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LINE–ITEM VETO CONSTITUTIONAL ISSUES

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BEFORE THE

COMMITTEE ON THE BUDGET
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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LINE–ITEM VETO CONSTITUTIONAL ISSUES

THURSDAY, JUNE 8, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE BUDGET,
Washington, DC.

The committee met, pursuant to call, at 9:30 a.m., in room 210, Cannon House Office Building, Hon. Jim Ryun (acting chairman of the committee) presiding.

Members present: Representatives Ryun, Bonner, Diaz-Balart, Hensarling, Lungren, Ryan, Campbell, Spratt, Moore, Neal, and Cooper.

Mr. RYUN [presiding]. Good morning, everyone, and welcome. Today the Budget Committee will hold the second of two hearings on the line item veto prior to marking up the legislative Line Item Veto Act of 2006 introduced by Representative Paul Ryan on this committee. Before we go further, I would like to take a moment and congratulate our troops on a very significant capture of Abu Musab al-Zarqawi, a terrorist who obviously has been significant in the war on terrorism, and our prayers and thoughts go with the troops as they continue to fight this most important battle.

Prior to the adjournment for the Memorial Day break, we heard from several experts on how the line item veto might best be used to reduce the necessary Federal spending. Today, our discussion will focus on specific constitutional issues associated with the use of the line item veto. And I am pleased to have with us several experts on this issue: Charles Cooper, Partner with Cooper and Kirk; Viet Dinh, who is Professor of Law at Georgetown University Law Center; and Louis Fisher, Specialist at the Law Library at the Library of Congress. Welcome, and we look forward to receiving your testimony.

Controlling the budget is one of the most important obligations Congress has as the good stewards of the taxpayers' money, making sure it gets spent wisely and prudently and not wastefully. The aim of the Line Item Veto Act is to provide another tool that can help in this ongoing effort. But we also have an even higher obligation, and that is to protect the Constitution on which the entire framework of government and the democratic freedoms we enjoy is based.

As I noted, the purpose of today's discussion is to ensure we do all we can to balance these budgetary and constitutional obligations. As all of you are likely aware, Congress has tried before to create a commonsense mechanism such as this which would allow the President to strike individual items from the spending bill and to help trim away some of the unnecessary parochial items that

sometimes get tacked onto legislation that gets moved through Congress. But the previous attempts, when tested in the courts, had not met the rigorous demands of the Constitution. So great care has been taken with Congressman Ryan's bill to learn from the earlier efforts and to meet constitutional guidelines. And our witnesses today will offer their opinion about whether these measures achieve these goals.

I know that most members of this committee and most Members of Congress, certainly our witnesses today, have very strong opinions about this matter, and there is good reason. One of the principal concerns of this Nation's Founding Fathers was to protect the freedom and liberty of the people. They went to great lengths to design a government that would prevent any one person or group from becoming too powerful, and our Constitution is the blueprint of that government. Anything that might affect the balance achieved by that blueprint must be analyzed, and we will do that today in a very serious way.

As we face the important challenges of managing the government's purse, we must make sure that in our efforts to regain control of spending, we also stay consistent with the Constitution that has safeguarded our freedoms for more than 200 years. And we certainly hope that this hearing today will be of use in that effort. And I want to thank our witnesses for being here.

And at this point, I would like to turn to Mr. Spratt for any comments he would like to make.

Mr. SPRATT. Thank you, Mr. Chairman. I echo your welcome to our witnesses this morning. And we are going to take up constitutional perspectives on the line item veto or on rescission.

Mr. Chairman, I can't help but note the irony we are taking up budget processes at a time when we don't have a budget, at least a concurrent resolution on the budget, and you have to wonder if this is something of a diversionary tactic. When we had the last hearing, it was acknowledged that if we adopt a rescission, expedited enhanced rescission, it is not likely to resolve a deficit of 3- to $400 billion. Certainly won't rid us of that deficit. It could bring it down a bit, but it leaves most of the work yet to be done.

The justification for this enhanced and expedited rescission bill instead was stated in terms of improving, transforming, making clearer and more transparent the processes of the Congress, improving our scrutiny, and making sure that we scrub the budget good to get rid of extraneous and unjustified spending items.

If that is really our objective, there are other tools that we are not dealing with at all, at least not in this hearing which is simply focused on one particular solution to the problem. And it may be a minor solution compared to some that we could also and should consider.

For example, simple solutions like a layover of spending bills so that we can actually scrutinize the spending bill, read the spending bill, explore the spending bill, and find out what is in it that might be subject to question, particularly on the floor. More sunshine, better identification of earmarks, better identification of earmarks to Members and to the intended beneficiary, and the discussion of their merits and demerits. And there are lots of things that we can do to improve the processes of the Congress when it comes to

spending money—and maybe even rein in and restrain spending—that are not on the table with just a line item veto.

There is a possibility—and we should be aware of this: that a line item veto in the hands of a clever, manipulative President could actually be used to increase spending rather than decrease spending, particularly the way the bill is drawn in its current form; because in its current form, the President could go back and propose an item veto of anything—not something recently adopted, but anything adopted since the adoption or enactment of this bill—could go back and pull that up with its application to a particular Member and threaten, cleverly of course, under the guise of AOA, that this would be the subject of a rescission request unless a Member acceded to a President's demand that a Member vote for this or that, that the President was particularly pushing.

So unless we are careful about how we much structure this cession of authority from the Congress to the President, we could actually increase the means by which a devious, manipulative President could extract spending from the Congress of the United States.

At bottom, this is an acknowledgement that Congress cannot do its job well and needs more tools to do the job, but basically the tool we are coming up with is one whereby we transfer more authority to the President of the United States. Before we go to that end, I think we would be well advised to take a look at the other things that are useful to us here in the Congress so that we can do our job better. At least those things should be on equal footing, standing with the line item veto that we will be considering today in the form of an item, a rescission item.

So, Mr. Chairman, I welcome the discussion of this topic, but I think there are other things that we also need to be looking at before we move this bill to the floor for passage, and I welcome our witnesses and look forward to their testimony. Thank you very much indeed.

Mr. RYUN. Thank you, Mr. Spratt, for your comments.

At this point, before we hear from our witnesses, I would just like to recognize the sponsor of this bill, Mr. Ryan, for any comments he would like to make.

Mr. RYAN. Thank you Mr. Chairman, I will be fairly brief. I want to thank the committee for holding this hearing on this issue and the distinguished witnesses for coming here. In particular, I would like to recognize Mr. Cooper and Mr. Dinh for their efforts to work with our office to ensure that this legislation that comes out of this committee is constitutional, and I want to thank you two for being here today.

As members of this committee know, I have been very supportive of the expedited rescissions approach for a long time. I used to work on this issue on a bipartisan basis with Charlie Stenholm. Now we are working with people like Mr. Cooper, Mr. Cuellar, and other Democrats in order to try to get this legislation passed.

I agreed with the Supreme Court's ruling in Clinton versus the City of New York, in which our guest, Mr. Cooper, argued that the previous version of the line item veto violated the bicameralism and presentment clause of the U.S. Constitution.

In addition, I also had strong concerns that the previous approach violated the separation of powers between the executive and legislative branches because it did not require Congress to act for the line item veto to take effect. Although the Supreme Court's holding did not turn on this question, this was a strong factor in the decision in the lower courts.

Despite problems with the previous line item veto, we must try again to help bring fiscal restraint to the budget process, to bring transparency and accountability to the back end of the process. The earmark reforms that we recently passed as part of the lobbying reform bill in the House will shed light, just like what Mr. Spratt talked about, will shed light on the front end of the spending process, but we need to extend that throughout the whole process.

I believe that this legislation that we are discussing today will do just that, and I believe that it will do so in a constitutional manner.

The reason this version is constitutional is that it keeps Congress in the process where it belongs. Congress retains the power of the purse in the final say-so on any proposed rescission. No rescission can take effect without Congress' approval. And Congress can reject the President's request with a simple majority vote. At the same time, a process we are proposing comports with the bicameralism and presentment clause because both houses must act affirmatively and the President must sign the approval bill into law before it can take effect. This is directly in line with the process envisioned by our Founding Fathers.

Before I turn to the witnesses, I would like to reach out again to my colleagues on the other side of the aisle. During the last hearing on this issue, Mr. Spratt and others made very valid criticisms of H.R. 4890 that I am working strenuously with this committee and with Democrats to try and address these concerns.

For example, I agree with Mr. Spratt that we should limit the number of requests that the White House sends down to Congress. And I also believe that 180 days is probably too long for a period of these deferrals. So let's work together on this. Let's come up with a strong bipartisan product, change the culture of spending around here, and really begin to address our fiscal problems and do so in a constitutional manner. And I think this hearing will help us accomplish those goals.

And with that, I thank the Chairman for yielding.

[The prepared statement of Mr. Ryan of Wisconsin follows:]

PREPARED STATEMENT OF HON. PAUL RYAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Chairman Nussle, thank you for holding today's markup to consider H.R. 4890, the Legislative Line-Item Veto Act of 2006. I am very pleased that the House Budget Committee has decided to move forward on this important piece of legislation, and I am satisfied with the excellent bill that we have before us today. The manager's amendment to H.R. 4890 is the product of exhaustive consultations with Members and staff of the House Budget Committee, the House Rules Committee, the Office of Management and Budget (OMB), constitutional lawyers, Democrats, Republicans, and many other interested parties. We are certain of this bill's constitutionality, we are certain that it is narrowly crafted to meet its intent, and we are certain of the need to pass this legislation to help us control Federal spending. I look forward to the Committee's passage of this legislation and its ultimate consideration on the House floor. It is my strong belief that H.R. 4890 will take an impor-

tant step toward bringing greater transparency, accountability and a dose of common sense to the Federal budget process.

THE SPENDING AND EARMARKING PROBLEM IN CONGRESS

The amount of pork-barrel spending included in the Federal budget continues to increase every year. According to Citizens Against Government Waste (CAGW), the Federal Government spent $29 billion on 9,963 pork-barrel projects in Fiscal Year 2006 (FY 2006), an increase of 6.3% from 2005, and an increase of over 900% since 1991. Overall, the Federal Government has spent $241 billion on pork-barrel projects between 1991 and 2005, an amount greater than two-thirds of our entire deficit in FY 2005. This includes irresponsible spending on items such as the $50 million Rain Forest Museum in Iowa; $13.5 million to pay for a program that helped finance the World Toilet Summit; and $1 million for the Waterfree Urinal Conservation Initiative.

To make matters worse, this total does not include earmarks placed in authorization bills or special-interest tax pork placed in tax legislation. As an example, last year's highway authorization bill contained approximately 6,371 earmarks, with a total cost of $25 billion.

Many of these pork-barrel spending projects are quietly inserted into the conference reports of appropriations, authorizing, and tax bills at the end of the process where there is little transparency and accountability. Not only do most Members not have the ability to scrutinize these provisions at all, but even if wasteful spending items are identified at this stage, Congress is unable to eliminate them using the amendment process. In fact, the only time that Members actually vote on these items is during an up-or-down vote on the entire conference report, which includes spending for many essential government programs in addition to the pork-barrel earmarks. In this situation, it is very difficult for any Member to vote against a bill that, as an overall package may be quite meritorious, despite the inclusion of wasteful spending items.

Unfortunately, the current tools at the President's disposal do not enable him to easily combat these wasteful spending items either. Even if the President identifies numerous pork-barrel projects in an appropriations or authorizing bill, he is unlikely to use his veto power because it must be applied to the bill as a whole and cannot be used to target individual items. This places the President in the same dilemma as Members of Congress. Does he veto an entire spending bill because of a few items of pork when this action may jeopardize funding for our troops, for our homeland security or for the education of our children?

The President's ability to propose the rescission of wasteful spending items under the Impoundment Control Act of 1974 has been equally ineffective at eliminating wasteful spending items. The problem with the current authority is that it does not include any mechanism to guarantee congressional consideration of a rescission request, and many Presidential rescissions are simply ignored by the Congress. In fact, during the 1980's, Congress routinely ignored President Reagan's rescission requests, failing to act on over $25 billion in requests that were made by the Administration. The historic ineffectiveness of this tool has deterred Presidents from using it with any regularity.

SUMMARY OF H.R. 4890, THE LEGISLATIVE LINE-ITEM VETO ACT OF 2006

To help bring accountability and transparency to the end of the budget process, I introduced H.R. 4890, the Legislative Line-Item Veto Act of 2006, on March 7, 2006. This legislation, which currently has the support of 106 bipartisan cosponsors in the House, is one important step toward the reform of the Federal budget process to force Congress to take better care of taxpayer dollars. It will serve as an important complement to earmark reforms that the House passed as a part of H.R. 4975, the Lobbying Accountability and Transparency Act of 2006, which will bring greater transparency to the front end of the process.

H.R. 4890 achieves this objective by providing the President with the authority to single out wasteful spending items and narrow special-interest tax breaks included in legislation that he signs into law and send these specific items back to Congress for a timely vote. After Congress receives the rescission requests from the President, H.R. 4890 requires an up-or-down vote in both chambers of Congress before the rescissions can become law. This requirement ensures that Congress retains control over the power of the purse and will have the final word when it comes to spending matters. In addition, H.R. 4890 also includes a mechanism that would guarantee congressional action on the proposed rescissions in an expedited time frame, which will make it much more effective than the current rescission authority vested in the President under the Impoundment Control Act of 1974.

