear before you today to discuss S. 2381, the proposed Legislative Line Item Veto Act of 2006, which would provide for expedited legislative consideration of certain Presidential proposals to rescind budget authority and targeted tax benefits.

In my testimony this morning, I offer the following thoughts:

- The current process of rescissions (cancellations of budget authority) has generally had very little net impact on the overall budget.
- S. 2381 would address some of the reasons that the current process is believed to be limited in its ability to reduce deficits.
- In analyzing such legislation, it is important to distinguish between the visible, direct effects that the legislation may have (the rescissions that are proposed and enacted) and the subtle, indirect effects it may have on the legislative process and fiscal policies.
- It is difficult to predict how S. 2381 would affect the legislative process and, consequently, whether the changes proposed in the bill would actually improve fiscal discipline or would simply shift spending priorities to those favored by the President.

### **The Current Rescission Process**

Following increasingly frequent conflicts between Presidents and the Congress over funding priorities, which peaked during the Nixon Administration, the legislative branch reasserted its constitutional control over the power of the purse with enactment of the Congressional Budget and Impoundment Control Act of 1974. That law instituted a formal process, centered on a concurrent resolution of the budget, through which the Congress could develop, coordinate, and enforce its own budgetary priorities independently of the President. The budget law created legislative institutions to implement the new Congressional budget process: the House and Senate Budget Committees to oversee execution of the budget process and the Congressional Budget Office (CBO) to provide the budget committees and the Congress with an independent, nonpartisan source of budgetary and economic information. As a check on unilateral action by the President to impound or cancel appropriated funding, the law established a new rescission process for controlling Presidential impoundments of funds.

Under the provisions of the 1974 law, the President can propose to rescind spending authority previously enacted into law. The Congress has 45 days of continuous session to approve the President's requests, but it does not have to act on the proposals. During the 45-day period, the President can withhold the funds

**Table 1.**  
**Rescissions of Budget Authority, Fiscal Years 1976 to 2005**

(Billions of dollars)

	1976- 1980	1981- 1985	1986- 1990	1991- 1995	1996- 2000	2001- 2005	Total, 1976- 2005
Rescissions Proposed by the President <sup>a</sup>							
Dollar amount	9.3	27.3	16.7	17.5	2.0	0	72.8
Dollar amount enacted by the Congress	3.0	15.5	0.2	4.7	1.3	0	24.6
Percentage enacted	32	57	1	27	63	n.a.	34
Rescissions Initiated by the Congress (Dollar amount)	3.5	11.7	24.3	47.4	25.4	29.8	142.1
<b>Total Dollar Amount of Rescissions</b>	<b>6.5</b>	<b>27.2</b>	<b>24.5</b>	<b>52.1</b>	<b>26.7</b>	<b>29.8</b>	<b>166.7</b>
Congressionally Initiated Rescissions as a Percentage of Total Rescissions	54	43	99	91	95	100	85
<b>Memorandum:</b>							
Total Discretionary Budget Authority	1,291.8	1,965.1	2,304.7	2,614.5	2,708.0	4,140.6	15,024.6
<b>Total Rescissions as a Percentage of Discretionary Budget Authority</b>	<b>0.5</b>	<b>1.4</b>	<b>1.1</b>	<b>2.0</b>	<b>1.0</b>	<b>0.7</b>	<b>1.1</b>

Source: Congressional Budget Office based on data from the Government Accountability Office and the Office of Management and Budget.

Note: n.a. = not applicable.

a. "Rescissions proposed by the President" include proposals submitted under 1974 Act procedures and do not include other proposed budget authority cancellations.

proposed for rescission. But once that period has expired, the funds must be made available for obligation.

Presidents have made very little use of the authority to recommend rescissions. From 1976 through 2005, Presidents proposed about \$73 billion in rescissions, about one-half of 1 percent of the more than \$15 trillion in total discretionary budget authority legislated in those years (see Table 1). Moreover, in dollar terms, the Congress enacted only about one-third of the proposed rescissions. At the same time, the Congress initiated considerably more rescissions (that were ultimately signed into law by the President) than those proposed by the Administration.

President Clinton operated under the Line Item Veto Act of 1996, effective on January 1, 1997, until it was declared unconstitutional by the Supreme Court in June 1998. That statute had authorized the President to cancel discretionary appropriations, any new item of direct spending, and certain new limited tax benefits. In order to overturn such a veto, the Congress would have to pass a resolution of disapproval within 30 days. The President could veto that resolution and force an override vote in each House. President Clinton's 82 cancellations would have saved about \$355 million in 1998 and just under \$1 billion from 1998 to 2002. The total savings over five years from cancellations that were not overturned (by the Congress or the courts) were less than \$600 million. By comparison, total spending and revenues in 1998 were both about \$1.7 trillion. The experience under President Clinton may not indicate how the line-item veto might have been used in other situations by other Presidents; nevertheless, President Clinton's use of the 1996 line-item veto statute is consistent with how little the 1974 law's rescission system has been used.

There are a number of reasons for the limited budgetary impact of the current process. First, under current law, the Congress need not act on the President's rescission proposals. Members never have to go on record in favor of or against items that the President has identified as unnecessary or wasteful. Proponents of a more effective rescission process believe that strengthening the President's role could serve as a deterrent to lawmakers' inserting into broader legislation provisions of little benefit to the general public interest. A more effective rescission process, proponents contend, would make it easier for the President to eliminate "pork-barrel" provisions that benefit narrow constituencies.

Second, the 1974 law applies to a limited portion of the budget. Presidents may propose to rescind only discretionary spending, which currently makes up just 38 percent of federal spending—a share that may decline even further if mandatory spending continues its rapid growth.

Third, under current practice, rescissions seem to have been used primarily to pay for other spending, rather than to reduce spending overall.

Fourth, and perhaps related to the third reason, rescissions often appear to be focused on spending items for which outlays would be significantly less than budget authority—at least in the first years and possibly altogether. Such budget authority could be most easily used to offset additional spending without compromising existing programs.

In assessing the impact of rescissions enacted from 2000 to 2005, CBO estimates that about half of the amounts rescinded will not result outlay savings. The bulk of such rescissions applied to the Department of Housing and Urban Development's Housing Certificate Fund, which accounted for about one-third of all rescissions during that period. Those rescissions of housing funds generally canceled excess budget authority from one of two sources: funds that had

originally been provided to finance vouchers for the tenant-based program but had not been used and funds that had been obligated for long-term contracts for project-based units but ultimately were not needed to pay for those contracts. Just how much of those funds would have been spent in subsequent years had they not been rescinded is unclear. (Congressionally initiated across-the-board reductions in discretionary spending enacted in six out of the past seven years are examples of rescissions under current law that have clearly reduced outlays.)

### **Proposals for Change**

Persistent deficits and rapid growth in federal spending in the 1980s, most of the 1990s, and now in the 2000s have generated interest in changing the rescission process to enhance fiscal discipline and improve accountability.

Generally, proposals to reform the rescission process would shift authority back to the executive branch by enhancing the President's power to cancel budget authority. Every President for the past 25 years has advocated some form of line-item veto. President Reagan advocated such a veto, which he had used while Governor of California. President George H.W. Bush called for expanded rescission authority. President Clinton advocated a line-item veto as a candidate for President and after his election operated under the Line Item Veto Act of 1996 until it was held to be unconstitutional. President George W. Bush advocated a line-item veto as a candidate and has continued to do so in several of his budget submissions, including the one for fiscal year 2007.

Reform proposals have taken several forms:

- A constitutional amendment to allow the President to veto portions of bills presented for his signature.
- Separate enrollment of funding provisions as discrete "bills" once a larger bill is passed by the Congress. Each provision would be presented separately to the President for signature, allowing the President to veto some "bills" according to constitutional procedures while signing the rest.
- Enhanced rescission, which would allow the President to continue to withhold funds unless the Congress acted to overturn the rescission proposals. That was the approach adopted in the Legislative Item Veto Act of 1996 and later found unconstitutional.
- Expedited rescission, which would establish "fast-track" procedures to help ensure that the President's proposed cancellations received an up-or-down vote by the Congress within a specified period of time. Expedited rescission would not shift as much power to the executive branch as other approaches described above. Although the President would not have unilateral authority

to cancel provisions of law, Presidential proposals could not be ignored by the Congress. This is the approach of S. 2381.

However, most of the proposals for strengthening the rescission process, including S. 2381, would be unlikely to have a significant effect on overall spending.

### **S. 2381, the Legislative Line Item Veto Act of 2006**

S. 2381 includes provisions to address many aspects of the current system that are thought to limit its effectiveness for deficit reduction, including these:

- Provisions intended to prevent rescinded funds from being used to offset additional spending. The legislation would require that, after enactment of a rescission bill, the budget committees adjust committee allocations in the budget resolution to reflect the rescissions and the appropriations committees revise allocations to subcommittees.
- Explicit authority for the President to propose rescission of new authority for mandatory spending and targeted tax benefits in addition to discretionary budget authority.
- Expansion of the definition of budget authority that may be proposed for rescission to include matters generally referred to as earmarks in legislative language and committee reports—thus addressing concerns about “pork-barrel” spending.
- Fast-track procedures that would require the Congress to vote expeditiously on rescissions proposed by the President.

