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Item Veto and Expanded Impoundment Proposals

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CONTENTS

SUMMARY

MOST RECENT DEVELOPMENTS

BACKGROUND AND ANALYSIS

Brief History of Impoundment
- Controversies Increase
- Impoundment Control Act of 1974
- Presidential Calls for Reform

Alternative of an Item Veto

Evolution of Expanded Rescission Proposals

Enactment of the Line Item Veto Act

Developments During the 105th Congress
- Initial Court Decisions
- The Line Item Veto in Action
- More Court Challenges
- Consideration of Alternatives to the Line Item Veto Act

Developments During the 106th Congress

Developments During the 107th Congress

LEGISLATION

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

FOR ADDITIONAL READING

Item Veto and Expanded Impoundment Proposals

SUMMARY

In recent years conflicting budget priorities and divided political control have accentuated the institutional tensions between the executive and legislative branches inherent in the federal budget process. President Clinton, like his two predecessors, called for an item veto, or possibly expanded impoundment authority, to provide him with greater control over federal spending.

Congress exercises its "power of the purse" by enacting appropriations measures, but the President has broad authority as chief executive in the implementation stage of the budget process. It is at this stage that the monies provided by Congress are actually spent by the federal government. Impoundment, whereby the President withholds or delays the spending of appropriated funds, provides one important mechanism for budgetary control during the execution stage, but Congress retains oversight responsibilities at this stage as well.

The Impoundment Control Act of 1974 (Title X of the Congressional Budget and Impoundment Control Act, P.L. 93-344), established two categories of impoundments: deferrals, or temporary delays in funding availability; and rescissions, or permanent cancellation of budget authority. With a rescission, the funds must be made available for obligation unless both houses of Congress take action to approve the President's rescission request within 45 days of "continuous session."

Consideration of impoundment reform increasingly became joined with that of an item veto for the President. Many who originally favored an item veto constitutional amendment came to embrace expanded rescission authority for the President as a functionally similar mechanism achievable more easily by statutory change.

The Line Item Veto Act was signed into law on April 9, 1996 (P.L. 104-130), and it became effective January 1, 1997. Key provisions allowed the President to cancel any dollar amount of discretionary budget authority provided in an appropriation, any item of new direct spending, or certain limited tax benefits contained in any law. After Congress had been notified of the cancellations in a special message, a period for expedited congressional review of the proposal followed.

On August 11, 1997, President Clinton first invoked the new authority; 81 more cancellations followed. On February 12, 1998, the Line Item Veto Act was held unconstitutional (for the second time) in a district court ruling, and on June 25, 1998, the Supreme Court affirmed that decision. In the case of *Clinton v. City of New York,* the Court held the law unconstitutional on grounds that it violates the presentment clause; in order to grant the President line item veto a constitutional amendment is needed (according to the majority opinion).

Measures seeking to provide a constitutional alternative to the Line Item Veto Act were introduced in the 106th Congress, and are again under consideration in the 107th. President Bush has endorsed the effort to restore the President's line item veto authority.

MOST RECENT DEVELOPMENTS

On February 4, 2002, President Bush transmitted his budget submission for FY2003. which contained some proposals for reform of the budget process, including a reformulated line item veto, linked to debt reduction, for the President. On January 23, 2002, the directors of the Congressional Budget Office (CBO) and of the Office of Management and Budget (OMB) both announced economic projections showing a deficit for the FY2002 federal budget. On August 28, 2001, CBO released a midyear budget update, projecting a small deficit for FY2001. The return to a deficit situation may stimulate renewed interest in mechanisms thought conducive to spending control, such as a line item veto or expanded impoundment authority for the President. On February 28, 2001, in his first budget transmittal to Congress, President George W. Bush identified several budget process reforms he supports, including a call to "restore the President's line item veto authority." On June 25, 1998, the Supreme Court rendered its decision in the case Clinton v. New York City, *striking down the Line Item Veto Act as unconstitutional.*

BACKGROUND AND ANALYSIS

The 1989 report of the National Economic Commission, among other commentaries, has suggested that the "balance of power on budget issues has swung too far from the Executive toward the Legislative branch." Debate about the appropriate relationship between the branches in the federal budget process seems endemic, given the constitutional necessity of shared power in this sphere. Under the Constitution, Congress possesses the "power of the purse" ("No money shall be drawn from the Treasury but in consequence of appropriations made by law"), but the President enjoys broad authority as the chief executive who "shall take care that the laws be faithfully executed."

The Constitution was silent concerning the specifics of a budget system for the federal government. Informal procedures sufficed for many years. The Budget and Accounting Act of 1921 (P.L. 67-14) for the first time required the President to submit a consolidated budget recommendation to Congress. To assist in this task, the Act also created a new agency, the Bureau of the Budget, "to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments." In 1970, the budget agency was reconstituted as the Office of Management and Budget (OMB). The OMB also plays an important role later in the budget process when funds are actually spent as appropriations laws are implemented. Impoundment of funds by the President represents an important component in this stage of budget execution.

Brief History of Impoundment

Impoundment includes any executive action to withhold or delay the spending of appropriated funds. One useful distinction among impoundment actions, which received statutory recognition in the 1974 Impoundment Control Act, focuses on duration, whether

the President's intent is permanent cancellation of the funds in question (rescission) or merely a temporary delay in availability (deferral).

