TESTIMONY OF CHARLES J. COOPER

Before the United States House of Representatives

Committee on the Budget

Concerning

H.R. 4890 -- "The Legislative the Line Item Veto Act of 2006"

June 8, 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 H.R. 4890. 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 H.R. 4890, 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, H.R. 4890 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).[1]

[1] 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

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

---

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 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.

has never seriously been questioned. Indeed, the First Congress enacted at least three general appropriations laws that appropriated "sum[s] not 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 H.R. 4890 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 H.R. 4890 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.