In addition, the bill would authorize the President to defer for up to 180 calendar days the obligation of any discretionary budget authority that he proposed to be rescinded. Similarly, the President could defer for up to 180 days execution of any direct spending proposed for rescission. Those deferrals would not end upon the Congress’s rejection of the rescission proposals. In contrast, under current authority, the President may withhold from obligation funds proposed for rescission for only 45 days (or until the Congress approves a rescission bill if that occurs sooner).

To the extent that the Legislative Line Item Veto Act would shift power from the Congress to the President, it might change behavior in subtle ways that are difficult to predict and observe. For example, the fast-track process for Congressional consideration of rescission proposals would decrease Congressional leaders’ control over the legislative process by forcing the President’s requests to the top of the list of matters for consideration.

The threat of the President's authority to propose rescission of discretionary budget authority and items of direct spending could restrain the Congress from including some provisions in legislation that it might otherwise have incorporated. They could even include items of direct spending that might have been added in order to generate support for overall reductions in direct spending, as is sometimes the case with reconciliation bills. Conversely, the Congress might accommodate some of the President's priorities in exchange for a pledge not to propose rescission of certain provisions, thereby increasing total spending. As CBO has previously testified, studies of the line-item veto at the state level have documented similar devices employed by state legislatures over the years to limit the budgetary impact of governors' item-veto authority. Additionally, Members might find it difficult to obtain support for a bill by including items favored by other Members but opposed by the President, who might propose rescinding them. The President's power to unilaterally defer spending for six months, thereby effectively canceling some budget authority and some programs altogether (for which the funding would lapse at the end of the fiscal year), would be a powerful tool to negotiate passage of the Administration's spending priorities.

Moreover, the President's inclination to exercise his authority to propose rescissions and to defer obligation and spending may depend on a host of political factors, including whether he and the Congressional majorities are of the same or opposing political parties.

Finally, although S. 2381 includes the authority to propose rescissions of new mandatory spending, it would not apply to existing mandatory spending authority. Some mandatory programs must be periodically reauthorized, and thus, the authority in S. 2381 could be used to propose rescissions of the newly reauthorized spending. However, the largest mandatory programs are permanently authorized, and, therefore, existing provisions of those programs would not be within the scope of S. 2381. Those programs now constitute the majority of the federal budget and are likely to pose significant fiscal challenges in coming years.

### **Conclusion**

Additional budgetary tools can assist in bringing about budgetary restraint, and improved accountability is desirable, whether the budget is in surplus or deficit and whether the amounts involved are large or small. Such tools, however, cannot establish fiscal discipline unless there is a political consensus to do so, competing priorities can make such consensus difficult to reach. In the absence of that consensus, the proposed changes to the rescission process included in S. 2381 are unlikely to greatly affect the budget's bottom line.

Moreover, in contemplating the bill, the Congress will have to weigh the potential for possibly modest budgetary benefits against possible drawbacks, which include a shift of power to the executive branch and effects on the legislative process.

Senator ALLARD. I will now call on Mr. Cooper as a founding member and the Chairman of Cooper and Kirk. And also, in 1985, President Reagan appointed Mr. Cooper to the position of Assistant Attorney General for the Office of Legal Counsel.

We look forward to your testimony, Mr. Cooper.

### **STATEMENT OF CHARLES J. COOPER, COOPER & KIRK, PLLC**

Mr. COOPER. Thank you very much, Senator Allard.

It is a great honor for me to be here this morning to present my views on this important measure. And it was certainly a special honor for me in 1997 to represent Senator Byrd and Senator Levin and other members of this body in a constitutional challenge to the 1996 Line Item Veto Act. That challenge was not taken up by the Supreme Court for lack of standing in Members of Congress, but the Court did later strike down the 1996 Line Item Veto Act in a case in which I was involved. And I think it controls the constitutional analysis here and it is that case to which I will direct my testimony.

The Line Item Veto Act of 1996 provided that the president may “cancel in whole” the same types of spending and tax items that are at issue in the measure before you. Cancellation took effect when Congress received a message, a special message from the president, to that effect.

The Act defined cancel as “to rescind” and “to prevent from having legal force or effect.” That term and its definition were carefully crafted to make clear that the President’s action would be permanent and irreversible.

Thus, a Presidential cancellation under the 1996 Act extinguished the canceled provision, as though it had been formally repealed by an act of Congress. And neither the President who canceled the provision nor any successor President could exercise the authority that the provision before its cancellation had granted. So the president could not change his mind after he had canceled it. The law itself was gone. And it could be restored only by a disapproval bill that was enacted according to the procedure prescribed by Article I, Section 7.

In striking down the Line Item Veto Act of 1996, the Supreme Court in the *Clinton* case concluded that vesting the President with unilateral power to cancel a provision of duly enacted law could not be reconciled with the procedures established under Article I, Section 7 for enacting or repealing a law, bicameral passage and presentment to the President.

The Court struck down the Act because—and these are the Court’s words—“Cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of acts of Congress that fail to satisfy Article I, Section 7.”

The Legislative Line Item Veto Act of 2006, the measure pending before you, in contrast is framed in careful obedience to Article I, Section 7 and to the Supreme Court’s teaching in *Clinton*. The President is not authorized by this bill to cancel any spending or tax provision or otherwise to prevent such a provision from having legal force or effect.

To the contrary, any spending or tax provision duly enacted into law remains in full force and effect under the bill unless and until it expires on its own terms or it is repealed in accordance with Article I, Section 7—that is after this body and the House pass it and it is presented again to the President for his signature.

To be sure, S. 2381 would authorize the President to defer or to suspend execution of the spending or tax provision at issue for up to 180 calendar days. The President would be also authorized to terminate his deferral if, according to the statute, “the President

determines that continuation of the deferral would not further purposes of this act.”

This delegation of deferral authority does not raise, in my opinion, a serious constitutional problem with this measure. The Congressional practice of vesting discretionary authority in the President to defer and even to decline expenditure of Federal funds has been commonplace since the beginning of the Republic, and its constitutionality has never seriously been questioned. Indeed, in the first Congress, President Washington was given discretionary spending authority in at least three appropriations bills to spend as much as he pleased or as little as he pleased, and the remainder obviously to be restored to the treasury.

In the *Clinton* case, the Government’s constitutional defense of the 1996 Line Item Veto Act relied heavily on that long inter-branch tradition of Presidential spending discretion. The Government argued in that case that the President’s cancellation power was not really a unilateral power of repeal but rather was simply—I am quoting from their brief—“in practical effect no more and no less than the power to decline to spend, specify sums of money, or to decline to implement specified tax measures.”

But the dispositive distinction is that a discretionary spending statute grants the President discretion in the implementation of the spending measure while the Line Item Veto Act of 1996 granted the President discretion to extinguish the spending measure. The President may exercise lump sum spending discretion at any time during the appropriation period. And if the president decides not to spend some or all of the appropriated funds, the authority to spend the funds—that is, the law itself—nonetheless remains in place until it expires in accordance with its terms or is repealed by this body. The President however, as long as that law remains, is free to change his or her mind about that spending decision.

In contrast, under the 1996 Act, the President’s cancellation discretion operated directly on the law itself, effectively revising its text to strike the spending or tax provision itself permanently. And if the President or his successor subsequently changed his mind about a canceled item, he was powerless to revive it.

Nothing in the bill before you, S. 2381, grants the President a unilateral power to rescind or amend the text of a duly enacted statute in the fashion that the 1996 Line Item Veto Act did.

Again, a deferral under the S. 2381 can last no longer than 180 calendar days. And immediately thereafter the President is obliged to execute the spending or tax provision for which he has unsuccessfully sought Congressional rescission. And the President’s discretionary authority to terminate the deferral and to execute the spending provision at issue remain in full force and effect right up until the moment that the appropriations statute expires under its own terms or is rescinded by Congress.

The short of my testimony is this: the Supreme Court’s decision in *Clinton* recognizes and enforces the constitutional line established by Article I, Section 7 between the power to exercise discretion in the making (or unmaking) of the law, on the one hand, and the power to exercise discretion in the execution of law, on the other. Congress cannot constitutionally vest the President with the former discretion—that is the discretion to make our unmake law

but it can the latter, and has done so repeatedly throughout the Nation's history.

So in my opinion, the powers granted the President under the legislative Line Item Veto Act of 2006 fall safely on the constitutional side of that line.

Again, Mr. Chairman, I appreciate very much this opportunity to share my views with you on this important measure.

[The prepared statement of Mr. Cooper follows:]

**TESTIMONY OF CHARLES J. COOPER**

Before the Senate Budget Committee

Concerning

S. 2381 -- "The Legislative the Line Item Veto Act of 2006"

May 2, 2006

Good afternoon Mr. Chairman and Members of the Committee. My name is Charles J. Cooper, and I am a partner in the Washington, D.C., law firm of Cooper & Kirk, PLLC. I appreciate the Committee's invitation to present my views on the constitutionality of the "Legislative Line Item Veto Act of 2006," which has been proposed by President Bush and has been introduced in this body as S. 2381. For reasons that I shall discuss at length below, I believe that the President's proposal is constitutional. But first I would like to outline my experience in this esoteric area of constitutional law.