The process under the manager's amendment to H.R. 4890 begins when the President signs an appropriations bill, authorizing bill, or tax bill into law. Within 45 days of enactment, the President would have the ability to put on hold wasteful discretionary spending items, wasteful direct spending items, or new special-interest tax breaks and could ask Congress to rescind these specific items.

After receiving a rescission request from the President, the House and Senate leadership or their designees would have 5 days to introduce an approval bill. The bill would then be referred to the appropriate committee, which would have 7 days to report the bill to the floor without substantive revision. If the committee failed to act within this limited time period, the bill would then be subject to a privileged motion to discharge, which could be raised by any Member and would have the effect of bringing the bill directly to the House floor for a vote. This would guarantee that the rescission request could not be ignored and would ensure its consideration by the full House and Senate within 14 total legislative days after the receipt of the President's message.

Once on the floor, Congress would have an up-or-down vote on these spending items. If Congress agrees with the President to rescind the funding, the spending would be cancelled. On the other hand, if Congress does not agree with the President and votes against his rescission request, the money would have to be obligated within a narrow timeframe.

Using the Legislative Line-Item Veto, the President and Congress will be able to work together to combat wasteful spending and add transparency and accountability to the budget process. This tool will shed light on the earmarking process and allow Congress to vote up or down on the merits of specific projects added to legislation or to conference reports. Not only will this allow the President and Congress to eliminate wasteful pork-barrel projects, but it will also act as a strong deterrent to the addition of questionable projects in the first place. At the same time, Members who make legitimate appropriations requests should have no problem defending them in front of their colleagues if they are targeted by the President. With H.R. 4890, we can help protect the American taxpayer from being forced to finance wasteful pork-barrel spending and ensure that taxpayer dollars are only directed toward projects of the highest merit.

CONSTITUTIONAL ISSUES

Unlike the line-item veto authority provided to President Clinton in 1996, H.R. 4890 passes constitutional muster because it requires an up-or-down vote in both chambers of Congress under an expedited process in order to effectuate the President's proposed rescissions. In Clinton v. City of New York, the U.S. Supreme Court held that the line-item veto authority provided to President Clinton in 1996 violated the Presentment Clause of the U.S. Constitution (Article I, Section 7, Clause 2), which requires that "every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." The problem with the previous version of the line-item veto was that the President's requested rescissions would become law by default if either the House or Senate failed to enact a motion of disapproval to stop them from taking effect. The lower court in Clinton v. City of New York also held that this version of the line-item veto upset the balance of power between the executive and legislative branches. On the other hand, H.R. 4890 leaves Congress in the middle of the process where it belongs and follows the procedure and balance of power outlined in our Constitution.

Perhaps the most compelling evidence of this bill's constitutionality in contrast to the 1996 Act and the decision in Clinton v. City of New York is the support of Charles J. Cooper, a partner at Cooper & Kirk, PLLC. Whereas Mr. Cooper argued against the previous version of the Line-Item Veto in the Supreme Court and was instrumental in the decision to have it overturned, Mr. Cooper now strongly supports the constitutionality of H.R. 4890. In fact, Mr. Cooper has testified three times in Congress that H.R. 4890 is constitutional, including last week in front of this Committee.

H.R. 4890 also withstands constitutional scrutiny under the U.S. Supreme Court's holding in I.N.S. v. Chadha. In I.N.S. v. Chadha, the Supreme Court invalidated part of the Immigration and Nationality Act that allowed a single house of Congress to override immigration decisions made by the Attorney General. The Legislative Line-Item Veto Act of 2006 is consistent with this holding because the President's authority to defer funds would not explicitly be terminated by the disapproval of a proposed rescission by one of the houses of Congress.

I agree with the Supreme Court's rulings in Clinton v. City of New York and I.N.S. v. Chadha. It is extremely important that Congress does not cede its law-

making power to the President. I believe that this violates the Separation of Powers in addition to the Presentment Clause. By contrast, H.R. 4890 withstands constitutional scrutiny because it requires both houses of Congress to act on any rescission request and for this legislation to be sent back to the President for his signature before the spending cancellation can take effect. This retains the power of the purse in the legislative branch and keeps Congress in the middle of the process as envisioned by our founding fathers.

THE EXPEDITED RESCISSIONS APPROACH—A BIPARTISAN HISTORY

The Legislative Line-Item Veto Act is based on an expedited rescissions approach to controlling spending that has been historically supported by both Democrats and Republicans as a means of bringing greater transparency and accountability to the budget process. In fact, the Ranking Member of this Committee, Mr. Spratt, introduced two pieces of legislation in the early 1990's that would have provided the President with the ability to propose the cancellation of spending items and special-interest tax breaks and have them considered by Congress on an expedited basis. The first of these bills, the Expedited Rescissions Act of 1993, was introduced by Mr. Spratt on April 1, 1993. When it was considered on the House floor later that month, it received 258 votes, including 174 from Democratic Members. A second budget process reform bill that included expedited rescissions language was introduced by Mr. Spratt on June 17, 1994. When this bill was voted on by the entire House later that year, it received 342 votes, including 173 votes from Members of the Democratic Party.

I have also worked on this issue on a bipartisan basis. On June 24, 2004, I offered an amendment with my former colleague Representative Charlie Stenholm, a Democrat from Texas, to add expedited rescissions provisions to a budget process bill that was being considered on the House floor at the time. Like H.R. 4890, this amendment would also have allowed the President to propose the elimination of wasteful spending items subject to congressional approval under an expedited process. Although this amendment failed to pass the House, it attracted the support of 174 Members of Congress, including 45 Democrats. A similar provision is also included in Section 311 of the Family Budget Protection Act, legislation that I introduced along with Congressman Jeb Hensarling of Texas, Congressman Chris Chocola of Indiana, and former Congressman Christopher Cox of California during 2004 and again in 2005.

REVISIONS TO H.R. 4890—ATTEMPTS TO ADDRESS BIPARTISAN CONCERNS

Since introducing H.R. 4890, I have received substantial feedback from interested Members of Congress on ways to improve the legislation to ensure that it best meets its intent of controlling Federal spending while keeping the power of the purse squarely in the legislative branch. I have had extensive consultations with Members and staff on the House Budget Committee, the House Rules Committee, OMB, constitutional lawyers, Democrats, Republicans, and many other interested parties. We have discussed many ways to tweak the original language of H.R. 4890, and I am very pleased with the product that we are considering today. I believe that the revisions we have made ensure that the bill meets its intent of allowing the President and Congress to work together to reduce wasteful spending earmarks while ensuring that Congress does not grant too much power to the executive branch.

As I worked to revise this bill, I paid special heed to the comments made by the Ranking Member of this Committee, who has a long history of working on this issue. During a hearing that the House Budget Committee held on this bill on May 25, 2006, Mr. Spratt pointed out numerous concerns with the original version of H.R. 4890. Among the Ranking Member's criticisms were the following: (1) the lack of a time frame for the President to make a rescission request; (2) the ability of a President to make the same rescission request numerous times; (3) the ability of a President to suspend spending for up to 180 days or longer; (4) the potential that this legislation could be used to go after existing entitlement programs; and (5) the lack of a sunset date on the bill.

I found many of Mr. Spratt's concerns to be valid. Not only were they things that I had already contemplated changing in the bill, but many of his concerns echoed criticisms that I had received from the other parties with whom I had been consulting about the legislation.

As a result, the manager's amendment makes numerous positive changes to the bill, including nearly every issue brought up by Mr. Spratt. First, the manager's amendment includes a 45-day limitation on the amount of time that the President has to submit a rescission request. I believe that this is an important change to help prevent the President from holding undue sway over Members of Congress.

Second, the manager's amendment also prevents the President from making duplicative requests of the same spending and tax items. Not only will this authority apply to rescission requests under this bill, but it will also prevent a President from combining the new authority with existing law to make multiple rescission requests. This change will prevent the President from continually forcing Congress to vote on the same rescission requests multiple times in order to slow legislative action on other bills.

The manager's amendment also significantly shortens the 180-day deferral period. In fact, under the bill we are considering today, the President would be given the ability to defer spending for 45 calendar days with the option to renew this authority for another 45 calendar days. The language is also drafted to encourage the President to obligate the funding as soon as either house of Congress votes against a proposal on the floor. While my preference would have been to have the deferral period directly linked to congressional action of either house, this raises serious constitutional concerns under the Bicameralism and Presentment Clause. As a result, we have settled on an approach that restrains the deferral authority as much as possible while respecting the Constitution and ensuring that the authority will not lapse when Congress goes into an extended recess.

Next, the manager's amendment also addresses Mr. Spratt's concerns that it could be used as a tool to go after existing entitlement programs. Although this was never my intention in drafting the bill, I am respectful of the concerns raised by the Ranking Member and have included explicit language to prohibit this possibility.

Finally, I have also worked with another friend of mine from the Democratic side, Mr. Cuellar, to include a sunset provision in this legislation and directly address Mr. Spratt's fifth concern. Mr. Cuellar has been a strong advocate of this bill, and I am very pleased that he is offering an amendment today to impose a 6-year sunset on H.R. 4890. This will give Congress the ability to review this legislation and decide whether or not to renew it after two Presidential Administrations have had the full opportunity to use it as a tool to control spending.

An additional change that I made to the bill was to add a provision to limit the number of rescission requests that the President can make per bill he signs into law. Under the manager's amendment, the President's requests would be limited to five per bill with an exception for ten for an omnibus spending bill. Like some of the other changes, this will go a long way toward preserving the separation of powers between the Executive and Legislative branches.

Finally, the language on the direct spending items and tax provisions was clarified to ensure that the President only has the ability to go after wasteful spending items, not policy. The intent of this bill is for the President to target unnecessary earmarks and work with Congress in a respectful fashion in order to eliminate them from legislation, not to give the President another tool to go after policy provisions passed by Congress. I believe that the revised version of this bill strikes an important balance of power between the branches of government and is narrowly crafted to meet its intent of allowing the President to propose to eliminate wasteful spending items.

CONCLUSION

In 2006, the Federal Government will once again rack up an annual budget deficit of over $300 billion, and our debt is expected to surpass $9 trillion. Meanwhile, the retirement of the baby boom generation looms on the horizon, threatening to severely exacerbate this problem. Given these dire circumstances, it is essential that we act now to give the President all of the necessary tools to help us get our fiscal house in order. By providing the President with the scalpel he needs to pinpoint and propose the elimination of wasteful spending, H.R. 4890 takes an important step toward achieving this goal. The value of this bill will be measured less in the number of wasteful projects that are eliminated and more by how many never get inserted in the first place.

Mr. RYUN. We will begin now with our witnesses. And our first witness is Mr. Cooper. I look forward to your comments.

STATEMENT OF CHARLES J. COOPER, PARTNER WITH COOPER AND KIRK, PLLC

Mr. COOPER. Thank you very much, Mr. Chairman and Members of the committee.

It is a great honor for me to be here this morning to present my views on this issue to you, and it is especially gratifying to join a

panel this morning with two of my old friends and very distinguished scholars, Dr. Fisher and Professor Dinh.

I also have to say that it was a special honor for me back in 1997 to represent 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, as Congressman Ryan has previously mentioned. And I think that issue, that case, largely controls the constitutional analysis here, and I will devote the bulk of my remarks to that case.

The Line Item Veto Act of 1996 provided that the President may, in the words of the statute itself, cancel in whole the same types of spending and tax benefits that are at issue in the measure now 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 and chosen by Congress to make clear that the President's actions 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 this body. 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 canceled it. A successor President could not—could not see the matter differently and reverse that previous President's decision.

The law itself was gone after cancellation. And it could be restored only by a disapproval bill that was enacted according to the procedure prescribed by Article I, section 7 of the Constitution.

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 provision—with the procedures established under Article I, section 7, for enacting or repealing a law; that is, 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 before you, in contrast, is framed in careful obedience, I submit, to Article I, section 7, and to the Supreme Court's teaching in the Clinton case. The President is not authorized by this bill to cancel any spending or tax provision or otherwise to prevent such 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, until it—until this body and the Senate have passed a rescission bill and that bill has been presented to the President for his consideration and approval.

Now, to be sure, H.R. 4890 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 also be authorized to terminate his deferral if, according to the bill, the President determines that continuation of the deferral would not further the purposes of the act.

So the President would have discretion, after suspending or deferring one of these measures that he has proposed for rescission to this body, to change his mind; conclude that, in fact, the moneys should be spent, and to go forward and to do so.

This delegation of deferral authority does not raise, in my opinion, the serious constitutional problem that the Supreme Court saw in the 1996 measure.

The congressional practice of vesting discretionary authority in the President to defer or 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 little or as much as he pleased, up to the limit of those spending authorities; and the remainder that was left over, if he didn't spend it all, would, of course, 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 interbranch tradition of Presidential spending discretion. The Government argued in that case that the President's cancellation power was not really a unilateral power to repeal but, rather, was simply—and I am quoting from the Government's brief in the case—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.

But the dispositive distinction that was grasped by the Supreme Court in the Clinton case and acted upon 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 measure itself.