Another useful contrast distinguishes impoundment for routine administrative reasons from impoundment to achieve distinct policy purposes. Virtually all Presidents have impounded funds in a routine manner as an exercise of executive discretion to accomplish efficiency in management. The creation of budgetary reserves as a part of the apportionment process required by the Antideficiency Acts (31 U.S.C. 1511-1519) provided formal structure for such routine impoundments, which originated with an administrative regulation issued in 1921 by the Bureau of the Budget and then received a statutory base in 1950. Impoundments for policy reasons, whether short-term or permanent, have proved far more controversial.

Controversies Increase

In the 1950s and 1960s, disputes over the impoundment authority resulted from the refusal of successive Presidents to fund certain weapons systems to the full extent authorized by Congress. These confrontations between the President and Congress revolved around the constitutional role of Commander-in-Chief and tended to focus on relatively narrow issues of weapons procurement. President Johnson made broader use of his power to impound by ordering the deferral of billions of dollars of spending during the Vietnam war in an effort to restrain inflationary pressures in the economy. While some impoundments during these periods were motivated by policy concerns, they typically involved temporary spending delays, with the President acting in consultation with congressional leaders, so that a protracted confrontation between the branches was avoided.

Conflict over the use of impoundments greatly increased during the Nixon Administration and eventually involved the courts as well as Congress and the President. In the 92nd and 93rd Congresses (1971-1974), the confrontation intensified as the President sought to employ the tool of impoundment to reorder national priorities and alter programs previously approved by Congress. Following President Nixon's reelection in 1972, the Administration announced major new impoundment actions affecting a variety of domestic programs. For example, a moratorium was imposed on subsidized housing programs, community development activities were suspended, and disaster assistance was reduced. Several farm programs were likewise targeted for elimination. Perhaps the most controversial of the Nixon impoundments involved the Clean Water Act funds. Court challenges eventually reached the Supreme Court, which in early 1975 decided *Train v. City of New York* (420 U.S. 35 (1975)), on narrower grounds than the extent of the President's impoundment authority.

Impoundment Control Act of 1974

During these impoundment conflicts of the Nixon years, Congress responded not only with ad hoc efforts to restore individual programs, but also with gradually more restrictive appropriations language. Arguably, the most authoritative response was the enactment of the Impoundment Control Act (ICA), Title X of the Congressional Budget and Impoundment Control Act of 1974. The ICA became effective upon signing on July 12, 1974 (88 Stat. 332). As a result of a compromise in conference, the ICA differentiated deferrals, or temporary delays in funding availability, from rescissions, or permanent cancellations of designated budget authority, with different procedures for congressional review and control of the two types of impoundment. The 1974 law also required the President to inform

Congress of all proposed rescissions and deferrals and to submit specified information regarding each. The ICA further required the Comptroller General to oversee executive compliance with the law and to notify Congress if the President failed to report an impoundment or improperly classified an action.

In the case of a rescission, the ICA provided that the funds must be made available for obligation unless both houses of Congress take action to approve the rescission request within 45 days of "continuous session" (recesses of more than 3 days not counted). In practice, this usually means that funds proposed for rescission not approved by Congress must be made available for obligation after about 60 calendar days, although the period can extend to 75 days or longer. Congress may approve all or only a portion of the rescission request. Congress may also choose after the 45-day period to rescind funds previously requested for rescission by the President. It is also possible for Congress to rescind funds never proposed for rescission by the President, but such action is not subject to the ICA procedures.

The ICA establishes no procedures for congressional disapproval of a rescission request during the 45-day period. However, some Administrations have voluntarily followed a policy of releasing funds before the expiration of the review period, if either the House or the Senate authoritatively indicates that it does not intend to approve the rescission.

In the fall of 1987, as a component of legislation to raise the limit on the public debt (P.L. 100-119), Congress enacted several budget process reforms. Section 207 prohibited the practice, sometimes used by Presidents when Congress failed to act on a rescission proposal within the allotted period, of submitting a new rescission proposal covering identical or very similar matter. By using such resubmissions repeatedly, with accompanying delays of 45 days or more, the President might continue to tie up funds even though Congress, by its inaction, had already rejected virtually the same proposal. The prohibition against such seriatim rescission proposals (contained in the 1987 law) applies for the duration of the appropriation, so that it may remain in effect for two or more fiscal years.

Presidential Calls for Reform

During the Ford and Carter Administrations, the provisions of the ICA proved relatively noncontroversial. Dissatisfaction increased during the Reagan Administration. President Reagan, in his 1984 State of the Union message, specifically called for a constitutional amendment to grant item veto authority, which he considered to be a "powerful tool" while Governor of California. During his second term, President Reagan repeatedly called for item veto authority, as well as for a constitutional amendment mandating a balanced federal budget. In his last two budget messages, President Reagan included enhanced rescission authority among his budget process reform proposals. President Bush also endorsed the idea of expanded rescission authority and an item veto for the President. During the 1992 campaign, then-Governor Bill Clinton advocated a presidential item veto, and in 1995, President Clinton again called for full line item veto authority for the President.

In the 2000 campaign, presidential candidates designate of both the Democratic and Republican parties were on record as favoring expanded rescission authority. Former Vice President Gore supported such legislation at least as far back as 1993, when the Report of the National Performance Review, which he chaired, specifically endorsed enactment of expedited rescission procedures. In a speech on June 8, 2000, then-Governor George W.

Bush, called for a number of budget process reforms, including "line-item veto legislation," stating: "The Supreme Court has made clear how such legislation can pass constitutional muster. Congress cannot give the president a permanent line item-veto. But is can give the president authority to decline to spend wasteful appropriations. As president I will seek that constitutional authority." In his first budget transmittal to Congress, on Feb. 28, 2001, President Bush reiterated his support for restoring such authority to the President.