I have spent the bulk of my career, both as a government lawyer and in private practice, litigating or otherwise studying a broad range of constitutional issues. On several different occasions, strangely enough, I have been involved in matters relating to the constitutionality of measures designed to vest the President with authority to exercise a line item veto or

its functional equivalent. In early 1988, while I was serving as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, President Reagan asked the Justice Department for its opinion on the question whether the Constitution vests the President with an *inherent* power to exercise an item veto. Certain commentators at that time had advanced the proposition that the President did indeed have such inherent constitutional power. See Steven Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, at 14, col. 4. After exhaustive study, the Justice Department reluctantly concluded that the proposition was not well-founded and that the President could not conscientiously attempt to exercise such a power. I suspect that many of the Members of this body can recall how fervently President Reagan longed to exercise a line item veto authority, and during my time in government, I had no task less welcome than advising him against it. The opinion of the Office of Legal Counsel is publicly available at 12 Op. Off. Legal Counsel 128 (1988).

In April of 1996, Congress enacted the Line Item Veto Act of 1996, which authorized the President to “cancel” certain spending and tax benefit measures after he had signed into law the bill in which they were contained. Shortly thereafter, I was retained, along with Lloyd Cutler, Alan Morrison, Lou Cohen, and Michael Davidson, to represent Senators Byrd, Moynihan,

Levin, and Hatfield, as well as certain members of the House of Representatives, to challenge the constitutionality of the Line Item Veto Act. Although the district court invalidated the Act, the Supreme Court held that the Members of Congress lacked standing to litigate their constitutional claims. Adjudication of the Act's constitutionality would therefore have to await the suit of someone who had suffered judicially cognizable injury resulting from an actual exercise of the President's statutory cancellation power. *See Raines v. Byrd*, 521 U.S. 811 (1997). That did not take long.

Less than two months after the Supreme Court's decision in *Raines*, President Clinton exercised his authority under the Line Item Veto Act to cancel "one item of new direct spending" in the Balanced Budget Act of 1997, which had the effect of reducing the State of New York's federal Medicaid subsidies by almost \$1 billion. I represented the City of New York and certain healthcare associations and providers, which lost many millions of dollars in federal matching funds as a direct result of the President's cancellation, in a suit challenging the constitutionality of the Line Item Veto Act. The Supreme Court struck down the Line Item Veto Act, concluding that "the Act's cancellation provisions violate Article I, § 7, of the Constitution." *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). The *Clinton* case controls the analysis of the constitutionality of the

Legislative Line Item Veto Act of 2006, and so an extended discussion of the case is warranted.

The Line Item Veto Act of 1996 provided that the President may “cancel in whole” any (1) “dollar amount of discretionary budget authority,” (2) “item of new direct spending,” or (3) “limited tax benefit” by sending Congress a “special message” within five days after signing a bill containing the item. 2 U.S.C. § 691(a). Cancellation took effect when Congress received the special message. 2 U.S.C. § 691b(a).

The Act defined “cancel” as “to rescind” (with respect to any dollar amount of discretionary budget authority) and to “prevent . . . from having legal force or effect” (with respect to items of new direct spending or limited tax benefits). *Id.* § 691e(4). The purpose of the term and its definition was to make it clear that the President’s action would be permanent and irreversible: “The term ‘cancel’ was specifically chosen, and is carefully defined. . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations.” H.R. REP. NO. 104-491, at 20 (1996) (Conf. Rep.) (emphasis added). For taxes, cancellation mandated “collect[ion of] tax that would otherwise not be collected or . . . den[ial of] the credit that would otherwise be provided.” *Id.* at 29.

Thus, a presidential cancellation under the 1996 Act *extinguished* the cancelled provision, as though it had been formally repealed by an act of Congress. A presidential cancellation operated on the provision of the law itself, permanently removing it from the body of operative federal statutes, and neither the President who cancelled the provision nor any successor President could exercise the authority that the provision, before its cancellation, had granted. It could be restored to the status of law only if a “disapproval bill,” 2 U.S.C. §§ 691d, 691e(6), was enacted according to the procedure prescribed by Article I, Section 7.

In striking down the Line Item Veto Act of 1996, the Supreme Court in *Clinton* concluded that vesting the President with unilateral power to “cancel” a provision of duly enacted law could not be reconciled with the “ ‘single, finely wrought and exhaustively considered, procedure’ ” established under Article I, Section 7 for enacting, or repealing, a law -- bicameral passage and presentment to the President. 524 U.S. at 439-40, quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983). As the Court explained, Article I, Section 7 “explicitly requires that each of . . . three steps be taken before a bill may ‘become a law.’ ”: “(1) a bill . . . [is] approved by a majority of the Members of the House of Representatives; (2) the Senate approve[s] precisely the same text; and (3) that text [is] signed into law by

the President.” 524 U.S. 448. And if the President disapproves of the Bill, he must “reject it in toto.” *Id.* at 440, quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940). The *in toto* requirement ensures that the President, like the House and Senate, lacks power to unilaterally revise the text of the measure approved by the other participants in the lawmaking process.

President Clinton’s cancellation, however, did unilaterally revise the law by “prevent[ing] one section of the Balanced Budget Act of 1997 . . . ‘from having legal force or effect,’ ” while permitting the remaining provisions of the Act “to have the same force and effect as they had when signed into law.” 524 U.S. at 438. Accordingly, the Court concluded that “cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7.” *Id.* at 444.

The Legislative Line Item Veto Act of 2006, in contrast, is framed in careful obedience to Article I, Section 7 and to the Supreme Court’s teaching in *Clinton*. The President is not authorized by the bill to “cancel” any spending or tax provision, or otherwise to prevent such a provision “from having legal force or effect.” To the contrary, the purpose of S. 2381, as President Bush put it in proposing the legislation, is simply to “provide a

fast-track procedure to require the Congress to vote up-or-down on rescissions proposed by the President.” Message of President George W. Bush to the Congress, March 6, 2006. Thus, any spending or tax provision duly enacted into law remains in full force and effect under the bill unless and until it is repealed in accordance with the Article I, Section 7 process -- bicameral passage and presentment to the President.

To be sure, S. 2381 would authorize the President to “defer” or “suspend” (hereinafter “defer”) execution of the spending or tax provision at issue for up to 180 calendar days from the date that the President transmits his rescission proposal to Congress. The purpose of this deferral authority, obviously, is simply to allow the Congress adequate time to consider the President’s rescission proposals and to vote them up-or-down. The President would be authorized to terminate the deferral “if the President determines that continuation of the deferral would not further the purposes of this Act.” H.R. 4890, 109th Cong. §§ 1021(e)(2), 1021(f)(2) (2006).<sup>1</sup>

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<sup>1</sup> Continuing to defer execution of a spending or tax provision after a rescission proposal is voted down by one or both Houses of Congress would presumably not further, except in the most unusual of circumstances, the purposes of the Act. Statutorily requiring or triggering termination of the deferral, however, on a negative vote on the President’s rescission proposal in either House of Congress would raise a serious constitutional issue under *Chadha*, which held that any action by Congress that has “the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch” is a legislative action that must conform to the

Accordingly, if at any time during the pendency of the deferral period, the President changes his mind about the deferred spending or tax provision, or if a successor President disagrees with his predecessor's deferral decision, the President would be free to terminate the deferral and execute the provision. Likewise, if Congress rejects the President's rescission proposal, the President would be required to make the funds or tax benefits available no later than the end of the deferral period -- which, again, cannot exceed 180 days. Thus, deferral of a spending or tax provision under the bill does not rescind or otherwise prevent the provision from having legal force or effect. To the contrary, the provision remains "law" during the deferral period, and it must be executed at the moment the deferral period ends, unless Congress itself has enacted a new law rescinding it.

The congressional practice of vesting discretionary authority in the President to defer, and even to decline, expenditure of federal funds has been commonplace since the beginning of the Republic, and its constitutionality has never seriously been questioned. Indeed, the First Congress enacted at least three general appropriations laws that appropriated "sum[s] not

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bicameralism and presentment requirements of Article I, Section 7, of the Constitution. *INS v. Chadha*, 462 U.S. 919, 952 (1983). As framed in the bill, however, the deferral provisions would not raise this concern under *Chadha* even if the President felt bound in good faith (as he presumably would) to terminate any deferral at the moment that either House voted down his rescission proposal.

exceeding” specified amounts for the government’s operations. *See* Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. *See* Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1579 (1974). By appropriating sums “not exceeding” specified amounts, Congress gave the President discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. *See, e.g.*, H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) (“Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity.”)

The First Congress also enacted laws providing for “lump-sum” appropriations – that is, appropriations for the operation of a department that do not specify the particular items for which the funds were to be used. The President was thereby given discretion not only with respect to how much of the appropriated sum to spend, but also with respect to its allocation among authorized uses. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937) (“Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated governmental agencies.”). As the Supreme Court has

noted, “a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.” *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted). And the constitutionality of such lump-sum appropriations “has never been seriously questioned.” *Cincinnati Soap Co.*, 301 U.S. at 322.