Under a discretionary spending statute, the President may exercise his spending discretion at any time during the appropriation period. And if the President decides not to spend some or all of the appropriated funds, then the authority is to spend the funds, that is, the law itself, nonetheless remains in place until it expires in accordance with its own terms, or it is repealed by this body acting in conjunction with the Senate and presentment to the President. The President, though, under a discretionary spending measure, 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, as I mentioned earlier, or his successor, changed his mind about a canceled item, it didn't matter; the law

itself was gone and the President was powerless to revive it under that bill.

Nothing in the bill that is pending before you grants the President such 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 H.R. 4890 can last no longer than 188 calendar days, and immediately thereafter the President is obliged to execute the spending or tax provision for which he unsuccessfully sought congressional rescission. And the President's discretionary authority to terminate the deferral and to execute the spending provision at issue remains in full force and effect right up until the moment that the appropriations statute itself expires under its own terms, or is rescinded by bicameral passage and presentment to the President.

The short of my testimony, Mr. Chairman and members of this distinguished committee, is simply this: The Supreme Court's decision in Clinton recognizes that and enforces the constitutional line established by Article I, section 7, between the power to exercise discretion in the making or the 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, the power to make or unmake a law. But it can, constitutionally, delegate discretion to the President for the latter, the discretion to decide how or when or whether to spend money. And it has done so repeatedly throughout the Nation's history; the important point being that that is determined by this body and this body alone.

So, finally, in my opinion, the powers granted to the President under the Legislative Line Item Veto Act of 2006 falls safely on the constitutional side of that line.

And I thank again the members of this committee, and, Mr. Chairman, you, for inviting me to present my views, and look forward to any questions that the committee may want to put to me.

Mr. RYUN. Mr. Cooper, thank you very much for your comments.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF CHARLES J. COOPER, PARTNER, COOPER & KIRK, PLLC

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 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 2 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 5 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] 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 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 par-

[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 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.

ticular 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 appro-

priated 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.

Mr. RYUN. At this point I would like to recognize Mr. Dinh for 10 minutes as well.

STATEMENT OF VIET D. DINH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you very much, Mr. Chairman. Mr. Chairman, Ranking Member Spratt, and members of the committee, thank you very much for having me here and the honor of appearing with my colleagues Chuck Cooper and Lou Fisher. It is truly an honor, because I think Chuck Cooper as an advocate has argued more Su-

preme Court cases than I have learned as an academic. And Lou Fisher I think is recognized as the successor to the mantle of Warren Burger as the most consistent and effective advocate of congressional authority and prerogative in our Nation's history. So it is truly an honor for me to appear with them to aid this committee in its legislative process.

In my opinion, the only real issue is the whether H.R. 4890 serves as a real constraint on the budgetary process.

I do not think that there is a significant question that H.R. 4890 is constitutional.

I will touch very briefly on both of these points, in reverse order. On constitutionality, one can truly judge its act by its title. H.R. 4890 is aptly named the Legislative Line Item Veto Act. The act does not delegate the power to make, change, or repeal the law to the President, the Comptroller General, or to anyone else outside the legislative branch using the legislative process.

Rather, the act specifies the procedures that Congress, and only Congress, uses to rescind individual items in the budget. And these procedures require a rescission bill to be passed by both Chambers and signed by the President, just like any other legislation, as required by Article I, section 7, of our Constitution.

The President, under the act, proposes the items to be rescinded is of no consequence because the President does that on a daily basis. The operative question, therefore, is whether the mandated deferral of those items for a period pending congressional action works a partial repeal of the budget.

I don't think so, nor does it offend the constitutional separation of powers.

Congress passes the law, the President executes and enforces the law. The latter responsibilities to enforce the law also includes some discretion to decide whether and under what circumstances a law would be enforced.

This Presidential power, this prerogative, under the teaching of a seminal case of Youngstown, is at its zenith when Congress expressly authorizes or endorses its exercise, as H.R. 4890 does, for the decision to defer.

I think Mr. Cooper, both in his oral testimony and in his written statement, has ably and comprehensively catalogued the commonplace granting use of this power not to spend throughout the history of this Republic, starting from the very first Congress.

The act therefore offends neither the lawmaking process of Article I, section 7, nor the constitutional separation of powers. Rather, in my opinion, it affirms both of these principles. H.R. 4890 is a straightforward exercise of Congress' power under Article I, section 5, to, quote, "determine the rules of its proceedings."

The fast-track procedure embodied in the act is, in effect, a form of congressional self-policing. With such internal controls, Congress binds itself to reassess certain portions of the budget law according to procedures specified by the act.

In this sense, H.R. 4890 is little different from the fast-track procedures of the Trade Act of 1974 which was renewed successively in 1984, 88, 91, and 93. These procedures committed Congress to considering international trade agreements proposed by the Presi-

dent expediently, without amendment, and with a final up-or-down vote.

If you view the act in this light, the only real question, based by H.R. 4890, is whether the act is passed pursuant to the rules clause at all, given that it is not internally adopted through the Rules Committees of each house, but would have gone through the lawmaking process of Article I, section 7, like normal legislation.

This question, in my opinion, has been answered by the various cases addressing and validating the fast-track procedures in the Trade Act as a proper and nonjusticiable exercise of Congress' power to determine the rules of its own proceedings.

This last comment, that the act is a nonjusticiable exercise of Congress' internal rulemaking power, leads to my second point, which is the act's effectiveness in constraining the budgetary process. In the event that Congress responds to an eventual Presidential rescission proposal by completely ignoring the fast-track up-or-down procedures of H.R. 4890, it is my opinion that any challenge to such a procedural violation would not be justiciable or heard in a court of law.

Fealty to the act, therefore, depends not on lawyers and judges, but rather on legislators and the political process. I do not agree with the commentary that passage of the act would amount to an admission by legislators that they have failed in public duties to constrain spending.

Instead, the act simply recognizes the collective action problem in decision-making processes of multimember bodies and seeks to mitigate its effect in the budgetary process.

The political economy of any multimember decision-making body, like Congress, is that it is in the individual interests of Members and their constituents to push for specific items, even though we all agree that the aggregate restraint is in our collective interests of the body and of the Nation.

By specifying procedures for Congress to reconsider individual items, the act shines the political spotlight on the most egregious of our controversial instances and allows the collective body to act on them individually and thereby work to solve, in some limited way, the collective action problem.

Only time and experience will indeed tell us whether this internal process, this check, is enough to overcome parochial politics and capping budgetary excesses. But I for one have faith in legislators and the institution and the people that you all serve. Thank you very much.

Mr. RYUN. Mr. Dinh, thank you very much for your comments.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF VIET D. DINH, GEORGETOWN UNIVERSITY LAW CENTER

Mr. Chairman, Ranking Member, and Members of the Committee, Thank you for the opportunity to testify before you this morning on the Legislative Line Item Veto Act of 2006. My name is Viet D. Dinh. I am Professor of Law at the Georgetown University Law Center and Principal of Bancroft Associates PLLC. My comments here are prepared with Nathan A. Sales, currently John M. Olin Fellow at the Georgetown University Law Center. Neither of us represents any entity in this hearing, and neither receives any grant or contract from the Federal Government.

The proposed legislation, of course, furthers the unassailable policy principles of fiscal discipline and balanced budgets. We applaud Congressman Ryan and the co-sponsors for their leadership and thank the Committee for its work on this impor-

tant legislation. Our testimony, however, will be limited to the constitutional issues raised by the proposed legislation and, more broadly, the constitutional principles that should guide Congress as it considers a line item veto.

We believe that H.R. 4890 satisfies the Constitution's Bicameralism and Presentment Clauses, and thus does not suffer from the defects that doomed previous line item veto legislation invalidated by the Supreme Court. The Act also is consistent with the basic principle that Congress has broad discretion to establish procedures to govern its internal operations, including by adopting fast-track rules for the quick consideration of legislation proposed by the President. Finally, there are a number of different approaches through which Congress constitutionally could authorize the President temporarily to freeze spending items while Congress decides whether to rescind them permanently.

A. BICAMERALISM AND PRESENTMENT: OVERCOMING CLINTON V. CITY OF NEW YORK

The Legislative Line Item Veto Act of 2006 is perfectly consistent with the principles laid down in Clinton v. City of New York,[1] where a 6-3 Supreme Court invalidated predecessor legislation that Congress enacted and President Clinton signed in 1996. The 1996 version of the line item veto authorized the President to "cancel in whole" certain spending outlays and tax breaks that were approved by Congress and signed into law.[2] A cancellation did not require additional legislation to go into effect; it was effective as soon as Congress received the requisite special message from the President.[3] Congress could override a presidential cancellation, but only by enacting a "disapproval bill" by a veto-proof supermajority: "A majority vote in both Houses is sufficient to enact a disapproval bill," but the President "does, of course, retain his constitutional authority to veto such a bill."[4] In effect, then, the 1996 Act conferred on the President the power to strike, retroactively, items from legislation that had been passed by both Houses of Congress and signed into law. The law as enforced would be qualitatively different than what was congressionally enacted and presidentially approved.

It was precisely this feature of the 1996 Act—the power of the President to amend properly enacted laws—that proved its downfall in City of New York. Because a presidential cancellation "prevents the item 'from having legal force or effect,'[5] the 1996 Act effectively "gives the President the unilateral power to change the text of duly enacted statutes."[6] And such a grant of authority offends the Constitution's Bicameralism and Presentment Clauses, which require unanimity as to the content of a proposed law among all three players in the lawmaking process: the House, the Senate, and the President. That is why George Washington remarked that the Presentment Clause obliged him to either "approve all the parts of a Bill, or reject it in toto."[7] The 1996 Act was constitutionally impermissible, according to the Court, because it purported to authorize "the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature."[8]

The Legislative Line Item Veto Act of 2006 operates very differently from the 1996 incarnation, and its differences place the Act on different, and firm, constitutional ground. First, and most important, a suggested presidential rescission is just that: a suggestion. The President would submit to Congress for its consideration a proposal to cancel a set of spending outlays or tax breaks. Those items would be stricken if and only if majorities in both Houses of Congress vote in favor of the proposal and the President signs the resulting bill. Article I, section 7, of the Constitution requires no more than that. If a single House disagrees and fails to approve the new bill submitted by the President, the original spending decisions would remain in force. The Bicameralism and Presentment Clauses thus are fully respected.

The second critical difference follows from the first. Any cancellation proposed by the President would not go into effect immediately (as was true under the 1996 Act), but only after congressional deliberation and action. While the President would be able to suggest spending cuts to Congress and request that they be disposed of expeditiously, he would have no power by himself and immediately to "prevent[] the item 'from having legal force or effect.'"[9] None of the Executive Branch "unilateral[ism]" that was condemned in City of New York[10] is to be found here.

H.R. 4890 is a constitutional improvement over the 1996 Act in another sense, as well. Unlike its predecessor, it permits disputed spending items—those on whose desirability Congress and the President disagree—to go into effect without a supermajority vote. Suppose the President thinks that a given spending item is wasteful and should be eliminated, but congressional majorities believe the outlay is important and therefore support it. Under the 1996 Act, the President would cancel the item. Congress would then need to pass a disapproval bill to reinstate it, and the

President would veto the bill. The only way for Congress to ensure that its spending priorities go into effect would be to override the veto, requiring a two-thirds supermajority in each House. Under H.R. 4890, the President would identify the item and transmit to Congress a bill proposing to rescind it. If Congress wanted to preserve the outlay, all that would be necessary would be for a single House to reject the bill—by a simple majority vote. H.R. 4890 thus protects the procedure to make law prescribed by Article I, section 7, and vindicates the constitutional value of majority rule.[11]

In these respects H.R. 4890 is quite similar to the rescission authority enacted by Congress in the 1974 Impoundment Control Act (which remains in force today).[12] Like H.R. 4890, the Impoundment Control Act does not authorize unilateral presidential cancellation of spending items. Instead, the President may propose to Congress new legislation to strike the items, and rescission only goes into effect if Congress approves the bill and it is signed into law.[13] Unlike H.R. 4890, the Impoundment Control Act does not oblige Congress to consider the President's proposed rescissions. Congress is entirely free to, and over the lifetime of the Act often has, let them die on the vine through inaction. H.R. 4890 thus is little more than an enhanced version of its 1974 predecessor—one in which Congress would commit itself to giving the President's proposals an up-or-down vote through specified procedures. It is to those procedures that our analysis now turns.

B. CONGRESS'S POWER TO ESTABLISH ITS INTERNAL RULES AND PROCEDURES

The Legislative Line Item Veto Act of 2006 is consistent with the basic principle, expressly recognized in the Constitution, that Congress has broad discretion to "determine the rules of its proceedings,"[14] and that this power generally is "absolute and beyond the challenge of any other body or tribunal."[15] H.R. 4890—which would oblige Congress to vote on a rescission bill proposed by the President within a particular timeframe—should not be thought of as a transfer of authority away from the legislature and to the Executive Branch. Instead, the Act is little more than a straightforward application of the constitutional principle that Congress has wide latitude to govern its internal operations as it sees fit. In fact, Congress many times in the past has provided for the fast-track consideration of legislative proposals in the same way that H.R. 4890 would.