Alternative of an Item Veto

The U.S. Constitution provides that the President may either sign a measure into law or veto it in its entirety. However, constitutions in 42 States provide for an item veto (usually confined to appropriation bills), allowing the Governor to eliminate discrete provisions in legislation presented for signature. Ten States allow the Governor to reduce amounts as well as eliminate items, and seven States have an "amendatory" veto, permitting the Governor to return legislation with specific suggestions for change.

The first proposal to provide the President with an item veto was introduced in 1876. President Grant endorsed the mechanism, in response to the growing practice in Congress of attaching "riders," or provisions altering permanent law, to appropriations bills. Over the years many bills and resolutions (mainly proposed constitutional amendments) have been introduced, but action in Congress on item veto proposals, beyond an occasional hearing, has been limited. In 1938 the House approved an item veto amendment to the independent offices appropriations bill by voice vote, but the Senate rejected the amendment. Contemporary proposals for item veto are usually confined to bills containing spending authority, although not necessarily limited to items of appropriation.

In the 101st Congress, the Senate Judiciary Subcommittee on the Constitution held a hearing on proposed constitutional amendments permitting an item veto on April 11, 1989, and reported two, without recommendation, on June 8. S.J.Res. 14 would have allowed the President to veto only selected items in an appropriations bill, while S.J.Res. 23 would have authorized him to disapprove or reduce any item of appropriation, excluding legislative branch items. On April 26, 1990, the Judiciary Committee voted 8-6 to report both measures favorably (filed as S.Rept. 101-466 on September 19, 1990).

In the 102nd Congress, the House voted on language providing item veto authority for the President. On June 11, 1992, during debate on H.J.Res. 290, proposing a constitutional amendment requiring a balanced budget, the House rejected by vote of 170-258 an amendment by Representative Kyl. The Kyl proposal sought to allow the President to exercise item veto authority in signing any measure containing spending authority (broadly defined), limit total outlays for a fiscal year to 19% of the gross national product of that year, and require a three-fifths vote of the Congress to approve any additional funds.

Some have contended that the President already had item veto authority as a part of his constitutional powers. A 1987 article appearing in the *Wall Street Journal* advocated this position. While a minority interpretation, this view claims some notable supporters. The Senate Judiciary Committee's Subcommittee on the Constitution held a hearing on June 15, 1994, to receive testimony on the subject.

Some continue to believe that a statutory framework (different from the Line Item Veto Act of 1996), may yet be devised to give the President authority akin to an item veto without the necessity of a constitutional amendment. One statutory alternative entails bills incorporating the separate enrollment approach, which stipulate that each item of an appropriations bill be enrolled as a separate bill. Such separate enrollment measures have been introduced in the Senate most every Congress since 1985. The Dole Amendment No. 347 to S. 4, as passed by the Senate in March 1995, incorporated the separate enrollment approach, and S. 100 and S. 139 in the 106th Congress also reflected this approach.

Evolution of Expanded Rescission Proposals

Consideration of impoundment reform became increasingly joined with the subject of an item veto. In some respects, rescission action may be viewed as a functional equivalent to an item veto: the President identifies certain items in an appropriations law for possible deletion via an impoundment message to Congress. Legislative activity directed toward granting the President expanded rescission authority extended over several years. Various rescission reform measures were introduced in the 101st and 102nd Congresses. Over two dozen proposals for strengthened rescission power or a statutorily derived item veto were introduced in the 103rd Congress. The efforts to modify the framework for congressional review of rescissions by the President, rather than to grant item veto authority directly, ultimately proved successful. In the 104th Congress, an expanded rescission measure, the Line Item Veto Act, was signed into law as P.L. 104-130.

In examining impoundment reform legislation, the distinction is often drawn between "expedited" and "enhanced" rescission proposals. While there are some analytical problems with this distinction, it provides a useful starting point.

Generally, proposals for expedited rescission focus on procedural changes in Congress, with the intent to facilitate if not ensure a vote on those rescission requests from the President submitted shortly after the signing of the appropriation law to which they relate. For example, such measures usually contain a detailed schedule to ensure immediate introduction of a measure to approve the rescission, prompt report by committee or automatic discharge, special limits on floor amendments and debate, and so on. Expedited rescission legislation is designed to supplement rather than supplant the existing framework for rescissions. Under expedited rescission, congressional approval would still be necessary to cancel the funding. However, by expediting an up-or-down vote on the President's message, it likely would become more difficult to ignore proposed rescissions and hence to reject them by inaction. In the 106th Congress, H.R. 3442 and H.R. 3523 reflected this approach.

On the other hand, enhanced rescission proposals typically seek to reverse the "burden of action" regarding rescissions and thereby create a presumption favoring the President. Such proposals usually stipulate that budget authority identified in a rescission message from the President is to be permanently canceled unless Congress acts to disapprove the request within a prescribed period. Some bills are "hybrids," reflecting a combination of item veto and rescission language and sometimes features of both expedited and enhanced approaches to rescission reform (including the Line Item Veto Act of 1996).

Toward the end of the 102nd Congress, H.R. 2164, characterized by its supporters as a compromise rescission reform measure agreeable to most sponsors of the other measures as well, had over 220 cosponsors. For the first time an expanded rescission measure received favorable floor action, when H.R. 2164 gained House approval by vote of 312-97. The measure would have established procedures for expedited congressional consideration of certain rescission proposals from the President submitted not later than 3 days after signing an appropriations act. Under the measure, the proposed rescission could not reduce a program below the budget level of the previous year or by more than 25% for new programs. Funds would have become available after a vote in Congress to reject the proposed rescission.