Congress has typically enacted lump-sum appropriations when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic or military crisis. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135, 136 (1972). During the Great Depression, for example, Congress granted the President broad discretion to “reduce . . . governmental expenditures” by abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)). All appropriations “unexpended by reason of” the President’s exercise of his reorganization authority were to be “impounded and returned to the Treasury.” 47 Stat. 1519.

In 1950, Congress vested the President with general authority to establish “reserves” – that is, to withhold the expenditure of appropriated funds – in order “to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments.” General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Similarly, the Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, §§ 202(a), 203(a), 82 Stat. 271-72, authorized the President to reserve as much as \$6 billion in outlays and \$10 billion in new obligation authority, with no restrictions on the President’s discretion regarding what spending to reduce. §§ 202(b), 203(b), 82 Stat. 272. *See also* Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

And in the Impoundment Control Act of 1974 (ICA), 2 U.S.C. 681 *et seq.*, Congress distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of spending of appropriated funds). *See* 2 U.S.C. 682(1), 682(3). While generally authorizing the President to carry out deferrals, *see* 2 U.S.C. 684 (1982), the

Act prohibited the President from engaging in unilateral rescissions.

Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982).

In sum, when Congress has passed lump-sum appropriations bills, or when it has given the President general authority to reduce government spending below appropriated levels, Congress has largely freed the President to exercise his own judgment regarding which spending programs to reduce and how much to reduce them. And while the scope of authority vested in the President has varied in response to changing legislative judgments about the need for Executive Branch discretion, the extent of the Executive's spending discretion has always been regarded, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

In the *Clinton* case, the Government's constitutional defense of the 1996 Line Item Veto Act relied heavily on this long interbranch tradition of presidential spending discretion. The Government argued that the President's cancellation power was not a unilateral power of repeal, but rather was simply, "in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures." Gov. Br. at 40. The Act merely granted the

President general discretionary authority that is materially indistinguishable, the Government argued, from the specific discretionary authority routinely granted to the President in “lump sum” appropriations measures since the days of President Washington.

But the dispositive distinction, as noted previously, between a lump-sum appropriations statute and the Line Item Veto Act was that the former grants the President discretion in the *implementation* of the spending measure, while the Line Item Veto Act granted the President discretion to *extinguish* the spending measure. The President may exercise lump-sum spending discretion at any time during the appropriation period, and if the President decides not to spend some or all of the appropriated funds, the authority to spend the funds -- that is, the law itself -- remains in place until it expires in accord with the terms of the statute. The President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision not to spend in light of new information, further experience, or reordered priorities. Not until the appropriation law expires, or is repealed in accord with Article I, is the President’s spending discretion extinguished. In short, discretion over spending operates on the funds, not on the law authorizing it. In contrast, the President’s cancellation discretion under the 1996 Line Item Veto Act operated directly on the law authorizing

the spending, effectively revising its text to strike the spending or tax provision itself, permanently. And if the President (or his successor) subsequently changed his mind about a cancelled item, he was powerless to revive it.

Accordingly, the Supreme Court in *Clinton* concluded that the President's cancellation power under the Line Item Veto Act crossed the constitutional line between traditional discretionary spending authority and lawmaking: "The critical difference between [the Line Item Veto Act] and all of its predecessors . . . is that unlike any of them, this Act gives the President a unilateral power to change the text of duly enacted statutes." 524 U.S. at 446-47.

Nothing in the Legislative Line Item Veto Act of 2006, however, even arguably grants the President the unilateral power to change the text of a duly enacted statute. Indeed, the deferral authority that would be vested in the President under the bill is actually *narrower* than the spending discretion that Congress has routinely accorded the President throughout the Nation's history. Again, a deferral under the Bill can last no longer than 180 calendar days, and immediately thereafter the President is obliged to execute the spending or tax provision for which he has unsuccessfully sought congressional rescission. The possibility (however remote) that the

appropriation statute could expire during the period in which spending has been deferred does not alter this analysis. The President's discretionary authority to terminate the deferral and to execute the spending provision at issue would remain in full force and effect right up until the moment that the appropriation statute expired under its own terms.

The constitutional validity of the President's deferral authority under S. 2381 can be brought into sharper focus by hypothesizing an appropriations statute in which each individual spending or tax benefit item is accompanied by its own specific proviso authorizing the President to defer its execution for up to 180 days pending congressional resolution of a presidential rescission proposal. The constitutional authority of Congress to condition the expenditure or obligation of federal funds in this manner is clear. The bill would merely make such presidential deferral authority generally applicable rather than specifically targeted. And it is clear that the President's deferral authority under S. 2381 would act only as a *default* rule, for nothing in the bill purports to prevent Congress from determining that the President's deferral authority shall not apply to a particular spending or tax benefit measure or any portion thereof in the future. *See Raines*, 521 U.S. at 824 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act.").

The short of my testimony is this: The Supreme Court's decision in *Clinton* recognizes and enforces the constitutional line established by Article I, Section 7, between the power to exercise discretion in the making, or unmaking, of law and the power to exercise discretion in the execution of law, which in the spending context has historically included the power to defer, or to decline, expenditure of appropriated funds. Congress cannot constitutionally vest the President with the former, but it can the latter, and has done so repeatedly throughout our Nation's history. In my opinion, the powers granted the President under the Legislative Line Item Veto Act of 2006 fall safely on the constitutional side of that line.

Again, Mr. Chairman, I appreciate this opportunity to share my views with the Committee.

Chairman GREGG [presiding]. Thank you very much, Mr. Cooper. I have read your statement. I have read Dr. Marron's statement also. I wish I could have here to hear the entire statement in person, but we did have this vote and we did not want to hold you folks up.

Dr. FISHER.

**STATEMENT OF LOUIS FISHER, SPECIALIST AT THE LAW  
LIBRARY, LIBRARY OF CONGRESS**

Mr. FISHER. Thank you, Mr. Chairman.

I will summarize the major points I have in my paper. As I indicated in my paper, I appreciate that the motivation for this bill would be to take care of what is considered unnecessary spending and high deficits. I think the history we have of this, the different studies that are available and the experience also during the Clinton Administration with the item veto, I think the evidence is very strong that not much would be saved through this process and not much of a dent in the deficit.

So on the economic side of the budget issues, I do not think there is going to be a material difference. My point would be that the major impact would be on constitutional balance here and institutional strengths.

Mr. Cooper has just given a very good analysis, and I read it before I came here, on the impact of the Supreme Court decision in the Clinton case. I would make the point that I think a Member of Congress has to do more than to look at case law or to anticipate how a court would decide. You take an oath to support and defend the Constitution. I think the framers anticipated that each branch would take care of itself.

Which means that regardless of even if after obviously there being changes in this bill, even after those changes if you felt comfortable that the bill would pass muster under the Clinton decision, I do not think that is enough. I think you have to then say what does this do to you as an institution? What does this do to you in your capabilities to discharge your constitutional responsibilities?

I say this because I think the framers did not believe that individual rights and liberties were to be protected solely by the judiciary or through litigation. I think they believed strongly that the best protection for rights and liberties was the way you structure Government. And much of that is the separation of powers and the checks and balances and the strength of Congress to watch for abuses both within itself and outside itself.

I think the bill, as drafted, and even I think after it would be amended in markup, does damage to Congress as an institution. First of all, we are talking about the spending power always associated with democratic Government.

Second, I think the passage of the bill would send a very clear signal that Congress is admitting that it is not responsible and it cannot adequately do its job and it is setting up a process to give a President the chance to send back to it what the President considers wasteful spending. I noticed that the language OMB says that the President could single out "unjustified items".

Well, Congress decided when it passed it that it was justified. So why should we have a process where the President alone is the one to decide what is justified and what is not justified?

So the Congress, by passing a bill like this, would be saying that we do not have a process here where we are responsible. I think that sends a bad message inside the institution that the members do not feel adequate to do their job and need a President to send back a list of things that the President decides are unjustified.

My work over the decades has been on Presidential spending power and I do not see myself that the President has a really terrific track record in being the fiscal guardian. My impression is that most of the big spending items come out of the executive branch. Most of the Federal highway programs or space programs or supercolliders or supersonic transport, those come out of the executive branch.

I think when we get in trouble in terms of high deficits and so forth, to me my impression is basically what the President has done, not what Congress has done. And on the whole I think what happens, for both legal reasons and political reasons, Congress seems to stay pretty much around the aggregates that the President has submitted. You change the priorities, of course. But the size of the deficit, the size of the spending and so forth is basically what you get up front with the submission.

So why we would say that the President is a special guardian of the purse is hard for me to understand.

How the item veto would operate, I think, would be damaging to Congress. The President would send up a list. If you support the list, if you approve it, then that sends another signal that indeed there were wasteful things in the bill you presented to the President and the President, you agree, was good to send up the items and now they are going to be canceled.

The other choice is for you not to approve the President's list, which then the President could say I have sent up a list of wasteful items and I cannot get Congress to approve. And no one in the country is going to be able to look at that list and make an intelligent decision as to whether those items are wasteful or not. It is all going to be rhetoric.

We have already talked today about this being a tool for the President to contact members and say they are trying to preserve that project in your state and they just incidentally want to know what you are going to do on a nomination or a treaty or the legislation. It does not have to be the President calling you. It could be a staff person calling a staff person and so forth. You get the message pretty soon. That is why a process like this could end up spending more money because each side would agree.