The basic rule of congressional discretion is articulated in Nixon v. United States.[16] In Nixon, the House impeached a Federal district court judge who was convicted of making false statements before a Federal grand jury and was sentenced to imprisonment. (The judge refused to resign, and thus continued to collect his salary while in jail.) Pursuant to Senate Rule XI, the Senate's presiding officer appointed a committee of Senators to receive evidence in the impeachment trial, and the committee reported that evidence to the full Senate. After the Senate voted to convict and Nixon was removed from office, the former judge filed suit, claiming that Rule XI offends the Constitution's directive that the Senate shall "try" all impeachments.[17]

In a 6-3 ruling, the Supreme Court held that the dispute over the Senate's decision to assign its power of conducting evidentiary hearings to a committee was a nonjusticiable political question. The authority to determine the manner in which impeachment trials will be conducted "is reposed in the Senate and nowhere else."[18] Courts therefore will decline to override or otherwise interfere with that body's choice to conduct its business in a particular way. Even the separate concurrence of Justices White and Blackmun seconded the proposition that decisions by Congress about its own procedures ordinarily will not be disturbed. Though the concurrence denied that the Senate has "an unreviewable discretion" to establish its internal rules and regulations, they nevertheless maintained that "the Senate has very wide discretion in specifying [its] procedures."[19]

The same principle applies here. In the same way the Senate enjoys unfettered discretion to adopt whatever mechanism it wishes for gathering evidence in impeachment trials, so Congress as a whole is free to establish a rule that commits it to disposing of presidential proposals to rescind spending items on an accelerated basis. The Constitution expressly confers on the President the authority to submit legislative proposals to Congress: "He shall * * * recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient * * * ."[20] Congress frequently has adopted procedures to consider such proposals expeditiously, and courts just as frequently have held that they have no authority to second guess those internal legislative rules.

In particular, on at least five occasions, Congress has enacted legislation in which it commits itself to considering on a fast-track basis international trade agreements proposed by the President. The first fast-track trade bill was adopted in 1974. Re-

newals followed in 1984 (which enabled the Reagan Administration to negotiate trade agreements with Israel and Canada), and in 1988, 1991, and 1993 (under which the George H.W. Bush and Clinton Administrations completed the talks on NAFTA and the Uruguay Round of the GATT negotiations).[21] These fast-track trade procedures are strikingly similar to the ones proposed for spending rescissions in the Legislative Line Item Veto Act of 2006. Like H.R. 4890, the trade rules specified that congressional leadership will introduce the President's proposed bill soon after it is received.[22] Like H.R. 4890, the trade rules did not contemplate that the bill will be amended.[23] And like H.R. 4890, the trade rules required a final floor vote within a specified period of time.[24]

Federal courts have shown little enthusiasm for questioning Congress's internal procedures for speedy consideration of proposed trade agreements.[25] The same degree of deference should apply to rescissions rules, as well. Indeed, a decision by Congress to consider a President's proposed spending cuts on an expedited basis presents a much easier constitutional question than fast-track trade authority. The latter procedures, which allowed trade agreements between the United States and foreign nations to be adopted by simple majority vote in both houses of Congress, could be seen as conflicting with the Constitution's command that treaties must be approved by a two-thirds vote in the Senate.[26] In the rescission context, by contrast, there is no constitutional norm that arguably might specify internal rules that conflict with, and thus override, Congress's new streamlined procedures.

If Congress decides to proceed with H.R. 4890, it should consider making plain in the statutory text (as Section 2(b) of the current draft bill proposes to do) that the Legislative Line Item Veto Act of 2006 is an instance of its settled authority to craft procedures to govern its internal operations. (Congress did something similar in the fast-track trade legislation.[27],) Not only would such express language aid the courts in subsequent judicial review, it also would prevent a misinterpretation of the Act to imply a more extensive delegation of authority than Congress actually intends.

C. TEMPORARY FREEZES OF SPENDING ITEMS

Because H.R. 4890 does not (and under Clinton v. City of New York constitutionally could not) authorize the President unilaterally and immediately to cancel spending items, and because proposed rescissions are not effective unless and until Congress enacts conforming legislation, some mechanism is needed temporarily to freeze the identified items pending final congressional action. In the absence of a temporary suspension, a cloud of uncertainty would hang over the recipients of the contested funds. Recipients might decline to spend the funds once received for fear that Congress ultimately might revoke them. Alternatively, recipients might begin to spend the funds despite that uncertainty, and this could give rise to reliance interests that could militate against subsequent congressional cancellation. The safer course is to call a time-out until Congress has worked its way through the prescribed legislative process.

This is not a new insight. It was precisely for this reason that Congress in the 1974 Impoundment Control Act authorized the President to freeze the spending items he has targeted for rescission while Congress weighs his proposal. Specifically, after the President submits his suggested rescissions to Congress, the outlays he has identified are frozen for 45 days.[28] Congress could include a comparable mechanism in new line item veto legislation, and it could take any number of forms.

One approach would be to provide, as the current draft of H.R. 4890 does, that the President's suspension of spending items will remain in effect for a set number of calendar days (say, 45), and then lapse automatically. The advantage of this approach is that it steers well clear of any possible constitutional pitfalls under INS v. Chadha, to which we will return below. A shortcoming of the calendar-days model is that, because the clock continues to run during congressional recesses, it is conceivable that a temporary freeze could expire before Congress has had time to take final action on a proposed rescission bill.

An alternative approach is to provide, similar to the Impoundment Control Act, that a temporary suspension would lapse after a set number of legislative days. We understand that some have suggested that such a procedure could run afoul of the Supreme Court's ruling in INS v. Chadha.[29] These are legitimate concerns, but we believe them to be overblown. In Chadha, the Court held that the "legislative veto"—which allowed a single House of Congress to invalidate an action taken by the Executive Branch pursuant to congressionally delegated authority—violated the Constitution's Bicameralism and Presentment Clauses. There is "only one way" for Congress to make the "determinations of policy" necessary to override lawful Execu-

tive Branch action, and that is "bicameral passage followed by presentment to the President." [30]

To be sure, under the legislative-days approach, Congress could manipulate, by going in and out of session, the length of time the President may suspend the contested funds. The President's powers—specifically, his power to continue to freeze the spending items—in some sense thus would depend on congressional action that has not satisfied the Constitution's bicameralism and presentment requirements. But that does not necessarily mean that the use of legislative days necessarily would offend the Constitution. Chadha makes clear that only certain types of congressional acts are subject to the Bicameralism and Presentment Clauses—namely, legislative acts. "Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I." Instead, only actions that "in law and fact" are "an exercise of legislative power" must satisfy those requirements.[31] It follows that other sorts of congressional acts, such as those that are designed to regulate Congress's internal operations, need not.

It seems to us that a decision by a House of Congress to remain in session or go into recess is—at least in ordinary cases—a quintessential example of a nonlegislative, internallyoriented action. It certainly lacks the hallmarks of what we usually think of as legislative action. Deciding whether to be in session typically does not result in the distribution of benefits to citizens or others, nor does it impose new burdens on such persons. Regulated entities ordinarily do not change their primary conduct simply by virtue of Congress deciding whether or not to recess. In a word, a decision to be in session is not itself a legislative act; it is merely a prelude that enables Congress subsequently to engage in legislative acts.

It certainly is possible to imagine scenarios in which Congress's decision to recess would be "essentially legislative in purpose and effect" [32]—for instance, where the subjective intent of Members of Congress is to manipulate the length of time the President has to freeze the funds he proposes to rescind. That would present a close case under Chadha. But there is no reason to think that the mere possibility that Congress could act in such a manner renders a 45-legislative day freeze constitutionally infirm in all cases.

In closing, we again thank the Committee for the chance to share our views on this important issue. Fiscal restraint and balanced budgets are common ground among all, but even these shared values must yield to our fundamental commitment to the Constitution. Fortunately, the Legislative Line Item Veto Act does not force a choice between them. H.R. 4890 provides for rescission through bicameralism and presentment, and thus is fully consistent with the Supreme Court's admonitions in Clinton v. City of New York. The legislation further represents an effort by Congress to exercise its basic power to lay down rules and procedures for its internal operations. Finally, Congress might consider authorizing the President to suspend targeted spending items for periods of 45 legislative days. Given the Chadha Court's condemnation of the legislative veto, such an approach may be riskier than the use of calendar days, but only marginally so.

ENDNOTES

[1] 524 U.S. 417 (1998).
[2] Id. at 436 (citing 2 U.S.C. § 691(a) (Supp. II 1994)).
[3] See id. (citing 2 U.S.C. § 691b(a) (Supp. II 1994)).
[4] Id. at 436-37 (citing 2 U.S.C. § 691(c) (Supp. II 1994)).
[5] Id. at 437 (quoting 2 U.S.C. §§ 691e(4)(B)-(C) (Supp. II 1994)).
[6] Id. at 447.
[7] 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940).
[8] City of New York, 524 U.S. at 448. City of New York and INS v. Chadha, 462 U.S. 919 (1983)—where the Supreme Court invalidated the "legislative veto," which permitted one House of Congress to nullify an Executive Branch action—thus are flip sides of the same coin. Both cases proscribe unilateralism in the lawmaking process. City of New York stands for the proposition that the President may not unilaterally amend legislation enacted by Congress. And Chadha stands for the proposition that Congress may not unilaterally revoke a power previously delegated by law to the President. Both cases work together to ensure collaboration in the enactment of laws.
[9] City of New York, 524 U.S. at 437 (quoting 2 U.S.C. §§ 691e(4)(B)-(C) (Supp. II 1994)).
[10] Id. at 447.
[11] Note also that H.R. 4890 reverses the 1996 Act's presumption. Under the 1996 Act, the presumption was that a spending item identified by the President would be cancelled. Such an item was stricken immediately and could be restored only with congressional action. Under the current proposal, the presumption is that a spending item identified by the President would remain in force. Such an item would remain effective and could be abolished only if Congress enacts, and the President signs, new legislation; failure by Congress to do so would be enough to retain the item.
[12] See Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1011-13, 88 Stat. 298 (currently codified at 2 U.S.C. § 621 et seq. (2006)).

[13] See 2 U.S.C. § 688 (2006).
[14] U.S. CONST. art. I, § 5, cl. 2.
[15] United States v. Ballin, 144 U.S. 1, 5 (1892).
[16] 506 U.S. 224 (1993).
[17] See id. at 226-28 (citing U.S. CONST. art. I, § 3, cl. 6).
[18] Id. at 229.
[19] Id. at 239 (White, J., joined by Blackmun, J., concurring).
[20] U.S. CONST. art. II, § 3; see also Clinton v. City of New York, 524 U.S. 417, 438 (1998) (indicating that the President "may initiate and influence legislative proposals ").
[21] See generally Laura L. Wright, Note, Trade Promotion Authority: Fast Track for the Twenty-First Century?, 12 WM. & MARY BILL RTS. J. 979, 984-89 (2004) (recounting the history of fast-track trade procedures). The original fast-track trade authority, codified at 19 U.S.C. §§ 2191-94 (2006), lapsed in 1994. See Robert F. Housman, The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts, 10 CONN. J. INT'L L. 301, 310-14 (1995). Congress enacted new trade procedures, now known as "trade promotion authority," in 2002. See Bipartisan Trade Promotion Authority Act of 2002, Pub. L. No. 107-210 §§ 2101-13, 116 Stat. 933, 993-1022 (codified at 19 U.S.C. §§ 3801-13 (2006)).
[22] Compare 19 U.S.C. § 2191(c)(1) (2006) (trade bill to be introduced on the day it is received), with H.R. 4890, 109th Cong. § 1021(c)(1)(A) (2006) (rescission bill to be introduced within 2 days of its receipt).
[23] Compare 19 U.S.C. § 2191(d) (2006) (barring the proposal of amendments to a trade bill), with H.R. 4890, 109th Cong. § 1021(d) (2006) (barring the proposal of amendments to a rescission bill).
[24] Compare 19 U.S.C. § 2191(e)(1) (2006) (generally requiring a final floor vote on a trade bill within 15 days of it being reported out of committee), with H.R. 4890, 109th Cong. § 1021(c)(1)(C) (2006) (requiring a final floor vote on a rescission bill within 10 days of it being introduced).
[25] See, e.g., Made in the USA Found. v. United States, 242 F.3d 1300 (11th Cir. 2001) (holding that a dispute over the internal fast-track procedures by which Congress adopted NAFTA was a nonjusticiable political question).
[26] See U.S. CONST. art. II, § 2 (conferring on the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur "). Compare Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 HARV. L. REV. 799 (1995) (arguing that international accords like NAFTA need not be adopted through the Constitution's treaty-making procedures, but instead may be approved through new methods of agreement between Congress and the President), with Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 HARV. L. REV. 1221 (1995) (arguing that such methods are inconsistent with the Constitution's text and structure).
[27] See 19 U.S.C. § 2191(a)(1) (2006) (indicating that the fast-track procedures are enacted "as an exercise of the rulemaking power of the House of Representatives and the Senate ").
[28] See 2 U.S.C. § 683(b) (2006) (authorizing the freeze of spending items for "the prescribed 45-day period" while Congress considers a presidential rescission request); id. § 682(3) (indicating that the prescribed period is "45 calendar days of continuous session of the Congress ").
[29] 462 U.S. 919 (1983).
[30] Id. at 954-55.
[31] Id. at 952.
[32] Id. at 953.

Mr. RYUN. At this point, Mr. Fisher, you have 10 minutes for your comments as well.