Consideration of expanded rescission bills resumed in the 103rd Congress. On two separate occasions, the House passed expedited rescission measures. Meanwhile, on March 25, 1993, the Senate adopted two sense of the Senate amendments relating to rescission reform as a part of the Budget Resolution for FY1994. The conference version retained a single sense of the Senate provision in this regard, stating the "President should be granted line-item veto authority over items of appropriations and tax expenditures" to expire at the end of the 103rd Congress. H.Con.Res. 218, the Budget Resolution for FY1995, as adopted in May of 1994, also contained sense-of-the-House provisions regarding enactment of certain budget process legislation, including expedited rescission authority for the President.

Enactment of the Line Item Veto Act

Action on an expanded rescission measure commenced early in the 104th Congress. This reflected the results of the November midterm elections, which returned a Republican majority to both the House and Senate. On September 28, 1994, many House Republican Members and candidates signed the *Republican Contract with America*, which pledged action on a number of measures, including a "legislative line item veto," within the first 100 days, should a Republican majority be elected.

House floor consideration of H.R. 2 commenced on February 2, 1995, on the version of H.R. 2 reported as an amendment in the nature of a substitute, with an open rule and over 30 amendments pending. The House debated the measure for three days, during which time 6 amendments were approved and 11 amendments were rejected, along with a motion to recommit with instructions. On February 6, 1995, the House passed H.R. 2, as amended, by vote of 294-134. The date of passage had special meaning, as it was the 84th birthday of former President Ronald Reagan, long a supporter of an item veto for the President.

In the Senate, general debate on the subject of item veto began on March 16; it continued on March 17 and on March 20 until 5:00, when floor consideration of S. 4 began. The Republican leaders in the Senate reportedly delayed consideration of legislative line item veto bills in hopes of developing a compromise measure that supporters of S. 4 and S. 14 could all embrace. The "Republican compromise" substitute appeared as Dole Amendment No. 347 on March 20; this substitute amendment incorporated the separate enrollment approach, which seeks to confer item veto authority by statutory means.

Floor debate on S. 4 continued on March 21-23. Eight amendments were adopted by voice vote, including the Dole Amendment itself, providing for separate enrollment for presentation to the President of each item of any appropriation and authorization bill or

resolution providing direct spending or targeted tax benefits. The Senate ultimately passed S. 4, with the Dole Amendment in the nature of a substitute and additional amendments, on March 23, 1995, by vote of 69-29.

The significant differences between the House-passed H.R. 2 (enhanced rescission approach), and the Senate-passed S. 4 (separate enrollment approach), needed to be resolved in conference. On May 17, 1995, the House passed S. 4, after agreeing to strike all after the enacting clause of Senate-passed S. 4 and insert in lieu the language of the House-passed H.R. 2. The Senate agreed to a conference and named eighteen conferees on June 20. On September 7, 1995, the Speaker appointed eight House conferees, after a motion to instruct conferees to make the bill applicable to current and subsequent fiscal year appropriation measures was agreed to by voice vote.

The conference committee held an initial meeting on September 27, 1995, at which opening statements were presented, and Representative Clinger was chosen as conference chairman. The Members present then instructed staff to explore alternatives for reconciling the two versions. The conferees met again on November 8, 1996, at which time the House Republicans offered a compromise package. Some key elements included accepting the House approach of enhanced rescission; using the Senate definition of "item" for possible veto; using compromise language approved by the Joint Committee on Taxation for defining "targeted tax benefits;" including new direct spending; accepting Senate lockbox language; and dropping the Senate sunset proposal.

In his State of the Union message on January 23, 1996, President Clinton urged Congress to complete action on a line item veto measure, but negotiations apparently remained stalled. Following return from the congressional recess in February, the pace of conference activity appeared to pick up considerably. On March 14, 1996, Republican negotiators on the conference committee reported that they had reached agreement on a compromise version of S. 4, and the conference report (H.Rept. 104-491) was filed on March 21, 1996. Although there was no public conference meeting for approval, the Republicans obtained the signatures of a majority of conferees, thus readying the conference report for final action.

The conference substitute reflected compromise between the House and Senate versions, although the enhanced rescission approach of H.R. 2 rather than the separate enrollment framework of S. 4 was chosen. As in the November compromise package, new direct spending and certain targeted tax benefits were subject to the new authority of the President as well as items of discretionary spending in appropriation laws. The measure was to take effect on January 1, 1997, absent an earlier balanced budget agreement, and would terminate on January 1, 2005. The Senate approved the conference substitute on March 27, 1996, by vote of 69-31, and the House followed suit on March 28, 1996, by vote of 232-177. President Clinton signed S. 4 on April 9, 1996 (P.L. 104-130).