How much saved? I do not think much. I have all the details in my statement. The GAO study and the Clinton experience.

Another thing that is hard to predict here is every time you change procedure you change behavior. So if you had a process set up where the President could siphon off certain items and send them back, would that really help accountability? Or why would not, with a process like this, Members of Congress be even freer, if you added 100 things that the President did not want, why not add 200 or 300 things, since he has a process to send them back? So I think we lose visibility and accountability.

I just mentioned in my statement about targeted tax benefits in the Clinton Administration. I just thought it was interesting. You would think that any targeted tax benefit for 100 or fewer members would be sort of a definition of a special interest. But President Clinton had 70 opportunities to cancel those. He picked two and he made the point, what I think is valid, that just because something is for a special interest does not mean it is not in the

national interest. Most of those proposals came out of the Treasury Department. They were approved. So it is not as though Members of Congress are tucking these in. These had good understandable support.

I think the last point I made in my statement is are you delegating spending authority or also legislative authority because of this word that we have talked about here today, modified. It sounds to me it is not just sending up a list. It is allowing the President to rewrite. So not only does the President get a chance to drive your legislative calendar through submissions and packages but through modification. The definition of the legislative power is being able to shape and modify. You would not have that at all. The President would have that entirely. Your choice would be just to vote up or down without any chance of amendment.

Finally, my major point is I would only say that if you are worried about spending and you are worried about deficits, the answer is not through a process like this. The President has tremendous control over both his veto and his threatened veto. When a bill is in conference they can say we will veto it unless you take out these items. That goes on all the time.

As I mentioned, the biggest power the President has is submitting a responsible budget. That governs how Congress acts. If you are worried about aggregates, I think the pressure has to be on the President to submit a responsible budget.

Thank you.

[The prepared statement of Dr. Fisher follows:]

**STATEMENT BY LOUIS FISHER,  
SPECIALIST AT THE LAW LIBRARY,  
SENATE COMMITTEE ON THE BUDGET,  
MAY 2, 2006  
“A PRESIDENTIAL ITEM VETO”**

Mr. Chairman, I appreciate the opportunity to testify on legislation to grant the President a line-item veto.

I recognize that supporters of the item veto may regard it as a useful tool for cutting spending, eliminating certain tax provisions, and helping to reduce the level of federal deficits. I think those objectives are unlikely to materialize, for reasons I will give, but more important to me are the values of protecting institutional and constitutional interests. I am concerned that an item veto would damage Congress as an institution and weaken our system of separation of powers and checks and balances. Even if some budgetary savings resulted (minimal at most), the political cost to our system of self-government would be substantial.

**Safeguards for Liberty and Freedom**

How we structure government has a fundamental impact on individual rights and liberties. To the framers, it was second nature that the protection of individual rights did not start with trust in government or the good intentions of public officials. Protection came from dispersing power and creating a system of effective constraints on governmental abuse. Any weakening of those institutional checks represents a threat to individual liberties. Especially is that so with the spending power. In his concurrence in the item veto case of *Clinton v. City of New York* (1998), Justice Kennedy wrote: “Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. . . . [The framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term . . .” 524 U.S. at 450.

**Damaging Congress as an Institution**

The item veto does damage to the institutional interests of Congress in several ways. First, it transfers to the President part of the power of the purse that has always been associated with a democratic system of self-government. James Madison explained in Federalist No. 58 that the power of the purse represents the “most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” Members of Congress should think long and hard before transferring any of the spending power to the President.

Second, the mere enactment of an item-veto bill would damage Congress. It sends a message to the public that Congress is irresponsible with its legislative work and has decided to depend on the President to eliminate items that should never have been included in the bills presented to him. Probably even worse, it communicates to lawmakers that they are not up to the task and cannot properly conduct their constitutional duties. The assumption seems to be that the President is the more trusted guardian of the purse and the far better judge of what is in the national interest. I don't know why we should believe that. If we look at the chronic problems of budget deficits over the last two or three decades, what evidence supports the view that the President is more responsible in fiscal affairs?

Third, consider how the item veto process would operate. The President submits to Congress a list of items to be cancelled. In taking that action, the President would automatically receive credit in the public arena for fighting against waste. At the same time, Congress would be rebuked for having enacted the supposedly wasteful items. If Congress were to now disapprove the bill drafted by the Administration to eliminate the items, it would receive a second rebuke. The President could go to the public and admonish Congress for failing to support his effort to delete unwanted and unneeded funds. If Congress has an interest in building support and credibility with the public, this is a procedure to avoid.

Fourth, the President would have a new tool to control lawmakers and lessen their independence. He or his aides could call Members of Congress to alert them that a particular project in their district or state might be on a list of programs scheduled for elimination. During the phone call, the Member would be told that the Administration actually thinks the project is a good one and should be preserved. The Member is assured that the Administration will do everything it can to see that the project is not included on the final list. The Administration could then redirect the conversation to determine whether the Member is willing to support a bill, treaty, or nomination desired by the President. That political leverage diminishes Congress as a coequal branch.

#### **How Much Would Be Saved?**

What we know about the item veto indicates that the amount saved would be quite modest and certainly not a remedy for annual deficits in the range of \$300 billion or \$400 billion. The experience with the item veto, both conceptually and in actual practice, suggests that the amounts that might be saved would be relatively small, in the range of perhaps one to two billion a year. Under some circumstances, the availability of an item veto could actually increase spending. The Administration might decide to withhold the use of an item veto for a particular program if Members of Congress agreed to support a spending program initiated by the President.

In January 1992, the General Accounting Office (GAO) released a report that estimated the savings that could be achieved through an item veto. The study assumed that the President would apply the item veto to all the items objected to by the Administration in its Statements of Administration Policy (SAPs). GAO estimated that

the savings over a six-year period, during fiscal years 1984 through 1989, could have been \$70 billion.<sup>1</sup> I was asked to review the GAO study. Looking at the same data, I concluded that the savings over the six-year period would have been not \$70 billion but \$2-3 billion and probably less. I also suggested that instead of reductions the process could lead to increases through executive-legislative quid pro quos.<sup>2</sup>

Comptroller General Charles A. Bowsher, writing to Senator Robert C. Byrd, later acknowledged that actual savings from an item veto “are likely to have been much less” than the \$70 billion originally projected. Actual savings “could have been substantially less than the maximum and maybe, as you have suggested, close to zero.” Mr. Bowsher also discussed situations “in which the net effect of item veto power would be to increase spending.” Such a result could occur if a President “chose to announce his intent to exercise an item veto against programs or projects favored by individual Senators and Representatives as a means of gaining their support for spending programs which would not otherwise have been enacted by the Congress.”<sup>3</sup>

Another helpful measure in gauging how much an item veto would reduce federal deficits comes from the Clinton Administration. President Bill Clinton used the authority in the Line Item Veto Act of 1996 to cancel a number of discretionary appropriations, new items of direct spending, and targeted tax benefits. The total savings, over a five-year period, came to less than \$600 million. His cancellations for fiscal year 1998 were about \$355 million out of a total budget of \$1.7 trillion.<sup>4</sup>

The totals would have been somewhat higher had all of his recommendations been accepted by Congress. He canceled 38 projects in the military construction bill, with an estimated savings of \$290 million over a five-year period. At hearings held by the Senate Appropriations Committee, testimony was received from the Air Force, the Navy, and the Army. The military witnesses contradicted claims made by the Administration in justifying the cancellations.<sup>5</sup> The votes against the cancellations, in a joint resolution of disapproval, were 69 to 30 by the Senate and 352 to 64 by the House. President Clinton vetoed the resolution, but Congress managed override votes of 78 to 20 in the Senate and 347 to 69 in the House.

Another proposed cancellation by the Clinton Administration, estimated to save \$854 million over five years in the federal retirement system, was withdrawn after Senator Ted Stevens, chairman of the Appropriations Committee, and Senator Pete Domenici, chairman of the Budget Committee, challenged the legal basis for the

<sup>1</sup> U.S. General Accounting Office. *Line Item Veto: Estimating Potential Savings*, GAO/AFMD-92-7, January 1992.

<sup>2</sup> My CRS memorandum of March 23, 1992 is reprinted at 138 Cong. Rec. 9981-82 (1992).

<sup>3</sup> Letter of July 23, 1992 from Charles A. Bowsher, Comptroller General of the United States, to Senator Robert C. Byrd, chairman, Committee on Appropriations, reprinted at 142 Cong. Rec. 6513 (1996).

<sup>4</sup> *The Line Item Veto*, hearing before the House Committee on Rules, 105th Cong., 2d Sess. 12 (1998). Testimony by June E. O'Neill, Director of the Congressional Budget Office.