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

Mr. FISHER. Thank you, very much Mr. Chairman, Members of the committee. I am pleased here to be with Chuck Cooper and Viet Dinh as well. Chuck Cooper's career I have followed at least from the 1980s when he was in the Reagan administration, head of Office of Legal Counsel, and highly respected. Some of his opinions took a lot of guts. I respect all of his opinions, but some of them took a lot of guts where the outside community was leaning on Chuck to go in a different direction. Very principled grounds; he held firm.

And Viet Dinh I know. I followed his career and the respect he has of the constitutional structure and institutions of government. So, my pleasure.

I say in my statement that I don't think this bill will result in much in the way of cuts either in spending or in the deficit or in earmarks. I explain in my statement why I think it could lead in

the opposite direction. You could get more spending and more earmarks and greater deficits.

So whatever the fiscal results of this process would be, my main point—which is the subject of the hearing today, and I appreciate it—is to look at how this affects our constitutional system. Chuck Cooper and Viet Dinh appropriately looked at litigation, what the courts have said, particularly the Supreme Court. That is one thing that is necessary; but the much more important step, I think, is to appreciate that the experts on constitutionality and legislative prerogatives are Members of Congress. You have the responsibility. You have the experience. You have the duty to protect your own institution. And that is what the Framers expected. Each branch would protect itself, and Congress would never expect some other branch to protect itself. Another branch doesn't have the experience and they don't have the commitment to protect your prerogatives.

So that is the basic point of my statement: What would this bill do to your institution in terms of its prestige, its reputation, and its powers?

I think as the bill was introduced, being an administration bill, I think it probably would have run into constitutional problems, particularly the 180 days. It would allow the President, if he submitted a proposal midway in the year, to unilaterally repeal and terminate provisions. I am sure you will fix that, but there are other problems. But even if you fixed those and some other features in the administration bill, you still have to think through what you are doing to your institution. I point out a number of areas where I think serious damage would be done.

One area would be just the way the bill is written. Even if it were amended, you are still making the statement that in the legislation that you just passed—that has gone through the House and the Senate and the conference committee—the bill you just passed is very likely defective, and you want a process where it can be corrected through Presidential initiative. You thus make a statement to the public and to yourselves that you have doubts as to whether you can write responsible legislation. That is quite a message to send.

I think if you had a process where you could recognize deficiencies in each branch and there would be a way to make those adjustments, that would be one thing. But here it looks to me like one direction. The one branch that looks defective is Congress, and the President is the one who is guardian of the purse.

This is one area I have studied in my career, Presidential spending power and the purpose of the 1921 Budget and Accounting Act. It was never to make the President the more trusted guardian of the purse. I don't think there is anything in the history to indicate that. I think most of your big-ticket items come from the executive branch, and I list some of them in my statement. Congress adds, Presidents add, that is part of our process.

But why anyone would elevate the President of the United States as someone who can be trusted more in limiting spending and deficits, I don't think the record supports that.

Secondly, I think about how the bill would actually function. You pass a bill, it would go to the President, and the President would

be able to put together a list of items that he felt were unjustified or wasteful, and he would do so.

So he would get—that would be the second area to me—he would get, in the public's eye, the credit for having seen the deficiencies in the bill that he just received and to put together a list. Now, there is no way the public or even the press can ever, in a responsible way, distinguish between justified and unjustified items. Maybe on the extremes you could identify certain items. Most things are going to be very debatable. But the President will make a list of unjustified items and he will get credit for that.

If Congress supports the President's list, indeed the President gets even more credit. He has put together a list, and Congress has acknowledged that it was defective in the first place when it gave the bill to the President. So that is area No. 2.

Now, if Congress were, under this bill, to say we disagree with your list, we think those items were justified, we have done a lot of work and you did not support the President, then I think the President probably would get credit even more. He has put together a list, Congress has refused to support it, and Congress gets beat up again.

The fourth area I think is the President's ability or the White House's ability, or, coming from the departments, the ability to call Members of Congress and say that we are putting together a list of items to be canceled, and someone has put the project in your district on the list. We happen to think that that project is a good one, and we are going to do everything we can to make sure it gets off the list. And now on a quite different matter, we would like to know if we can count on your vote on the President's spending bill or in the Senate on a treaty, or a nomination, or anything else that the White House would want. That is tremendous leverage on the part of the executive branch. I think that is great damage to Congress as an independent institution.

What are the potential dollar savings? I think from whatever we know about it, it is next to nothing. I describe here a Government Accountability Office (GAO) report in 1992 where they estimated that over a 6-year period, the President could save up to $70 billion through an item veto. I did my own analysis of it and GAO later reversed and said that it would probably save hardly anything, and would cost more through this quid pro quo that I just mentioned.

If you look at the Clinton years, the experience under the 1996 act was very little; maybe under a billion or so. That is a lot of money. But you have to ask whether that is an answer or remedy for the deficits we are facing today. If you do get a result somewhere between a billion or less, then you have to ask what are you doing to your own institution.

I have a section in my statement about what would happen to earmarks, it is another unknown. You are changing the process. Every time you change the process you are going to change behavior. You could end up with more earmarks. It is just an unknown. And it wouldn't be with any transparency. These are not things that the public is going to be able to follow.

I end my statement by saying that there are plenty of very good remedies available right now. Of course, the President could use

his veto. He could use the threat of a veto and tell people in conference, get things out of there; otherwise I will veto the bill.

To me, the most effective step a President can take, and it is why we had the 1921 Budget and Accounting Act, is Presidential leadership. The President is supposed to submit a responsible budget. And the record, I think, shows that when the President submits a budget, that politically Congress stays around the aggregates of the President's budget. You change your priorities, which you have every right to do. But if a President is concerned about spending and deficits, then the step is to present a responsible budget. Once that is done, 90 percent of the problem is taken care of.

If a President doesn't submit a responsible budget, there is very little on the legislative side that can do to correct that.

Thank you very much.

Mr. RYUN. Thank you very much for your testimony.

[The prepared statement of Mr. Fisher follows:]

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

Mr. Chairman, thank you for inviting me to testify on legislation that would give the President authority to exercise a type of item veto. The apparent goal is to reduce Federal spending, earmarks, and the budget deficit. For reasons given in my statement, I think spending, earmarks, and deficits would not be materially changed by this procedure and might even grow worse. That is counterintuitive, perhaps, but I will explain why.

Whatever the fiscal results of this legislation, a more profound issue is the effect the bill would have on congressional prerogatives, checks and balances, and the system of separation of powers. Individual rights and liberties are protected in large part by the way we structure government. How should Members of Congress decide the constitutional issues implicit in this legislation? Look to court decisions for ultimate guidance or make independent judgments about how best to protect congressional interests?

MAKING CONSTITUTIONAL JUDGMENTS

In House and Senate hearings held earlier this year, considerable attention was paid to whether this legislation would meet the standards set forth in the item veto case of Clinton v. City of New York (1998). Although it is useful to examine judicial precedents, each Member of Congress has an obligation to support and defend the Constitution and needs to exercise independent judgment in fulfilling that task. The branch responsible for protecting the rights, duties, and prestige of Congress is not the judiciary. It is Congress. The Framers expected each branch to defend itself.

Earlier hearings offered testimony that the item veto bill drafted by the Administration might not satisfy the conditions set forth in Clinton. Especially was that so with the President's authority to defer spending for 180 calendar days while Congress considered his proposal to terminate spending. Depending on the time of the year when the President submitted his request, 1-year money might lapse, resulting in a virtual cancellation by the President without any congressional action or support.

Of course Congress can amend the Administration bill to avoid this problem, but Congress needs to do more than merely adjust legislative language to satisfy Supreme Court decisions. Even if this bill were significantly modified to eliminate any problems under Clinton, a Member of Congress has a separate and unique duty. The fundamental test: Does this legislation protect the prerogatives, powers, and reputation of Congress as a coequal branch? The answer does not lie in case law. It lies in the willingness of each Member to determine what Congress must do to preserve its place in a system of coordinate branches. The true expert here is the lawmaker, not the judge. No one outside the legislative branch has the requisite understanding of congressional needs or can be entrusted to safeguard legislative interests.

A lawmaker need not be an attorney to decide such questions. A non-attorney is just as able and experienced in judging what Congress must do to protect representative democracy and the rights of citizens and constituents. Congress should not consciously pass an unconstitutional bill. Similarly, lawmakers should not pass leg-

islation that damages their institution simply because they predict the bill will not be overturned in the courts.

PROTECTING THE REPUTATION AND CREDIBILITY OF CONGRESS

This item veto bill does damage to the institutional interests of Congress in several ways. First, it sends a clear message to the public that Congress has been irresponsible with its legislative work, both in the level of spending and the particular provisions it places in bills. To remedy those supposed defects, Congress will establish a fast-track procedure to enable the President to eliminate items that should never have been included in the bill. This process signals that Members are not up to the task and cannot properly conduct their constitutional duties. That is Damage No. 1.

I don't know on what grounds it can be said that the President is the more trusted guardian of the purse and the far better judge of what is in the national interest, including earmarks. Why is the President, with the assistance of aides, more qualified to decide how Federal funds are to be allocated to particular districts and states? Granted, he has the general veto power and can, by threatening its use, force Congress to strip from bills certain features and provisions. But lawmakers know district and state needs better than agency employees and have the legitimacy that comes from being an elected official.

As for the level of aggregate spending and the size of the Federal deficit, what evidence supports the view that the President is more responsible in fiscal affairs? Congress initiates various spending programs, of course, but the big-ticket items seem to come generally from the President: the national highway system, the space program, supercolliders, the Supersonic Transport, military commitments, entitlement programs, etc.

OTHER LIKELY DAMAGES

I have questioned the premise behind the bill. Now I look at the way it would operate. Under the fast-track procedure, the President would submit to Congress a list of items to be cancelled. In so doing he would automatically receive credit in the public arena for fighting against waste. The public is unlikely to be able to differentiate between "justified" and "unjustified" programs. The President would win on image alone, not substance or analysis. At the same time, Congress would receive a public rebuke for having enacted the supposedly wasteful items. That is Damage No. 2. If Congress were to disapprove the bill drafted by the Administration to eliminate the items, it would be further criticized. The President could go to the public and claim that Congress, having established the fast-track procedure to correct for its deficiencies, refuses to delete unwanted and unneeded funds. Damage No. 3. If Congress has an interest in building support and credibility with the public, this is a procedure to avoid.

Moreover, the President would have a new tool to coerce lawmakers and limit their independence. He or his aides could call Members 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 in its power to see that the project is not placed on the final list. At that point the conversation shifts course to inquire whether the lawmaker is willing to support a bill, treaty, or nomination desired by the President. That political leverage diminishes the constitutional independence of Congress. Damage No. 4.

WHAT ARE THE POTENTIAL DOLLAR SAVINGS?

What we know about the item veto indicates that the amount saved would be quite modest, if any, and certainly would not be a remedy for annual deficits in the range of $300 billion or $400 billion. Both conceptually and in actual practice, the experience with the item veto 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, an item veto could increase spending, as with the Quid Pro Quo described above. The Administration withholds cancelling a Member's program with the understanding that the Member will support a spending program favored by the President.

In January 1992, the General Accounting Office 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 6-year period, during fiscal years 1984 through 1989, could have been

$70 billion.[1] I was asked to review the GAO study. Looking at the same data, I concluded that the savings over the 6-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 accommodations.[2]

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 mean of gaining their support for spending programs which would not otherwise have been enacted by the Congress."[3]

Another helpful measure in gauging how much savings can be expected from an item veto 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 5-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.[4]

A WAY TO ELIMINATE EARMARKS?

It might be argued that the procedures outlined in the bill would allow the President to single out for cancellation unjustified earmarks added by Members. I suggest that it will be very difficult to measure what happens because the fast-track procedure is likely to change legislative behavior. Suppose, for the sake of argument, that Congress currently adds 150 earmarks that the President finds objectionable. Through item-veto authority, he recommends that 50 be eliminated. Congress agrees to support the cancellation of half that amount. Thus the total declines from 150 to 125, a significant reduction. But how would Members behave with the availability of an item-veto procedure? Perhaps the number of "objectionable" earmarks will grow from 150 to 250, allowing Members to take credit for initiatives taken on behalf of constituents and place the blame on unelected bureaucrats who offer objections. The President responds with a list of 100 earmarks to be eliminated. Congress supports him on half. The result: earmarks decline from 250 to 200. That isn't progress. It's more like a shell game and far removed from the "transparency" used to describe the benefits of item-veto legislation. Functioning in that manner, the process reduces rather than enhances congressional responsibility.

OTHER DISPUTED PROVISIONS

House and Senate hearings on the item-veto bill have spotlighted other controversial provisions. The bill placed no restrictions on the number of rescission proposals the President may submit to Congress. It could be one message per bill or a hundred per bill, and the same rescissions could be sent up a second or third time. As a result, the President gains substantial control in driving and determining the legislative schedule. I have already mentioned the 180 calendar day time for deferring the spending of funds. Third, there is no time limit when the President must submit his item-veto proposal to Congress. The problems identified here, and there are others, 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 the bill but they would not address the serious institutional

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[1] U.S. General Accounting Office. Line Item Veto: Estimating Potential Savings, GAO/AFMD-92-7, January 1992.

[2] My CRS memorandum of March 23, 1992 is reprinted at 138 Cong. Rec. 9981-82 (1992).