The Line Item Veto Act of 1996 amended the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344), to give the President "enhanced rescission authority" to cancel certain items in appropriations and entitlement measures and also certain narrowly applicable tax breaks. The Act authorized the President to cancel in whole any dollar amount of discretionary budget authority (appropriations), any item of new direct spending (entitlement), or limited tax benefits with specified characteristics, contained in a bill

otherwise signed into law. The cancellation was to take effect upon receipt in the House and Senate of a special notification message. "Cancellation" in this context meant to prevent from having legal force; in other words, provisions canceled never were to become effective unless Congress reversed the action of the President by enacting a "disapproval bill." The President was only to exercise the cancellation authority if he determined that such cancellation would reduce the federal budget deficit and would not impair essential government functions or harm the national interest; and then notified the Congress in a special message of any such cancellation within five calendar days after enactment of the law providing such amount, item, or benefit. The Act provided 30 days for the expedited congressional consideration of disapproval bills to reverse the cancellations contained in the special messages received from the President. Detailed provisions for expedited consideration of the disapproval bill in the House and Senate were outlined. The Line Item Veto Act also contained a "lockbox" procedure to help ensure that any savings from cancellations go toward deficit reduction. This was to be accomplished by binding the new procedures to existing requirements relating to discretionary spending limits and the PAYGO requirements of the Budget Enforcement Act of 1990. To facilitate judicial review, the Act provided for (1) expedited review by the U.S. District Court for the District of Columbia of an action brought by a Member of Congress or an adversely affected individual on the ground that any provision of this Act violates the Constitution; (2) review of an order of such Court by appeal directly to the Supreme Court; and (3) expedited disposition of such matter by the Supreme Court. The Act became effective on January 1, 1997, but was subsequently overturned by the Supreme Court on June 25, 1998.

Developments During the 105th Congress

During 1997, the first year with the Line Item Veto Act in effect, several noteworthy developments involved judicial challenges and the first use of the new authority by President Clinton. In Congress, disapproval bills to overturn the cancellations by the President were introduced, along with alternative measures for providing the President with expanded rescission authority, bills to repeal the Line Item Veto Act, and even a bill to correct an apparent "loophole" in the original Act. In 1998, there were additional court challenges, with the Supreme Court eventually striking down the new law as unconstitutional.

Initial Court Decisions

On January 2, 1997, the day after the Line Item Veto Act went into effect, another suit challenging its constitutionality was filed in the same court (referred to as *Byrd v. Raines*). The plaintiffs, led by Senator Robert Byrd, now included six Members of Congress: Senators Byrd, Mark Hatfield (since retired), Daniel Moynihan, and Carl Levin, and Representatives David Skaggs and Henry Waxman. Office of Management and Budget Director Franklin Raines and Secretary of the Treasury Robert Rubin were named as defendants, because of their responsibilities for implementing key aspects of the law. The plaintiffs contended that the Act violates the constitutional requirements of bicameral passage and presentment "by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of federal law."

This was not the first case challenging the new law. On April 9, 1996 (the same day the Line Item Veto Act was signed by President Clinton), the National Treasury Employees Union et al. filed a complaint for declaratory and injunctive relief, challenging the constitutionality of the new law in the U.S. District Court for the District of Columbia (Civil Action No. 96-624). Only individuals "adversely affected" by the expanded presidential authority, or Members of Congress, can bring action under the "expedited judicial review" provision in the law. On July 3, 1996, a federal judge dismissed the case, ruling that the union's claims were "too speculative and remote" to provide legal standing under the law.

Meanwhile, on January 22, 1997, the Senate by unanimous consent agreed to S.Res. 21 to direct the Senate Legal Counsel to appear as amicus curiae (friend of the court) in the name of the Senate in the *Byrd v. Raines* case. During debate on S.Res. 21, Majority Leader Trent Lott noted that Title VII of the Ethics in Government Act authorized such action by the Senate in any legal action "in which the powers and responsibilities of the Congress under the Constitution are placed in issue."

On March 21, 1997, U.S. District Court Judge Thomas Penfield Jackson heard oral arguments in the case of *Byrd v. Raines*. Less than three weeks later, on April 10, Judge Jackson ruled that the Line Item Veto Act was unconstitutional because it violates provisions of the Presentment Clause in the Constitution (Article I, Section 7, Cl. 2). His ruling found that compared with permissible delegations in the past, "The Line Item Veto Act, in contrast, hands off to the President authority over fundamental legislative choices." In so doing, "Congress has turned the constitutional division of responsibilities for legislating on its head."

As already noted, the Line Item Veto Act provided for expedited judicial review, allowing for appeal of a district court decision directly to the Supreme Court. Such a request was filed, and on April 23, 1997, the Supreme Court agreed to an accelerated hearing. The Court heard oral arguments on May 27 and announced its decision in *Raines v. Byrd* on June 26, 1997. In a 7-2 decision, the Court held that the Members of Congress challenging the law lacked legal standing, so the judgment of the lower court (finding the Act unconstitutional) was put aside and the Line Item Veto Act remains in force. However, the Supreme Court confined its decision to the technical issue of jurisdiction and refrained from considering the underlying merits of the case, i.e., whether the Line Item Veto Act is unconstitutional.

The Line Item Veto in Action

On August 11, 1997, President Clinton exercised his new veto authority for the first time by transmitting two special messages to Congress, reporting his cancellation of two limited tax benefit provisions in the Taxpayer Relief Act of 1997 (P.L. 105-34), and one item of direct spending in the Balanced Budget Act of 1997 (P.L. 105-33). Both measures had been signed into law on August 5, 1997. The law provided a period of 30 calendar days of session after receipt of a special message (only days when both the House and Senate are in session count) for Congress to consider a disapproval bill under expedited procedures.