<sup>5</sup> 143 Cong. Rec. 22133-34 (1997) (statement by Senator Ted Stevens). For the Administration's justifications, see *Weekly Compilation of Presidential Documents*, vol. 33, pp. 1501-02 (1997) and *Public Papers of the Presidents*, 1997, II, p. 1301.

cancellation. The Administration had proposed the action as a cancellation of discretionary budget authority, but the two Senators determined that the change in federal retirement benefits did not constitute “budget authority.” Administration officials later admitted that President Clinton did not have legal authority to cancel funds in the retirement program.<sup>6</sup>

In his testimony on March 15, 2006 before the House Rules Committee, Acting CBO Director Donald Marron cautioned against expecting much savings from an item veto. The impact of item-veto legislation, he said, may “simply shift spending priorities to those favored by the President” and introduce “subtle, indirect effects” on the legislative process and fiscal policies.<sup>7</sup> Unless there is a political consensus between the two branches to establish fiscal discipline, “the proposed changes to the rescission process included in H.R. 4890 are unlikely to greatly affect the budget’s bottom line.”<sup>8</sup>

#### **Procedural Changes Alter Political Behavior**

It might be argued that the procedures contemplated by S. 2381 would produce some material savings, even if modest. Let us assume that presidential pressure through this procedure will prompt Congress to support his recommendations to reverse some legislative decisions. What would be the final result? Suppose that Congress currently adds 150 items each year that the President objects to. Through the item-veto authority, he recommends that 100 be rescinded. Of that amount, Congress agrees to support the cancellation of 50. The progress appears to be a net reduction from 150 to 100. But it all depends on what Members of Congress do with the availability of an item veto. A new dynamic has been added. Why shouldn’t Members increase the number of congressional add-ons from 150 to 250? The President responds by recommending that 125 be rescinded. Congress supports him on 75. The result: a net reduction from 250 to 175. That isn’t progress. It’s more like a shell game and far removed from the “transparency” used to describe the goals of item-veto legislation. Functioning in this manner, the process reduces congressional responsibility.

#### **The Source of Targeted Tax Benefits**

The experience of the Clinton Administration with targeted tax benefits is of interest because it challenges a common assumption that these provisions typically come from lawmakers who seek to assist a favored and powerful constituent. Under the 1996 item veto law, the President was authorized to cancel “any limited tax benefit” — defined to mean any revenue-losing provision that provided a federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries, or any federal tax provision that provided temporary or permanent transitional relief for 10 or fewer beneficiaries.

<sup>6</sup> Stephen Barr and Joan Biskupic, “Clinton Recants on Item Veto of Pension Switch,” *Washington Post*, Dec. 20, 1997, at A1. See also 62 Fed. Reg. 54338 (1997) for the cancellation proposal.

<sup>7</sup> CBO Testimony, Statement of Donald B. Marron, Acting Director, “CBO’s Comments on H.R. 4890, the Legislative Line Item Veto Act of 2006,” before the Subcommittee on the Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, March 15, 2006, at 1.

<sup>8</sup> *Id.* at 6.

Out of 79 opportunities to cancel limited tax benefits, President Clinton canceled only two. Reporters questioned this modest use. One reporter asked him why the statutory authority had not been used more vigorously against a limited tax benefit that “sounds like the very definition of a special interest goodie.” President Clinton responded: “Well, it’s certainly the definition of a special interest group, but not all special interests are always in conflict with the general interest. If that were true, our country would not have survived for over 200 years.”<sup>9</sup> He also explained that 30 of the items had been recommended by the Treasury Department to fix flaws in current law, and another dozen or more were put in by Congress by agreement with Treasury to fix other procedural problems.<sup>10</sup>

#### **Delegating Legislative Authority as Well?**

The comments above discourage the expectation of achieving significant savings through an item veto. However, language in S. 2381 appears to offer unusual opportunities for savings in entitlement programs. The 1996 statute authorized the President to cancel “any item of new direct spending,” defined to mean budget authority provided by law (other than an appropriation law), entitlement authority, and the food stamp program. As specified in Section 1021(a), the President was required to “cancel in whole.” There were thus two restrictions: cancellation would be directed toward *new* direct spending, and the cancellation would have to be in whole not in part.

Section 1021 of S. 2381 authorizes the President to propose the rescission of any dollar amount of discretionary budget authority or the rescission, “in whole or in part,” of any item of direct spending. That seems to authorize not merely the cancellation of an entitlement but some alteration of the legislative language adopted by Congress. Later in the bill, on page 13, the terms “rescind” or “rescission” are defined to mean “to modify or repeal a provision of law to prevent (A) budget authority from having legal force or effect; (B) “in the case of entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect”; and (C) in the case of the food stamp program, to prevent the specific provision of law that provides such benefit from having legal force or effect. What is the meaning here of “modify”? It appears to be something more than repeal. Does it contemplate giving the President authority to rewrite mandatory programs enacted by Congress?

It is true that S. 2381 only authorizes the President to *propose* modifications. His recommendations must be enacted into law by Congress. Still, the President has decisive advantages in changing legislative language. He may pick and choose as he wishes, pursuing whatever modification is in his interest. For its part, Congress must vote his proposals up or down. The fast-track procedure prohibits any amendments by Congress, either in committee or on the floor. The essence of legislative authority is the capacity to shape a product. Under S. 2381 the President can do that. Congress cannot.

<sup>9</sup> 33 *Weekly Compilation of Presidential Documents* 1209 (1997).

<sup>10</sup> *Id.* at 1226.

### Further Analysis of S. 2381

Several features of the Senate bill would shift significant political power to the President. First, the bill places no restrictions on the number of rescission proposals he may submit to Congress. It could be one message per bill or a hundred per bill. Section 1022(a) of the 1996 statute directed the President to transmit a cancellation proposal “[f]or each law.” S. 2381 appears to allow the President to package proposed rescissions from different laws. If Congress decided to withhold approval, nothing in S. 2381 prevents him from submitting it another time. The result is that the President gains substantial control in driving and determining the legislative schedule.

Second, S. 2381 permits the President to defer spending for 180 calendar days while Congress considers his proposal. It is not clear why 180 days are needed. Under the expedited procedures, committees must act within five days and floor action must be completed within the next five days. One chamber could complete the process within two or three weeks. Let us say 20 days. If that chamber decides not to approve the proposal, why shouldn’t the funds be released for obligation? Why continue to block their expenditure for the next 160 days? The bill allows the President to release the funds if he “determines that continuation of the deferral would not further the purposes of this Act.” The branch that decides whether the purposes are furthered is the President, not Congress.

Third, there is no time limit when the President must submit his item-veto proposal to Congress. The 1996 statute required the President to notify Congress of his recommendations to cancel items “within five calendar days (excluding Sundays)” after the enactment of a law containing discretionary budget authority, new direct spending, or limited tax benefits. S. 2381 has no deadline for presidential action. Suppose a bill reaches the President 80 days into a fiscal year. He then takes 120 days to notify Congress of his proposal and proceeds to defer obligation for 180 days. If the funds are one-year money they would lapse. The consequence: a virtual cancellation by the President without any congressional action or support.

The problems identified here could be taken care of by changes to the bill: placing limits on the number of rescission bills the President may present to Congress, prohibiting repetitive requests, reducing the 180 days to something like 45, requiring the President to submit his requests within a specified number of days (such as 10 or 15), and eliminating the authority to “modify” language in mandatory spending bills. Those changes would improve S. 2381 but would not, in my opinion, address the serious institutional damage done to Congress and representative government.

### Conclusions

Failure to enact some type of item-veto legislation does not prevent the President from exercising close control over the level of federal spending and the size of the annual

deficit. Through the regular veto power, the President can instruct Congress that unless it removes a number of items in a bill that is in conference, he will exercise his veto. Threats of that nature are regularly employed to control the contents of legislation. The President may announce that if a bill exceeds a certain aggregate amount, he will veto it, again putting pressure on Congress to reshape the bill to the President's satisfaction. At any time the President may submit a rescission bill to Congress under the 1974 Budget Act procedure. Congress is at liberty to ignore his request, but a determined President can apply sufficient pressure and appeals to the public so that legislative inaction comes at a cost. Just as important, the President is the one who submits the plan for a national budget and it is within his power to recommend a budget that balances expenditures and revenues in such a way as to minimize or eliminate budget deficits. Presidential leadership of that form has far greater impact on spending and deficits than item-veto authority.

Chairman GREGG. Thank you, Dr. Fisher.

I appreciate Senator Allard taking over while I was gone. So why do we not go to Senator Allard for questions, then Senator Conrad, and then back to me.

Senator ALLARD.

Senator ALLARD. Thank you, Mr. Chairman. I want to thank the panel for their testimony.

Dr. Marron, on the fiscal note of the previous enhanced decision rescission, referred to as line item veto, I think that was a positive

fiscal note if I remember correctly, then one that ended up passing and then got challenged in the Supreme Court.

Have you looked at this particular piece of legislation? Are we looking at a positive or negative fiscal note? Could you give us some reasons why, whatever your decision might be, if you have reached that decision?

Mr. MARRON. Certainly. So in my testimony I refer to what evidence is available on—I believe you are referring to the items that were line item vetoed in essence by President Clinton.

The amounts we had were 82 cancellations by the President that would have saved about \$355 million in 1998 and just under \$1 billion over 5 years. Some of those were overturned by Congress, some were overturned by courts, and so the actual net was somewhere in the neighborhood of \$600 million.

As to whether that is a large number or not depends on your perspective. It is obviously relatively small relative to the overall size of the budget and spending at that time. But on the other hand it is still \$600 million.

Senator ALLARD. Would you expect the same dynamics with this new piece of legislation if it were to pass?