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

[4] The Line Item Veto, hearing before the House Committee on Rules, 105th Cong., 2d Sess. 12 (1998). The totals would have been somewhat higher had all of President Clinton's 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 congressional hearings, witnesses from the military services contradicted claims made by the Administration in justifying the cancellations. President Clinton vetoed the resolution of disapproval but both Houses easily overrode the veto (votes of 78 to 20 in the Senate and 347 to 69 in the House).

damage that would be done to Congress, representative government, and constitutional checks.

REMEDIES ARE AVAILABLE

There are more effective ways of dealing with Federal spending, earmarks, and budget deficits. Through the regular veto power, the President can tell Congress that unless it strips a number of identified items from a bill that is in conference, he will exercise his veto. Threats of that nature are regularly employed to shape 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 modify 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. True, Congress can ignore his request, but through this procedure the President can publicly declare his opposition to excessive spending and put pressure on Congress to comply. A determined and skillful President can assure that legislative inaction comes at a cost.

More important than those tools, however, is the budget that the President submits. It is within the President's power to recommend a budget that balances expenditures and revenues in such a way as to minimize or eliminate budget deficits. It is quite true that the President's budget is merely a proposal and that Congress can change it as it likes. But the historical record suggests that the aggregate numbers submitted by Presidents (total spending, deficit or surplus, etc.) are generally followed by Congress, and that legislative changes have to do with priorities, not totals. Presidential leadership in the form of submitting a responsible budget has far greater impact on spending and deficits than the availability of item-veto authority.

Mr. RYUN. I would like to begin with Mr. Cooper. I thank you very much for your comments.

Based upon your testimony, you feel that H.R. 4890, unlike the 1996 line item veto, is constitutional. Can you explain perhaps how you arrived at this decision and how you might distinguish why this is constitutional as opposed to the 1996 one not being constitutional?

Mr. COOPER. I am happy to do that, Mr. Chairman. I think for me the central defect—and I think the Supreme Court identified as the central defect—of the 1996 act was that the President's discretion that the Congress vested was to cancel law, was to repeal law.

As I mentioned in my testimony, once the President canceled a provision pursuant to the authority contained in that act, it was as surely extinguished as it would have been if a repealer had been enacted under Article I, section 7. And nothing could recall it, cancellation or appeal; if the law is gone, it is gone. And whatever authority existed prior to the cancellation of the repealer could not be exercised.

I think that is the central constitutional teaching of Clinton. And I think that this bill that is pending now before you obeys that constitutional teaching, because it doesn't exercise—it doesn't grant the President the power to exercise any type of discretion as to the law itself, but rather to exercise a discretion as to the authority contained under the law, which it has done since the days of Washington, a discretion to spend or not to spend.

The powers separated by the Constitution are, under that approach, completely observed and obeyed. The Congress decides, all right, here is how much money the President can spend up to, but we are going to let the President decide what the discretion will be on that.

But the legislative determination is Congress'.

The administrative or executive branch discretion, I think this much should go here, this much should go here, and I have money

left over, it should go back to the Treasury; that executive type of decision-making is in the President.

It is when this body purports to give the President the legislative power to actually make the law go away, that is when the separation of powers has been traversed. So I think that is the central distinction in why I believe this measure now under consideration falls on the constitutional side of that line.

Mr. RYUN. I want to take note, you said when there is money left over going back to the Treasury. I wonder how long it has been since that has actually taken place. But, nevertheless, I appreciate your comments.

Mr. Fisher, I know you simply feel this is a bad idea. I know you mentioned something with regard to perhaps maybe the dollars saved—I don't want to mischaracterize this—may not be very significant. I will say this. Coming from a pretty rural district, every dollar saved, I know, for my farmers means a great deal. But besides that, I recognize that you feel it is a bad idea, regardless of who gets the credit or who gets the damage, but in your opinion you feel that this is unconstitutional per se?

Mr. FISHER. The point I make is that if you go look at court decisions, I think with the adjustments to the bill, I think you could say the courts would not strike this down. But my point is that even though the courts would uphold a piece of legislation, it can still do damage to Congress as an institution.

As far as Chuck Cooper's statement about discretionary authority on the part of the President, if Congress decides to appropriate X amount of money and the President can accomplish that task for less, and the remainder goes to the Treasury, there is no damage done, no discrediting of Congress. But there would be under this procedure where, in the bill that you just passed, the President has a chance to make public a whole list of things that he says should never have been in the bill in the first place.

Mr. RYUN. Thank you for your comment. I am going to turn to Mr. Spratt at this point for any questions he may have.

Mr. SPRATT. Thank you very much, Mr. Chairman. I think you would all agree that this bill represents a substantial cession of authority, transfership of authority from the Congress to the President.

I doubt that many people who are following this debate really appreciate how broad a ground of authority this is. One way of illustrating how far it goes is to look at how it applies not just to discretionary spending every year that is appropriated, and to some extent line items, a lot of the appropriations process is accomplished through committee language as opposed to bill language—but this also applies broadly, much broader than the Line Item Veto Act passed in the 90s, to direct spending or entitlement spending.

In particular, I don't have the bill citation, but on page 13, this bill would extend to the President the power to, in the case of entitlement authority, prevent the specific legal obligation of the United States from having legal force or effect.

Now, Mr. Cooper, Mr. Dinh, Mr. Fisher, can I ask you. Does this mean that the President could say if the Medicare trust fund, Part B trust fund, Part A trust fund, runs out of money at a given time, that the Government of the United States would not have the au-

thority to pay the obligations of the Medicare program to provide for benefits of the program except to the extent that trust fund assets would cover the cost? Could he go that far? Could he literally cancel out a certain program of that magnitude with a stroke of a pen; obviously, at least, propose it to Congress?

Are we talking about that bottom ground of authority? We are not talking about a bridge. We are not talking about a road. We are not talking about a museum. We are talking about a whole program, Social Security, Medicare, the farm program.

Mr. FISHER. The way I read the bill on page 13 when it uses the term "modify," you are giving the President not just discretionary authority on spending, but discretionary authority on legislation. The President could, with the word "modify," rewrite legislation. And that is the heart of the Congress' power, to shape and write legislation. Here under this procedure, the only one who could modify legislative language would be the President. Congress could not. Congress would be restricted to an up-or-down vote. So I think you are giving away both spending power and legislative power.

Mr. SPRATT. He can reach back to existing entitlement programs. No. 1, he has got elsewhere in the bill the power to modify direct spending. But here he has the authority in the case of entitlement authority to prevent the specific legal obligation of the United States from having legal force or effect. Social security, Medicare. Am I reading too much into this?

Mr. COOPER. Congressman, I did not previously, until your comments, consider the possibility that the President could propose a rescission with respect to existing spending authority.

And, in fact, I guess the way I had read the bill was that he could not——

Mr. SPRATT. As I understand, any spending authority enacted after the effective date of enactment of this bill. So once this bill comes, anything enacted thereafter is fair game.

Mr. COOPER. OK. And now that I look at the effective date provision, having not thought about the question you are raising until now, that may be a valid interpretation of it.

Mr. SPRATT. In your language in the line item bill was one new direct spending item. I am not sure what direct spending item is, because there is a lot of direct spending that comes out of big accounts rather than what I would consider a line item or an item in the budget. But it was obviously a tentative attempt to see if that could be part of the President's arsenal without giving him too much, limited to one particular provision which happened to come down on the City of New York in the form of some Medicaid cuts.

Mr. COOPER. It is correct that the 1996 act applied only to spending authority, moneys that were enacted, obviously, after that line item veto enacted. And the President's authority could only be exercised within 5 days—the cancellation authority, within 5 days of the passage of the new spending authority.

I have always, I guess, grasped—I have never heard the suggestion previously made—that the President could, for example, in the year 2010, if this passes, go back and propose a rescission with respect to a spending measure or authority that was created, you know, in some year past. This is the first suggestion I have heard of that. It may have been in common discussion, but not to my

ears. And I don't immediately see anything in the bill that contradicts your point. But I will say that I have understood its purpose to be focused only on matters of new spending or taxing authority that comes into existence after the passage of the act, and the President would have to move contemporaneously with that.

Mr. SPRATT. The President proposed that Congress would have to dispose, we would actually have to pass a rescission bill with that provision in it. However, as drawn, this statute will allow, this bill would allow the President, by proposing to at least effect the deferral of this expenditure, this entitlement obligation, for a period of 6 months.

Mr. COOPER. That is correct. The key point, however, that I want to continue to emphasize is that the elimination of that authority and the spending, wherever it may come from, the spending authority, isn't eliminated unless this body agrees with the President's proposal. And that, to me is what this measure really is most easily likened to, and as a litigator this comes readily to my mind, is a petition for reconsideration, which is, you know, a procedural device that in every courtroom is commonplace. When a court makes a decision initially, the litigants can look at it, and they can always petition for reconsideration. And that is what, essentially, the President is saying to this body.

I see a spending measure here, and you know, I just——

Mr. SPRATT. In its purest sense, that may be true. But there are certainly conceivable opportunities for a President to use it more manipulatively than simply the way you have described it. Jim Wright used to say, to understand the problems with a line item veto you need to have served under Lyndon Baines Johnson.

Lots of Presidents can be manipulative like that. And our concern, my concern right now in this line of questioning, is how do you detract from this bill as much as possible the potential for abuse that a manipulative President could put this act to? For example, the requirement in the past when we had this bill on the floor, the President had to act quickly. Within a week after getting the bill, he had to send this back for petition, for reconsideration. Now he can act at any time on any legislation that hasn't yet been fully spent out. He can go back, and if he is trying to get the last Republican Member to vote for the prescription drug bill, he can pull his arsenal, he can pull this out of his arsenal and use this as leverage.

Mr. COOPER. And, Mr. Spratt, I for one think that some type of reasonable time limit from the enactment of a spending or taxing measure for the President to propose a rescission would be a positive improvement on the bill as written, quite frankly, because I think it would address a number of the concerns that have been voiced about potential for abuse by a manipulative President.

I have to quickly add, however, that I do think the legislative process, you know, in just the 200-year tradition of our country, is that some level of interbranch good faith is assumed whenever legislation is passed. And there is always authority for a President to abuse authority or others who have authority under law.

Mr. RYUN. The Chair would like to interrupt at this point. I would like to give every opportunity to other members for questions. If you would observe the 5-minute clock, there may be time

for a second round of questions. Mr. Cooper has time, but he apparently needs to leave around 11:30, and I would like you all to have an opportunity to ask him questions. At this time, I would like to turn to the sponsor of this bill, Mr. Ryan.

Mr. RYAN. Thank you, Mr. Chairman. First let me try to address some of the issues and questions that have been raised. This is much like the bill, Mr. Spratt, that was introduced in the past Congress to achieve the same purpose.

As to the question of the manipulation by the executive branch, could a future LBJ really manipulate this thing? First of all, that is not the intention of this bill. Second of all, the bill as currently drafted does not give the President the ability to go back years past and upset entitlement policy. But just to make it very, very clear that this is not the intention of this bill, I intend to introduce in the manager's amendment next week in the markup to make this very, very clear, No. 1, the way we wrote this bill in the beginning was we put 180 calendar days out there, knowing that we needed to figure out how to make it a little cleaner, a little crisper. The reason we put 180 calendar days at the time was there was great constitutional debate about the Chadha case and about the constitutionality of how these time limits are set.

So now that we know a little bit more, and this is the question I am going to: No. 1, I think we need to put a time limit on the front end. How much time does the President get to submit a rescission request to Congress? There is a finite time limit that ought to be in place. I think that addresses the gentleman's point.

No. 2, the calendar day versus other kinds of time limits. Why 180 days? The reason we put 180 days in there is because we didn't want to see a situation where Congress could game the system by passing, let's say, an omnibus appropriations bill in the middle of October, then going home until the State of the Union address on January 22nd and waiting it out; and waiting out the deferral period of a President. That is a very conceivable situation. So what we wanted to do was be able to incorporate large recess periods within the legislative process.

My personal preference is that we have a time limit on the front end and a deferral on the back end, tie it to legislative days, a finite number of legislative days which incorporates any kind of intervening recess. Now, when we first drafted this bill, we were concerned that might run into a Chadha problem.

I want to ask Mr. Cooper and Mr. Dinh about that. But before I do, let me address something Mr. Fisher said that this is a bad tool or could be used to increase spending. I don't see it that way. The way I see it—and this is my 8th year as a member, 5 years as a staffer, part on this committee in the past—there is no transparency and accountability in the spending system at the end process here in Congress.

With the earmark reform we are working on right now, we are trying to bring some transparency and accountability in spending in the beginning of the process when we write these bills and pass them through the original House and Senate passage. But when these bills go to conference and come out of conference, there is a lot of brand-new spending policy that is contained in large pieces of legislation.

Members of Congress have one vote, yes or no, on the entire bill. The President of the United States has one decision, sign it or veto the entire piece of legislation. And it is that stage in the process where there is lacking any set sign of transparency and accountability. This is meant to bring transparency and accountability through this whole system by revising the rescissions process which is moribund. The rescissions process today effectively doesn't work. It is ignored. This simply makes the rescission process work.

So my specific question, Mr. Dinh and Mr. Cooper, because I know you two have looked at this a lot, is will we run into Chadha problems or any constitutional court problems by trying to time-limit the deferral period?