Upon reconvening in early September, Congress responded quickly to the President's cancellations, with the introduction of four disapproval bills. S. 1144 and H.R. 2436 sought to disapprove the cancellation of the direct spending provision in P.L. 105-33, transmitted by the President on August 11, 1997, and numbered 97-3, regarding Medicaid funding in New York. S. 1157 and H.R. 2444 sought to disapprove the cancellations of two limited tax

benefit provisions in P.L. 105-34, transmitted by the President on August 11, 1997, and numbered 97-1 and 97-2. The first provision dealt with income sheltering in foreign countries by financial services companies, and the second involved tax deferrals on gains from the sales of agricultural processing facilities to farmer cooperatives. A compromise was apparently reached between the White House and congressional leaders on the canceled tax benefit provisions; a new bill (H.R. 2513) restoring the canceled provisions, with some modifications, was introduced by the Chairman of the Ways and Means Committee on September 23, 1997. On November 8, 1997, the House approved H.R. 2513 by voice vote under suspension of the rules; H.R. 2444 (the disapproval bill) was tabled.

On October 6, 1997, President Clinton exercised the new authority to veto items in appropriations bills by cancelling 38 projects contained in the FY1998 Military Construction Appropriations Act (P.L. 105-45). (See CRS Report 97-210 for further discussion of the specific cancellations.) On October 24, the Senate Appropriations Committee approved S. 1292, with an amendment to exclude two more of the projects from the disapproval bill, reflecting the wishes of Senators from the states involved; there was no written report. On October 30, the Senate passed S. 1292, after the committee amendment was withdrawn, disapproving 36 of the 38 cancellations, by vote of 69-30. On November 8, 1997, the House passed its version of the disapproval bill, H.R. 2631 (covering all 38 of the cancellations originally in the President's message), by vote of 352-64. On November 9, the Senate passed H.R. 2631 by unanimous consent, precluding the need for conference action, and clearing the disapproval measure for the President. On November 13, 1997, the President vetoed H.R. 2631, the first disapproval bill to reach his desk under the provisions of the 1996 law. The House voted to override on February 5, 1998 (347-69), and the Senate did likewise on February 25, 1998 (78-20): so the disapproval bill was enacted over the President's veto (P.L. 105-159) . (Cancellations under the Line Item Veto Act became effective on the date the special message from the President was received by the House and Senate, but the cancellations became null and void if a disapproval bill was enacted.)

On October 14, 1997, President Clinton vetoed 13 projects in the Department of Defense Appropriations (see CRS Report 97-205). On October 16, 1997, he used the cancellation authority on a provision in the Treasury and General Government Appropriations relating to pension systems for federal employees (see CRS Report 97-202). On October 17, 1997, the President applied his veto to eight more projects, this time in the Energy and Water Appropriations Act (see CRS Report 97-207). On November 1, 1997, President Clinton exercised his line item veto authority in two appropriations acts, canceling seven projects in the VA/HUD measure and three projects in the Transportation Act. On November 20, 1997, the President canceled two projects from Interior and five from the Agriculture Appropriations Act. On December 2, 1997, President Clinton exercised his line item veto authority for a final time in one of the 13 annual appropriations acts for FY1998, canceling a project in the Commerce-Justice-State measure. This action brought the total of special messages in 1997 to 11, and the total cancellations under the new law to 82. On November 13, 1997, President Clinton vetoed H.R. 2631, disapproving the 38 cancellations in the Military Construction Appropriations; on February 25, 1998, the bill was enacted over the President's veto (P.L. 105-159), when the Senate voted 78-20 for the override; previously, on February 5, 1998, the House agreed to the override (347-69).

More Court Challenges

Once the President used the new authority, other cases were expected to be brought by parties who could more easily establish standing, having suffered ill effects directly as a result of the cancellations. On October 16, 1997, two separate cases challenging the Line Item Veto Act were initiated. A complaint was filed by the City of New York and other interested parties seeking to overturn the cancellation of the new direct spending provision affecting Medicaid funding in the Balanced Budget Act in the U.S. District Court for the District of Columbia (case number 1:97CV02393). On the very same day, the National Treasury Employees Union (who had brought the first suit challenging the new law in the spring of 1996, even before it became effective), filed another suit in district court, seeking to overturn the veto of the federal pension provision in the Treasury Appropriations Act (case number 1:97CV02399). On October 21, 1997, a third case, seeking to overturn the cancellation of the limited tax benefit affecting farm cooperatives, was filed in the district court by Snake River Potato Growers, Inc. (case number 1:97CV02463). On October 24, 1997, by order of the three judges initially assigned to the cases of the three suits challenging the Line Item Veto Act, which had been filed separately in the District Court for the District of Columbia, were combined, placed in the random assignment pool, and ultimately reassigned to Judge Thomas Hogan. On October 28, 1997, NTEU filed an amended complaint, challenging the specific application of the cancellation authority (as well as the constitutionality of the law). A hearing on the consolidated case was set for January 14, 1998.

Meanwhile, on December 19, 1997, the Clinton Administration conceded that the President's cancellation in October of the pension switch provision exceeded the authority conveyed in the Line Item Veto Act. On January 6, 1998, Judge Hogan approved a negotiated settlement in the suit between the Justice Department and the National Treasury Employees Union and ordered that the previously canceled provision in the Treasury appropriations for an open season to switch pension plans be reinstated. The order found that the President lacked authority to make this cancellation, and so it was "invalid and without legal force and effect." The NTEU's constitutional challenge was declared moot, but oral arguments for the two remaining parties in the consolidated case challenging the law's constitutionality were to proceed.