Mr. MARRON. It is difficult to predict because a lot will depend on how the President would choose to exercise it and how the Congress would respond. As I said, the history of the current rescission process suggests that it is not used that much. This proposal before us would give the President more incentive to use it, so you might imagine it would be used more. But then you would still face the question about whether or not the Congress would go along.

Senator ALLARD. Have you had a chance to look at the fiscal note of the previous veto that was ruled unconstitutional by the Court?

Mr. MARRON. I am sorry, when you say fiscal note?

Senator ALLARD. The fiscal note upon—the line item veto that was eventually adopted by the Congress and then went before the Court, it had a positive fiscal note on it, if I recall.

Mr. MARRON. You mean it had a net savings, as it was used?

Senator ALLARD. That is correct.

But then as we heard in testimony from Mr. Cooper, the argument was made it permanently eliminated the program, to put it in plain English. Was the fiscal note based on that, do you recall? Or was it based—and would you anticipate a future fiscal note would have that same—would they balance that against the previous note that was presented to the Congress from the other line item veto legislation being considered, as opposed to this one here?

Mr. MARRON. I guess I am not entirely sure what you mean by fiscal note.

Senator ALLARD. Well, when you make—you look at the impact of the budget.

Mr. MARRON. Oh, you mean the cost impact.

Senator ALLARD. Yes.

Mr. MARRON. So in terms of the provisions that end up being vetoed?

Senator ALLARD. Yes.

Mr. MARRON. For discretionary items, we would score the 1-year discretionary amount of money because then Congress has the opportunity to revisit the level of discretionary spending the following

year. For any mandatory item that would flow through the baseline, we would score it for however long the provision would have existed.

Senator ALLARD. How would you project in this piece of legislation that passed, how would you project its cost out over 5 years?

Mr. MARRON. So for this provision itself, one of the fundamental constraints that we operate under at CBO is that we cannot predict the behavior of Congress. So we have to take current law as it is written.

So to make a decision about how this proposal would affect the 10-year budget window, that would require a judgment on our part not just of how the President would use it but then how the Congress would respond. And so that is not something that we can directly go out and score.

There might be some cost of implementing it that we might evaluate. But beyond that, it is not something that we could score.

Senator ALLARD. Thank you.

Mr. Cooper, in your argument, the main argument was before the Supreme Court. Is your view that this piece of legislation we have now, based on the arguments by the Supreme Court in the previous legislation, would that pass constitutional law?

Mr. COOPER. That is my view of it, Senator Allard. As I mentioned, I was involved in the litigation of both the *Raines* case, representing Senator Byrd and other members of this body, and in the *Clinton* case in which the Supreme Court did strike down the previous 1996 Line Item Veto Act.

And its central basis was the determination that to cancel an item of spending or a tax benefit was to eliminate it from the law as surely as a repeal by this body would. So a President would not be able to, or a successor President, would not be able to think differently about that decision, which is the key difference between a discretionary authority to spend or not to spend, which this body, this Congress has accorded to the President since the days of President Washington.

And Presidents have been able to exercise that discretion with essentially the same result, moneys not spent do not get spent in the same way that moneys canceled do not get spent.

But the difference is the difference between a President canceling or repealing a law which only this body can do and simply exercising a discretion that this body has given to him to exercise. That is the constitutional difference. And I think it is an outcome determinate difference, Senator, in these proposals.

And so it is only with great reticence that I venture into disagreement with Senator Byrd, my former client, on a separation of powers issue but I do see it differently.

Senator ALLARD. Thank you very much for your response. My time has expired, Mr. Chairman.

Chairman GREGG. Thank you, Senator Allard.

Senator CONRAD.

Senator CONRAD. Thank you, Mr. Chairman.

And I want to thank this group of witnesses. We appreciate very much your being here. I, too, apologize for being called away to a vote. But I did have a chance to review all of your testimony before this session.

Dr. Fisher, I started out this session by talking about the single greatest concern I have about this measure is a transfer or power from the legislative branch to the executive branch. Do you see that danger in this provision? And what tells you that there would be a transfer of power if such a measure were to pass?

Mr. FISHER. I think a transfer of power is both what you do in the bill language, and also I would say transfer of power is in the perception of individual members and the public. So I was concerned, in my statement for the Committee, that the mere passage of the bill would send a signal that Congress is not up to the task, that the President is. That is a perception. And to me it is a very damaging perception. I happen to not believe that it is true. I think the record of Congress is as good as the President, if not better. So that is a perception.

And then the actual, beyond the perception, is what we talked about here is the way this would play out, the President getting credit when he submits this. If you approve it, he gets more credit. If you do not approve it, he gets credit for putting it to you. And then, of course, there is the leverage we talked about.

So I think on multiple levels there is a weakening of Congress as an institution. When you do that, you are weakening representative government and the placement by the framers of the spending power in the legislative branch. So I see it as very damaging.

Senator CONRAD. Let me just ask you, on the question of leverage, because I have been here now 20 years and I have had Presidents come at me many different ways in order to persuade me to support a position or reject a position.

Do you see it is possible that the scenario that I described at the beginning, that the President might be in conversation with a member, or as you described it could be a staff member, and just linking the two—that is, perhaps the President has a controversial nominee before the Senate, and at the same time is considering rescissions on members' spending matters that are critically important back home.

I come from Bismarck, North Dakota. We have a bridge called Memorial Bridge. That bridge desperately needs replacing. It is the gateway to the capital city in Bismarck, North Dakota. That bridge is being replaced on the Highway Bill.

I do not think it is too far-fetched to think a President or his staff might let it be known to this member on a controversial appointment that he was at the same time considering building that Memorial Bridge. And maybe that would be a matter of rescission that would come before Congress.

Does that sound far-fetched to you?

Mr. FISHER. No, I think it is a real threat. There is always this effort of the two branches eventually to coordinate and find a consensus. But under the process in this bill, I think you are under pressure to play ball the way the President wants to play ball. And if you do not want to there is a penalty there.

Senator CONRAD. Dr. Marron—thank you.

Dr. Marron, you indicated that during the period that President Clinton had rescission authority only \$600 million was rescinded over a 5-year period? Is that correct?

Mr. MARRON. That is correct.

Senator CONRAD. What was the total budget during that 5-year period? Do you know?

Mr. MARRON. In 1998, just for that year alone, it was \$1.7 trillion. So multiply that by five.

Senator CONRAD. So that would be \$8.5 trillion over 5 years?

Mr. MARRON. Yes.

Senator CONRAD. \$8.5 trillion. So \$600 million of \$8.5 trillion is an asterisk, almost, is it not?

Mr. MARRON. It is small in relative terms, yes.

Senator CONRAD. It is a very modest amount. It really made no significant difference in the trajectory of Federal spending. Of course, in that time we were not having deficits. We were having surpluses, were we not?

Mr. MARRON. Toward the latter end of that period, yes.

Senator CONRAD. So the fact is it made virtually no difference.

I would go to Mr. Cooper if I could. My time is—just one final question, if I could. I thank the Chairman.

Mr. Cooper, have you looked at this language with respect to this 180 day deferral and how that could play out with multiple requests and just continuing to extend? Does that cause you a question in terms of constitutionality?

Mr. COOPER. I have looked at it, Senator Conrad. And frankly, when I first looked at it, it was not all that clear to me that it did authorize serial rescissions with respect to the same item.

Also, frankly, it is hard to imagine how such serial rescissions with respect to the same item would be consistent with what appears to be, on the face of the bill, its central purpose, which is simply to give this body the chance to vote up or down on the President's proposal and consider his opinion as to whether or not a certain spending measure is well taken or not. One opportunity and then he either wins or—

Senator CONRAD. After listening, though, to the testimony this morning—

Mr. COOPER. It is pretty clear that the Administration's witness agreed that the President, that the bill would, in fact, authorize serial rescissions with respect to the same item.

Senator CONRAD. Could you help me and reflect on how a court might see that provision?

Mr. COOPER. Well, I am reluctant to predict how a court would see it, but based on my own study of the authorities, Senator Conrad, I do not think it would represent a constitutional threat.

Senator CONRAD. It would not fail on the constitutional question?

Mr. COOPER. On the constitutional issue.

Senator CONRAD. It may fail on other matters. It may fail as a question of policy, which I would strongly argue.

Mr. COOPER. Yes.

Senator CONRAD. But would not fail on the constitutional question.

Mr. COOPER. And it appears to me that nobody on either side of this table wants to bring about the kinds of abuses or authorize the kinds of abuses that apparently might be possible under the bill, as written. It would be a simple matter, I think, to address.

Senator CONRAD. I thank you for that.

I want to thank the witnesses. Dr. Fisher, did you have a final—

Mr. FISHER. On what Mr. Cooper just said. I would think if you have a fiscal year beginning and way into the fiscal year 130 days, and then the President gets a bill, and there is no time limit on when he has to send it up. And when he sends it up and then you add 180 days, the fiscal year is over and the money has been lost. It is expired.

I just think that is flat out against the Clinton case. I just cannot imagine the Court allowing the President, through that process, to terminate something without any congressional action. It is the Clinton problem.

Senator CONRAD. It strikes me that way, as well. I am not a lawyer, I would be the first went to confess. But it strikes me as he could accomplish the same purpose as what concerned the Court in the Clinton case.