What we want to accomplish is a legitimate deferral period, but not one that is too long. We don't want to give the President 6 months on anything. But we also want to make sure that Congress can't rig the system by passing major spending bills, then recessing for 3 months and outlasting the deferral period. So we would like to have a finite deferral period which incorporates some of these large recesses that we have in these intervening times.

Could you speak to that issue?

Mr. DINH. On the issue of legislative days versus calendar days, I see an issue there. I don't think it is a very serious issue or even a significant one in terms of constitutionality either under Chadha, under a one-house legislative veto issue, or a presentment clause issue.

The reason I recognize it as an issue is that, of course, the recess decision is not an Article I, section 7, decision—legislative act. But precisely because it is not a legislative act, it should not have to go through Article I, section 7, issue.

That it has a collateral effect on this and a whole bunch of other laws with respect to the operation of those laws, I don't think raises a serious constitutional issue under Chadha or other separation of powers issues. And there are, by the way, no authorities on this because it doesn't arise very often.

The closest analogy I can think of is the pocket veto issue. That is, the Constitution requires the President to return a signed bill within 10 days. Obviously, whether or not he is able to return that depends on whether or not the Congress is in session.

And so there was a challenge in the 1930s that this obviated—this extended the number of days for him to return the bill, and the Court rejected that argument, saying that is part of the constitutional process, and just because Congress happened to be out of session doesn't make it to be a constitutional issue. And so, conversely either the legislative days or calendar days does not pose such a type of Article I, section 7, problem. If it did pose a problem for legislative days, then using calendar days wouldn't help because you have the same—the same issue about Congress going in and out of session during the calendar day. And so—but I think that the decision whether or not to be in session is a nonlegislative act. It doesn't raise a significant issue at all.

Mr. RYAN. Thank you.

Mr. RYUN. Mr. Cooper, would you like to respond to that? And I would like to remind members that there is a 5-minute time limit. Green means you can ask and answer questions. Yellow

means you wrap it up. And red means it is time to pass. So, Mr. Cooper.

Mr. COOPER. Mr. Chairman I really have nothing to add to Mr. Professor Dinh's analysis. It seems quite sound to me. I do see the administration's concern about a Chadha problem with triggering, you know, the President's suspension authority on a negative vote in one house or the other. But I would just endorse what Professor Dinh has said.

Mr. RYUN. All right. Thank you very much.

Mr. Cooper, it is your turn for questions.

Mr. COOPER OF TENNESSEE. Thank you, Mr. Chairman. First, on page 6 of Mr. Cooper's testimony, he says precisely the same text, and that text is signed into law by the President.

Quoting the Clinton decision, I think—I would hope that the five constitutional suits that are headed toward the Supreme Court right now concerning the Deficit Reduction Act could perhaps get you—your or Mr. Dinh's expertise, because as you are well aware, identical texts were not delivered to the President.

The President picked one over the other in a terrific breach of constitutional duties in my opinion.

But the big question—it is a little bit sad that great constitutional scholars like you three have to be dragged into Congress to try to give us backbone, because that is what this issue is all about. The President has never used his veto power, the longest stretch since Thomas Jefferson. He has really never used his rescission power which every President since Nixon has used. So what this is really about is Nero fiddling while Rome burns.

Now that sounds a little extreme, but if you read "The Wall Street Journal" yesterday, you will discover that Standard & Poor's, the leading rating agency for bonds, said that U.S. Treasury bonds would lose their AAA rating in 2012. That is pretty serious, and this is from Standard & Poor's, not any political organization. The credit of America is being destroyed.

Another point, the head of the GAO has testified to this committee that the cost of 1 year of delay in addressing some of our fiscal problems is $3 trillion, $3 trillion. Now, this Congress this year will meet fewer days than any Congress since 1948. Harry Truman called that "the Do-Nothing Congress."

As Mr. Spratt mentioned earlier, this is a Congress without a budget, and here we are talking about fine-tuning Presidential powers. We haven't produced a budget, and the President has never used the powers he has always had. Who is fooling whom here? So that is why I use strong words like "Nero fiddling while Rome is burning."

We must protect the credit rating of America. We must not return in January to a problem that is $3 trillion worse. Those are the real issues you face. And y'all have great constitutional expertise, but we have budget responsibility, and we are not meeting that responsibility.

So whether this is constitutional or not—and even Mr. Fisher is agreeing that it could be drafted to be constitutional—we are missing the larger central question that affects the future of our country, and you are not expected to be experts on that. But this is one more fig leaf to try to hide the nakedness that most citizens are

not aware of, that the President has not used the powers he has got.

Two of you gentlemen have conservative backgrounds. To me, the President is not acting in a conservative fashion. The Reagan economist, Bruce Bartlett, has written a book about this called "Impostor: How George W. Bush Bankrupted America and Betrayed the Reagan Legacy."

Is this conservative that we are seeing from this administration when, so far as I know, for the first time since the existence of Standard & Poor's, the credit rating of America is endangered not decades out, but in the relatively near term. What is going on here except an excuse from a lot of Congressmen, and some in both parties, to stop action or delay recognition of these problems?

These are problems that simply must be addressed whether you are conservative or liberal, strict constructionist or more activist approach. And it is fine to talk about all the legal niceties, but the larger issues are simply being ignored.

This is not the Judiciary Committee. This is the Budget Committee, and we do not have a budget for America this year.

So forgive me for the statement. If I could return my quick earlier point, I hope that you gentlemen can use your expertise in that pending Deficit Reduction Act case. Thank you.

Mr. RYUN. The next question will come from Mr. Lungren. You have 5 minutes.

Mr. LUNGREN. Thank you very much, Mr. Chairman.

I am kind of surprised at some of the comments from my colleagues here. I mean, my ranking member, Mr. Spratt, called this a diversionary tactic. I guess the next thing we are going to hear is killing al-Zarqawi was a diversionary tactic. This is something that is serious. This is an issue that we have here that all of us, I thought, were serious about.

If I could borrow from George Will, this bill is kind of like the Betty Ford Clinic for earmark addiction in both the executive and legislative branch. I returned to Congress after a 16-year absence, and frankly, I am horrified at the lack of concern about spending constraint. And I remember Congress' reaction when I was a Hill staffer years ago, and it was to punish Richard Nixon for trying to have spending restraint by passing a bill that cut off some of his authority of impoundment.

So now we are talking about in some ways sharing the responsibility on spending restraint.

I look at this as transparency. I look at this—you talk about a manipulative President. Hey, come on, let's wake up. There have been LBJs and others for years, both in the House and the Senate and the Presidency. At least this requires it to be on the table. At least there is a little bit of a window into some of the spending, but I would like to ask a couple of constitutional questions here.

The U.S. Supreme Court indicated in the Clinton case that both Houses of Congress must agree on any rescission. That would seem to take care of the bicameralism requirement. But looking at Clinton and Chadha, how does the proposal meet the present requirement? The bill makes reference to a bill to rescind the amounts of budget authority or items of direct spending as specified in the special message in the President's draft bill.

I would ask one question: Is it enough to present the approval of the items rescinded or should we present the legislation altered by the rescissions that will be signed into law? That is one question.

The second question is this: Could one Congress pass the law and send it to the President at the end of this Congress? For instance, we are here in a lame duck session this December if this bill were in effect; we pass a spending bill to the President. The period of time, whatever it is 180 days, or legislative days, goes over into the next Congress.

Is there any constitutional problem with a new Congress rescinding through this act something done by a previous Congress? Because presumably what you are doing is suspending application of the law as opposed to actually having a completed law, in a sense; is that any problem?

Mr. DINH. If I may take a first crack at that, I look at the procedure set forth in the act here as no more extraordinary than if you were to consider a repealer. Here are special procedures for a special kind of repealer. And so the language of a repealer that is passed by Congress and presented to the President is simply this item as opposed to this act or this provision of law is hereby repealed.

Here it says, this specific item is hereby rescinded so it works as a partial repealer of the Budget Act and also a—or a special amendment, subsequent amendment, to that act. So it is not any more extraordinary.

With respect to crossover presentment, the normal rules would apply with respect to the end of session, whether or not it has come in within the session and signed within the session.

With respect to repeal of prior Budget Acts, that is, prior budget cycles, again, I think that the question there is with respect to whether or not you can rescind the authorization prior—that what had been previously granted—I see no special problem with that with the exception of whatever limiting language you may have in any given Budget Act with respect to its validity. Like I said, it is just because this is a legislative line item veto. The legislation that is used is like any other Article I, Section 7 issue.

Your question also pointed out the earlier question regarding entitlement programs. I think the provision that was read earlier with respect to modification and withdrawing of entitlement is necessary as legal matter because of the Goldberg v. Kelly case that says that there is a new property interest out there with certain authorizations that give people certain expectations of receiving that property.

That particular provision takes away the statutory entitlement, whether or not Goldberg v. Kelly extends also to create a new entitlement of a constitutional nature, is a question for the courts subsequently to decide.

Mr. COOPER. I listened very carefully to Professor Dinh's response, and I did not detect anything that I thought I, in any way, disagreed with. It does seem to me that passage of simply, you know, the approval of the President's rescission proposal would do the trick. I don't really detect any reason why going farther and actually perhaps reenacting the underlying measure without the re-

scinded measure or item would be a necessary step, if I understood your question correctly, Congressman Lungren.

And also, I think that the constitutional mechanics of this process are that Congress is enacting a repealer, and a subsequent Congress—I would see no reason why a subsequent Congress would have any restraints on its ability to repeal something that a previous Congress had enacted even if it were, again, just pursuant to special provisions that the Congress has effectively in this bill promised the President it will undertake should he make a proposal pursuant to the authority that is provided him.

Mr. RYUN. At this time, I would like to recognize Mr. Neal for 5 minutes.

Mr. NEAL. Thank you very much, Mr. Chairman. Thanks to the panelists. It is really nice to have individuals of your caliber here today.

Is it your position that Congress currently has the tools to restrain spending? Does anybody disagree with that statement?

Mr. FISHER. I agree it has the tools.

Mr. NEAL. Mr. Dinh.

Mr. DINH. No.

Mr. NEAL. I want to have brief answers because I have a lot to get in here.

Do you think Congress currently has the tools to restrain spending?

Mr. FISHER. Yes.

Mr. NEAL. Mr. Cooper.

Mr. COOPER. I don't disagree with that.

Mr. NEAL. Thank you.

Is there a guarantee that if this would be enacted that anything other than priorities would be shifted, meaning that the President would decide what priorities we are spending on rather than Members of Congress?

Mr. FISHER. I think the main impact would be priorities, not total spending.

Mr. DINH. There are no guarantees.

Mr. NEAL. No guarantees.

Mr. Cooper.

Mr. COOPER. I think that this provision simply identifies a way that the Congress and the President, working together, can make decisions and correct earlier mistakes. That is all.

Mr. NEAL. Thank you.

Do Members of Congress serve under the President?

Mr. FISHER. No. As I last recall, I think they take an oath to support and defend the Constitution.

Mr. NEAL. Mr. Dinh.

Mr. DINH. No.

Mr. NEAL. Mr. Cooper.

Mr. COOPER. No, sir, of course not.

Mr. NEAL. Mr. Ryan indicated in his comments that the Framers would be thrilled with this initiative. Do you think Mr. Madison would be happy with the proposal that is in front of us?

Mr. FISHER. I made a point in my statement that Madison and others expected each branch to protect itself. And Congress being the first branch, the branch closest to the people, he wouldn't have

wanted to see it put itself in a position where it would be injured or demeaned or discredited.

Mr. DINH. One note there. This is—nobody can speak for James Madison, but I would note, James Madison is the forefather of understanding political process, political economy, and I think he would recognize the collective action problem.

Mr. NEAL. But he was also haunted by what happened with Charles and what happened at Runnymede.

Mr. DINH. No question.

Mr. NEAL. Very concerned about kingly responsibilities.

Mr. DINH. If this were a delegation, an abdication of responsibility to the executive branch, I think that would be a point very well taken, but this is still retention of authority by the legislature.

Mr. NEAL. Thank you.

Mr. Lungren kind of glossed over the notion of Lyndon Johnson. Have you ever listened to the tapes of Mr. Johnson and Senator Long as they discussed a new courthouse in Shreveport, Louisiana? I assume you haven't.

Has anyone read the trilogy recently that was offered by Taylor Branch as one of the great scholarly achievements on Martin Luther King's life, when Lyndon Johnson suggests by 1965 and 1966 that the war in Vietnam is a mistake, and he can't figure out how to get out of it—58,000 people dead when the war ended in 1974.

Is there a potential here—I will ask our scholars, and you truly are that, and I have great regard for what it is you do. Is there a potential here for executive mischief?

Mr. FISHER. Of course, there is. But let me just say, also, we have been talking about transparency here, and that's an important issue.

Mr. NEAL. I have the press releases from members of our committee on the earmarks that they have embraced.

Mr. FISHER. Right. But I am raising the question about what transparency this bill has on the executive side. Once the executive branch puts together that list of items to come back to be terminated, how did that list get put together? Would these be congressional add-ons? Does that mean you can't add anything to the President's budget?

Mr. NEAL. Well, I think there is a great constitutional issue that we ought to be focused on, as members of the legislative branch, and that is called the K Street Project, because in some measure, we are here today because of the K Street Project.