On January 14, 1998, there was a three-hour hearing before Judge Hogan. Arguments were presented by attorneys for the Idaho potato farmers group and for New York City and co-plaintiffs in the cases involving cancellations by the President in August, 1997, of a limited tax benefit provision and an item of new direct spending (affecting Medicaid funding). Judge Hogan on February 12, 1998, issued his ruling, which held the Line Item Veto Act unconstitutional, because it "violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upsets the balance of powers so carefully prescribed by its Framers. On February 20, 1998 the Justice Department appealed that decision to the Supreme Court, and on February 27, 1998, the Supreme Court agreed to review the case.

The Supreme Court heard oral arguments in the case of *Clinton v. New York City* on April 27, 1998. Both sides conceded that a true item veto, allowing the President to sign some provisions and veto others when presented a piece of legislation, would be unconstitutional. The Solicitor General sought to distinguish the President's cancellation of provisions under the Line Item Veto Act from a formal repeal of the provisions, but several of the Justices

seemed skeptical. Another key argument concerned the matter of delegation and whether the Act conveys so much authority to the President as to violate the separation of powers. The issue of standing for the two groups of plaintiffs combined in the case also was examined. On June 25, 1998, the Court rendered its decision, holding the Line Item Veto Act unconstitutional, because its cancellation provisions were in violation of procedures set forth in the Constitution's presentment clause found in Article I, 7. (The decision is available online at [http://supct.law.cornell.edu/supct/html/97-1374.ZS.html]).

In the immediate aftermath of the Supreme Court decision there was some uncertainly regarding how funding for projects canceled under the now unconstitutional law could be restored. In the view of some, OMB might not be required to fund projects eliminated from appropriations acts, because the cancellations in the consolidated case brought before the Supreme Court only involved limited tax benefit and direct spending provisions. Some suggested that each affected party might have to sue, as did New York City in the case decided by the Supreme Court.

Although it was widely expected that funding for projects not explicitly covered by the Supreme Court decision would be restored, three weeks passed before the Justice Department and OMB determined officially that the funds were to be released. On July 17, 1998, OMB announced that funds for the remaining cancellations (those not overturned by previous litigation or the disapproval bill covering the Military Construction appropriations) would be made available. Funding for one cancellation was further delayed; on July 24, 1998, President Clinton proposed a recission in accordance with the 1974 Impoundment Control Act, totaling $5.2 million and affecting the Department of Interior (see House Doc. 105-290), but the funds were released following the 45-day congressional review period.

Consideration of Alternatives to the Line Item Veto Act

After the President exercised the new authority to cancel items in appropriations acts, bills were introduced to repeal the Line Item Veto Act. On October 9, 1997, such a bill was introduced by Representative Skaggs (H.R. 2650, referred to Budget and Rules Committees) and on October 24, 1997, a similar bill was introduced by Senators Byrd and Moynihan (S. 1319, referred to Committees on Budget and Governmental Affairs).

On March 11, 1998, the House Rules Subcommittee on Legislative and Budget Process began two days of hearings on the Line Item Veto Act. While the principal focus of the hearing was on the operation of the act during its first year, there was some consideration of possible alternatives should the law be found unconstitutional by the Supreme Court.

Now that the Supreme Court has revisited the Line Item Veto Act on its merits and struck it down, other legislative approaches such as expedited rescission or separate enrollment are being reconsidered. The alternative of an item veto constitutional amendment may receive renewed interest. Shortly after the district court decision in April 1997, such measures were reintroduced in the 105th Congress. On April 15, 1997, H.R. 1321, an expedited rescission measure similar to that passed by the House in the 103rd Congress, was introduced, and on the following day, S. 592, a separate enrollment measure identical to S. 4 as passed by the Senate in the 104th Congress, was introduced. Joint resolutions proposing an item veto constitutional amendment were also introduced. Another bill introduced in the

fall of 1997, H.R. 2649, combined the features of H.R. 2650 (repealing the line item veto) and H.R. 1321 (establishing a framework for expedited rescission).

On June 25, 1998, the same day the Supreme Court held the Line Item Veto Act unconstitutional, three more bills were introduced. Two new versions of expedited rescission (similar but not identical measures), seeking to apply expedited procedures to targeted tax benefits as well as to rescissions of funding in appropriations measures, were introduced as H.R. 4174 and S. 2220. A modified version of separate enrollment, applicable to authorizing legislation containing new direct spending, as well as to appropriations measures, was introduced as S. 2221.

In October of 1998, with the new fiscal year underway and elections fast approaching, congressional leaders reached an agreement with the White House, which led to the passage of a massive compromise package running close to 4000 pages, as the Omnibus Consolidated and Emergency Supplemental Appropriations Act (P.L. 105-277). Signed into law by the President on October 21, 1998, with no threat of an item veto to cancel any of its provisions, the measure provided over $500 billion in funding and elicited criticism from some Members of Congress as well as outside observers regarding the number of so-called "wasteful" funding provisions contained in it; such projects or activities generally have strong support in a particular congressional district or state, while others may consider them to represent unnecessary spending. Enactment of such omnibus spending measures in the past provided the impetus for the introduction of the first separate enrollment measure.

Developments During the 106th Congress

Upon convening of the 106th Congress in January 1999, measures were again introduced to propose constitutional amendments giving the President line item veto authority (H.J.Res. 9, H.J.Res. 20, H.J.Res. 30, and S.J.Res. 31), and to provide alternative statutory means for conveying expanded impoundment authority to the President (S. 100 and S. 139). Subsequently, two expedited rescission bills were introduced in the House (H.R. 3442 and H.R. 3523).