I am going to thank the witnesses very much for their time, their attention, and for their contribution to the Committee.

Chairman GREGG. Thank you.

To use a legal term, that is a moot point, in my opinion, because we are obviously not going to mark up a bill which allows that to happen.

We are also not going to mark up a bill which would allow serial rescissions period. We are also not going to mark up a bill that does not give more authority in the area of tax rescission.

So many of the issues which you raised here, which are legitimately raised, I think will be addressed in the vehicle we mark up.

I think there are two points which this panel has made which I need to make note. First, the bill is constitutional, it appears.

Second, the essence of Dr. Fisher's complaint, if I understand it, is basically the perception or shift of authority and the capacity of the President to game the process potentially.

And I would accept that argument if it were not for the fact that the omnibus appropriations bills have changed the playing field. We have gone to an omnibus appropriating process around here. You can even argue that we have gone to an omnibus mandatory program process such as the Part D drug program, which was a huge bill, sections of which probably should not have been put in but were put in.

The President is put in a position where, on an omnibus bill, he is signing legislation which can spend \$300 billion or \$400 billion. In fact, he spend the entire discretionary budget in some instances, which would be approximately \$900 billion. He has no capacity to get at specific programmatic activity.

And so the chance to take what I call a second look fast track rescission process is, I think, a legitimate right that should be considered for the President. The question is how you do it without creating disproportionate authority within the executive branch.

But the one issue that has been raised, and was touched on by Senator Byrd, that I am not comfortable yet with how to address—and this is what I want to get your thoughts on. Most of the items, especially which were raised by the Senator from North Dakota in his list of eight, I think we can address.

But the one issue which does concern me is this question of whether we should give the right to amend to the rescission package when it comes up. In other words, should there be motions to strike against that package or does it have to be an up or down vote?

The BRAC Commission is really, I think, the template to look at here. The theory was if you do not have an up or down vote on the final product as presented to the Congress, the Congress will simply eviscerate it and make it a nonfunctional event.

On the other side of the coin, what limits the President's ability, if he has to send up a package where everything has to be taken and nothing can be taken out, is the fact that if he puts too much in there that has too many constituencies in opposition, then he is not going to be able to pass his package.

I think the classic example here would be agricultural issues, where log rolling has become the process by which agricultural appropriations occur, where the sugar people support the cotton people, the cotton people support the soybean people, and so on and down the road. As individual groups they do not have the authority to pass their bill, but as a log rolling exercise they always get their legislation through, some of which is quite egregious in the area of spending money.

So I guess I would be interested to know what the panel thinks about whether we should allow the package to be picked at through the motions to strike, which would address one of the key concerns that Senator Byrd had? Or whether the basic impetus or the basic influence on the President's presentation is going to be such that he is going to have to send up packages which can pass the Congress and therefore not have so many constituencies against it that it is an irresponsible package or a package which is unsalable.

Which one of those approaches is most appropriate, the one the President has chosen? Or the Byrd approach, which would be motions to strike against the package?

If we could start with Dr. Marron and move down the line as to what your thoughts would be on that.

Mr. MARRON. A lot is going to depend on what the incentives are of the President in designing what packages to send up. As I understand the proposal, the President would already have the ability to parse it up as narrowly as he would like and in principle could thereby offer up whatever he thinks are sort of the right size packages, the right combination of things to get through, and also in essence to pre-strike those things that he thinks would be problematic and that Congress would advise him would be problematic.

So I think the more that you strengthened the opportunity to strike provisions, the more you would see the President going to smaller and smaller packages that would be suggested.

Chairman GREGG. Let us say we limit the number of packages he can send up on the theory that we do not want him controlling the legislative calendar? This was a point which was made earlier, and I think it is legitimate.

So he maybe only gets the opportunity after an omnibus is sent up, to send up say two motions for rescissions and two rescission packages and they have to be—and they cannot be over a certain

threshold of spending, or something like that that does not allow him to rescind the entire exercise.

Would that address the issue or aggravate the issue?

Mr. MARRON. That would place more pressure on the President to figure out the optimal bundles to send up. He would have to exercise presumably more choice in deciding which to include in a very limited number of packages. So then it is the usual question of does the ability for the Congress to strike provisions, does that make it easier or harder for him to accomplish what he has in mind?

I would have to defer to you, actually, on that.

Chairman GREGG. Do not do that, that is a mistake.

Mr. Cooper?

Mr. COOPER. Unfortunately, I am going to have to do the same thing, Mr. Chairman, and defer to you on that. I do not think that these issues rise to the level of constitutional moment.

Chairman GREGG. I understand that.

Mr. COOPER. Whatever ultimately this body determines shall be the President's discretion in this area will be what it is. And I defer to the greater expertise of my panel members here and their understanding of this process and of the real politik that underlies it. Of course, I am sure that Mr. Smythe would have some opinions from the Administration on those issues. But I honestly do not.

Chairman GREGG. Dr. Fisher, I see you have the Dartmouth mantle, so I know you must have an answer to this question.

Mr. FISHER. I would say it might not rise to a constitutional moment, the way Mr. Cooper just said it. I think it is a constitutional moment for Congress protecting itself and whether a court would find it OK or not. I think you still have to worry, as you are, about how many packages. So I think there are a lot of things you could do to make sure there is not as much mischief and abuse.

I did like the comparison you were making with the BRAC because if you look at it the way this item veto bill would work, even if you modify it, is still looks like the President has total control over what gets in the package whereas BRAC seems like it is a multilayered process where there is a list of things and it is publicly—and people scream and shout. And eventually it comes up. And then Congress, once it comes up, it is an up or down vote.

I think the same thing goes through in the trade packages where when the implementing bill comes up with the fast track, it is no amendments, it is up or down. But before the implementing bill comes up, it comes up in some informal way and there is a lot of back channel way for Congress to participate in what the final implementing bill is.

So that part, I think, is very healthy, that give and take on an informal and formal basis, and these other BRAC-type trade agreements.

So I think obviously you can do a lot of things in this bill to place limits on what a President can do and also on the opportunity to strike certain items. There are many things you can do to adjust the executive/legislative balance.

Chairman GREGG. The problem with the BRAC, of course, was there was a commission in between the Executive and the legislative branch. The Commission held hearings. I am not sure that

that is probably constructive to the process in something like this, to put a commission in the middle of it. But it did give you an airing opportunity, which my state took advantage of and was successful with.

But the issue of whether or not you give the authority to strike as versus you have to vote up or down the package is, I think, a key issue here. So if you folks have some more thoughts on it as you are reflecting on the testimony today, we would appreciate getting your input.

There is another vote on, so we are going to have to adjourn the hearing. But I certainly appreciate your testimony. It has been very substantive and to the point and very helpful to us.

Thank you taking the time to come by.

[Whereupon, at 11:56 a.m., the committee was adjourned.]



**Statement of Michael B. Enzi**

**Senate Budget Committee Hearing:  
S. 2381, A bill to amend the Congressional Budget and  
Impoundment Control Act of 1974 to provide line item  
rescission authority  
March 2, 2006**

I would like to thank Senator Robert C. Byrd, Mr. Austin Smythe, Acting Deputy Director of the Office of Management and Budget, Dr. Donald Marron, Acting Director of Congressional Budget Office, Mr. Charles J. Cooper of Cooper & Kirk, and Dr. Louis Fisher of the Library of Congress for agreeing to testify. I also want to thank Chairman Gregg for holding this hearing today.

I am proud to be a cosponsor of S. 2381, the Legislative Line Item Veto Act, so it is easy to tell where I stand on this issue. Giving the President expedited rescission authority is not something that Congress should take lightly. However, I believe that S. 2381 will help in the ongoing battle to control spending.

The first speech I gave in the Senate chamber in 1997 was on the need for a balanced budget. At the time, I said that the federal government must learn to live within its means. If we were not saddled with such enormous debt, we would have additional revenues to invest in the people and we could reduce the tax burden for every working man and woman in this country. This is still true today. This Committee took a step in the right direction earlier this year when we voted in support of a Fiscal Year 2007 Budget Resolution that restrains spending. Although I commend Chairman Gregg for introducing and passing a budget through the Senate which cuts the deficit in half by 2009, there is more to do.

By giving the President expedited rescission authority, the President and Congress can effectively reduce wasteful spending. Under S. 2381, Congress must consider the President's rescission proposal in an expedited manner. While this bill gives the President new authority, the final decision on spending continues to lie with Congress. If Congress decides not to support the rescission package, we can, and certainly will, choose to vote no.

The line-item veto is one of a few proposals I support as part of a larger debate on budget process reform. I would also like to see Congress adopt biennial budgeting, similar to the legislative schedule my home state of Wyoming uses. I would also like to see the use of emergency spending curtailed. It is clear from the current debate on the floor of the Senate that the use of the emergency designation has gone far beyond what any person would claim is an actual emergency. Congress must tighten the definition and save the use of supplemental spending bills for true emergency situations.

As I said during my speech in the Senate, the economic future of America's families depends on what we do now. I hope that this Committee, and the Senate as a whole, will decide to support S. 2381 in an ongoing struggle to rein in spending.

Finally, to all our panelists, thank you again for taking the time to testify today.