On July 30, 1999, the House Rules Subcommittee on the Legislative and Budget Process held a hearing to address the subject, "The Rescissions Process after the Line Item Veto: Tools for Controlling Spending." Testimony was received from the Office of Management and Budget, the Congressional Budget Office, and the General Accounting Office, as well as from a panel of academic experts.

On March 23, 2000, the House Judiciary Subcommittee on the Constitution held a hearing to consider measures proposing a constitutional amendment for an item veto. Two Members testified in support of H.J.Res 9. A second panel, consisting of seven outside witnesses, provided various viewpoints.

During the presidential election campaign in 2000, the topic of expanded rescission authority for the President received some attention. On June 8, 2000, Gov. George W. Bush endorsed several budget process reforms, including expanded rescission authority for the President; former Vice President Al Gore also was on record in support of such legislation.

Developments During the 107th Congress

In his Budget Message transmitted to Congress on Feb. 28, 2001, titled *A Blueprint for New Beginnings*, President George W. Bush endorsed several budget process reforms. Included under the rubric of "structural reforms" was a call to "restore the President's line item veto authority" (p. 171). In the subsequent discussion, the document suggested that the constitutional flaw in the Line Item Veto Act of 1996 might be corrected by linking the line-item veto to retiring the national debt: "This proposal would give the President the authority to decline to spend new appropriations, to decline to approve new mandatory spending, or to decline to grant new limited tax benefits (100 or fewer beneficiaries) whenever the President determines the spending or tax benefits are not essential Government functions and will now harm the national interest" (pp. 175-176). The following day, H.J.Res. 24, proposing a constitutional amendment to authorize such line item veto authority for the President, was introduced. H.J.Res. 23, proposing a constitutional amendment to allow an item veto of appropriations bills, is also pending in the 107th Congress. On April 9, 2001, President Bush transmitted to Congress a more detailed budget for FY2002, without further mention of the line item veto proposal.

On August 28, 2001, the Congressional Budget Office released its midyear budget update, projecting a small deficit in the on-line federal budget (on-budget accounts exclude the spending and revenues of Social Security and the Postal Service) for the fiscal year ending September 30. Then, on October 29, 2001, the Department of the Treasury released the final monthly statement of receipts and outlays of the United States Government for FY2001, confirming an on-line budget deficit for the year.

At hearings on January 23, 2002, the CBO Director provided baseline estimates for a federal budget deficit of $21 billion in FY2002; just last January (2001), CBO had predicted a surplus of $313 billion for FY2002. On the same day, the OMB Director announced projections for FY2002, likewise anticipating a budget deficit. The return to a deficit situation for the federal budget (excluding the accumulating Social Security surplus, to fund future retirements) may stimulate renewed interest in mechanisms thought conducive to spending control, such as a line item veto or expanded impoundment authority for the President. In his budget submission for FY2003, sent to Congress on February 4, 2002, President Bush again called for a line item veto linked to debt reduction.

LEGISLATION

H.J.Res. 23 (English et al.)
Constitutional amendment. Proposes an amendment to the Constitution to allow the President to disapprove any item of appropriation in any bill.. Introduced Feb. 28, 2001; referred to the Committee on the Judiciary.

H.J.Res. 24 (Andrews)
Constitutional amendment. Proposes an amendment to the Constitution to allow the President to decline to approve (i.e., to item veto) any in whole dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. Introduced Mar. 1, 2001; referred to the Committee on the Judiciary.

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

U.S. Congress. Conference Committees. *Line Item Veto Act; Conference Report To Accompany S. 4*. 104th Congress, 1st session. H.Rept. 104-491. Washington, U.S. Govt. Print. Off., 1996. 42 p.

U.S. Congress. House. Committee on Government Reform and Oversight; and Senate. Committee on Governmental Affairs. *Line Item Veto*. Joint Hearing. 104th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1996. 167 p.

U.S. Congress. House. Committee on the Judiciary. Subcommittee on the Constitution. *Item Veto Constitutional Amendment*. Hearing, 106th Cong., 2nd session. Mar. 23, 2000. Washington, U.S. Govt. Print. Off., 2000. 51 p.

U.S. Congress. House. Committee on Rules. *The Use and Application of the Line Item Veto*. Committee Print, January 2, 1997. Washington, U.S. Govt. Print. Off., 1997. 20 p.

——. Subcommittee on Legislative and Budget Process. *The Line Item Veto*. Hearing, 105th Congress, 2nd session. Mar. 11-12, 1998. Washington, U.S. Govt. Print. Off., 1998. 245 p.

U.S. Congress. Joint Committee on Taxation. *Analysis of Provisions Contained in the Line Item Veto Act (P.L. 104-130) Relating to Limited Tax Benefits*. Joint Committee Print, January 3, 1997. Washington, U.S. Govt. Print. Off., 1997. 68 p.

U.S. Congress. Senate. Committee on Governmental Affairs. *S. 4 and S. 14, Line-Item Veto*. Hearing. 104th Congress, 1st session. Washington, U.S. Govt. Print. Off., 1996. 94p.

FOR ADDITIONAL READING

CRS Report 98-690. *Line Item Veto Act Unconstitutional: Clinton v. City of New York*, by Thomas J. Nicola.

CRS Report RL30223. *Presidential Rescission Authority: Efforts to Modify the 1974 Framework*, by Virginia McMurtry.

McMurtry, Virginia A. "The Impoundment Control Act of 1974: Restraining or Reviving Presidential Power?" *Public Budgeting and Finance*, vol. 17 (Fall 1997). p. 39-61.