If you look at what has happened to the earmarking process in Congress, where members of our body routinely embrace press releases touting their spending achievements back home, but come in and complain about the spending priorities of the Nation, I mean, it seems to me that transparency is precisely the issue. Put your name next to the earmark and offer it in public, not the way that it is done now where the press and others can't get to who the author of the actual legislation is.

I mean, the three scholars here agree, and you have a great reputation, and I hold you in the highest regard. We acknowledge that the tools are available to this Congress. I voted for the Bush budget No. 1, 2 Clinton budgets. We balanced the budget with cuts in revenue increases and at the same time, at the same time, Members

of the other side embraced a constitutional amendment to balance the budget? This is gimmickry. Stand up for the institution.

My hands, I feel, are very clean today. I will tell you why. I oppose the balanced budget amendments to the Constitution. I opposed the line item veto and stood for the institution that imposed term limits. And there are Members of the body today who voted for the term limits and remain here to this moment, long after their vote had been cast.

And I will close on this note. The best speech I ever heard came from Henry Hyde on why we shouldn't use constitutional gimmickry.

Mr. RYUN. Gentleman's time has expired.

Mr. Bonner.

Mr. BONNER. I really came to the hearing today to learn and not to ask questions. But this debate and discussion has actually raised some questions that I would like to try to get on the record.

If any of the three of you had the role of chief counsel to the Speaker of the House, not your current role, and your advice was if by embracing this measure that many of us believe we do need both sides—the Blue Dog conservatives, the Democratic side, and the RSC members and others on our side that are very concerned about the growing spending habits in this city, but if your roles were to advise the Speaker of the House about whether or not by embracing this bill we would be giving up our constitutional status as a coequal branch of government to the administrative branch, in that role and wearing that hat, could you advise that, in fact, setting aside the goal of getting the balance—getting the budget and the spending habits under control, could any of you advise the Speaker of the House that this would, in fact, not weaken our coequal status with the administrative branch?

Mr. FISHER. I think the bill and its basic concept would weaken Congress. If Congress wants to protect that balance, then I think that it needs to be a process where just as the executive branch wants to go after some legislative decisions, Congress can go after some executive decisions.

If you remember, that is the way it worked in 1992 where there was a package at the end that had a rough balance, and it wasn't just Congress taking the hits.

So I think you have to have some process. If you remember, in 1992, they sent up about a $10 billion package of things they made fun of Congress for ever having enacted. And Congress said, if you want to play that game, we will go after some things on the executive agency side that look funny also.

In the end, there was a rough balance, and I think the status and prestige of both branches was protected, but I don't think that this bill protects Congress that way.

Mr. DINH. I think I may disagree with my friend and respected colleague, Lou Fisher, here, because I think in one way, this bill not only does not denigrate congressional power, but in one way, it affirms it.

If one takes as a given—I think that everybody has agreed that the President has some discretion not to spend or to pounce on certain funds even in the absence of any congressional authority, what this bill does is, it actually gives the President certain authority to

defer certain spending, and in that sense reasserts congressional authority and regulation into that branch regulatory budgetary process. So, in this regard, it is a reaffirmation of the congressional role in the spending decision, in addition to the authorization and appropriation decision.

Mr. COOPER. I, too, disagree with my friend Lou Fisher's thoughts on the idea that this would result, even if constitutional, with "discrediting," I think is the word he has used several times, this body and otherwise demeaning the legislature in favor of executive branch authorities. I don't look at this that way at all.

I see this, again, as I earlier analogized, as a mechanism by which this body is looking to the President for what amounts to, again, a petition for reconsideration of certain decisions that the body has taken in a collective effort; that that may well have spawned some errors that are in need of correction, some things that are not in the best interests of the country.

If more carefully considered in isolation and if the Congress doesn't agree with the President's judgment on this—and, yes, the President certainly can make his arguments in a robust way, designed to develop as much political force as he can gather behind his views on this—Congress has the same authority on its side. But at the end of the day, the question becomes, well, do the President and the Congress believe and agree that this measure was not well taken? And if they don't agree on it, it stays.

I don't understand that, as a process, as any more demeaning to this body than is a petition for reconsideration that I file—all too often, unfortunately—in a court in which I am litigating. It is no—you know, just asking, Could you look at this again; I think you didn't consider this or that concern. It is not demeaning process at all. It is just error correction.

Mr. BONNER. Thank you.

Mr. RYUN. Gentleman's time has expired.

The Chair would urge everyone to stay to 5 minutes. We are expecting votes at about 11:10. That would give us an opportunity for everyone that is here to ask questions.

At this point, I would like to give an opportunity to Mr. Moore, who is recognized for 5 minutes.

Mr. MOORE. Thank you, Mr. Chairman. And thank you, gentlemen, for being here this morning with your testimony. As I understand this bill, a rescission bill is to be used for deficit reduction purposes. Is that generally correct?

Mr. FISHER. Yes.

Mr. COOPER. Yes.

Mr. MOORE. Thank you.

I think all of you are familiar with the now-expired rule, at least the way it was, called PAYGO or pay-as-you-go. You have all heard of that rule and are all familiar with that rule?

Mr. FISHER. Yes.

Mr. COOPER. I am sorry. I am not familiar with that.

Mr. MOORE. Mr. Fisher, can you give just a brief one- or two-line statement about what PAYGO means?

Mr. FISHER. It just means that anyone that has an initiative that would unbalance the budget has the responsibility to do something of a corrective nature so that you have a neutral result.

Mr. MOORE. So if you have a new tax cut proposal or a new spending proposal, the second part of the proposal has to be, here is how it is going to be paid for so it is revenue-neutral; is that correct?

Mr. FISHER. That is correct.

Mr. MOORE. Would you support the reinstitution of that?

Mr. FISHER. I think that was a discipline that, to my knowledge, worked well and would work well again.

Mr. MOORE. Mr. Dinh.

Mr. DINH. I am just an absent-minded law professor. This is way above my pay grade.

Mr. MOORE. All right.

Mr. Cooper, having heard the explanation——

Mr. COOPER. Having heard the explanation, I honestly don't have an opinion of it. It doesn't seem to me to pose a constitutional issue. That is the only thing I would presume to advise this body on.

Mr. MOORE. I am trying to get at a policy of deficit reduction, and maybe there are more effective ways to do it than simply the line item veto or rescission. In fact, Chairman Greenspan, I believe, told this committee that he thought PAYGO should be reinstituted not only with regard to new spending proposals but also with regard to new tax cut proposals because both can reduce the money available to Congress to use as it sees fit. Does that make sense?

Mr. COOPER. It does to me, yes.

Mr. MOORE. All right.

Somebody—one of my colleagues on the other side mentioned George Will, the columnist. And George Will wrote that the administration's line item veto proposal would, quote, "aggravate an imbalance in our constitutional system that has been growing for seven decades, the expansion of the executive power at the expense of the legislature." And that was 16 March of 2006.

Does anyone disagree with George Will's observation there? I am not asking my colleagues. I am asking the witnesses here.

Mr. COOPER. I, for one, despite my reticence to venture into disagreement with Mr. Will, do disagree with that proposition. I don't think there has been a transfer of power or authority, certainly not constitutional authority, from the Congress to the President for seven decades.

Mr. MOORE. All right.

Mr. Dinh.

Mr. DINH. I have nothing to add.

Mr. MOORE. All right.

Mr. Fisher.

Mr. FISHER. I see it as a transfer that has been going on for a long time.

Mr. MOORE. Well, despite my reticence to agree with George Will, I do agree with him here, too.

House Appropriations Committee chairman, Jerry Lewis, testified before the Rules Committee that Presidents might misuse this proposed authority to target rescissions for political purposes. Now, Congressman Lewis is a Republican. We have a Republican President, but this President won't always be President.

Does that concern any of you that Democrats or Republican Presidents in the future might misuse this kind of power for political purposes?

Mr. DINH. I think institution design and procedural amendments, which I think this is the core of, should be made irregardless of who is in power at any given time, which is why I think that this is a very good measure.

I return to Mr. Cooper's very good analogy regarding a backbone both to all participants in this process, both the Chamber's and also the President's.

The Bible teaches us, even where the spirit is willing, the flesh may be weak, and that is why Ulysses has——

Mr. MOORE. The flesh certainly is weak.

Mr. Fisher, any observation here?

Mr. FISHER. Yes. I would just underscore that in 1921 there were people who said, let's have an executive budget and prohibit Members of Congress from adding to it; you would need the permission of the Secretary of the Treasury. Congress rejected that.

So Congress understood that when the President sends it up, it is an executive budget; when it gets up here, it is a legislative budget, and we do with it as you like. I think this bill threatens the bargain struck back in 1921.

Mr. MOORE. None of you are concerned about a grab for power by the executive branch? And I am not just talking about President Bush. I am talking about other Presidents in the future. Is that not a concern?

Mr. DINH. I don't think this bill——

Mr. MOORE. I have heard from you. I need to hear from the other two. I am sorry to cut you off, Mr. Dinh.

Mr. FISHER. It is a concern to me.

Mr. MOORE. Mr. Cooper.

Mr. COOPER. Sir, I do not regard this as a grab for power.

I did regard the cancellation authority in the 1996 Line Item Veto Act as just that and as a constitutional offense. And despite the fact that I favored as a policy matter and told my clients—very liberal members of this body and very liberal members of the Senate—that I disagreed with them at a level of policy, I thought that a line item veto would be a good thing if it could bring some additional discipline to the budgetary process.

But notwithstanding that, I joined them on a constitutional challenge to that bill. I don't think this one suffers from that kind of problem.

Mr. MOORE. Thank you.

Mr. RYUN. The gentleman's time has expired.

Mr. Hensarling.

Mr. HENSARLING. Thank you, Mr. Chairman.

No. 1, I would like to say how happy I am that we are actually holding this hearing. Since the time I have been a Member of Congress, it has been somewhat of a rarity that we actually examine the constitutionality of what we are about to engage in. And although I disagree with most of Mr. Fisher's testimony, I certainly agree that individual Members of Congress do have the duty to examine the constitutionality of the laws upon which they are about to vote.

I must admit, though, that I find it somewhat ironic that we are questioning the constitutionality. It only comes up in the context of when we are actually trying to save the people money. Any time we spend the people's money—rarely do I hear a constitutional argument against funding bike paths in Oregon, indoor rain forests in Iowa, bridges to nowhere in Alaska—or my favorite of the month, proposals to allow folks to buy flood insurance after the flood has arrived. I never quite hear the constitutionality being questioned in those contexts.

Mr. Fisher, in your testimony—our issue here really dealt with the constitutionality of the line item veto. Frankly, I heard very little in the way of argument in that regard. It appears to me that your main thesis is that this is going to upset a balance of power and do us very little good.

And, certainly, I will defer to the collective expertise of this panel, but my reading of history is such that as we look at the history of the Republic, it appears to me that really, until 1974, the Executive did have a functional line item veto and did have the power to delay and essentially impound funds. And so one might say that this would help in—to a modicum to go back to the status quo ante.

Is my reading of history correct, Mr. Dinh? Or how would you characterize it?

Mr. DINH. Yes. As both my and Chuck Cooper's testimony pointed out, especially Chuck's, the discretion not to spend, or affirmatively to impound, is one that started with the beginning of the Republic and continues to this day.

Mr. HENSARLING. Mr. Cooper, do you have a comment?

Mr. COOPER. Only to acknowledge that I believe that is correct.

Mr. FISHER. May I add that the President has had that discretion provided he carried out the purpose of the legislation. The difficulty was when Presidents began to terminate, or cut in half, programs.

Mr. HENSARLING. OK. Upsetting a delicate balance between the branches of government again, my reading of this is again, we are looking at ultimately the legislative branch of government being able to vote on a proposal of the President, passage by a majority. How is this functionally different from our fast-track authority on trade agreements?

Again, I will start with you, Mr. Dinh.

Mr. DINH. Sir, it is not—and I do not think that the balance of power in the Constitution is anything but delicate. You all know that there are politics going on in this town. There are very aggressive interbranch politics; and where there is advantageous activity by one Member, one House, or one Chamber, the President counteracts against that. Like we just asked, the Members in the House and the Chamber would counteract against advantageous activities by a President.

Mr. FISHER. On the fast track, there is a difference between the trade fast track and the fast track in this bill. The fast track on trade, it is a multistep process, and there are opportunities with informal bills and so forth to have Congress weigh in and change things before the implementing bill comes up. But that doesn't

occur here; you have no chance to change the list of items that come up to you.

Mr. HENSARLING. Mr. Fisher, in your testimony, you also argue that this does apparently very little good in battling spending. But isn't that a little akin to saying, the house is on fire, and let's not get a bucket of water thrown on it because one bucket doesn't do us much good? But doesn't one bucket perhaps lead to a bucket brigade?

We are looking now at roughly $8 trillion of debt, $300 billion of ongoing deficits. I always hear the argument around here, well, that does very little good, given the magnitude of the problem.

I wish that the gentleman from Tennessee was still here, as he was crying about the long-term deficit that we have. I happen to remember that when the President tried to lead an effort to save Social Security as we know it for the next generation, I think I remember every single Democrat fighting the proposition, in doing everything they could to ensure that that did not happen. And indeed, those who brought up PAYGO know that it has absolutely no impact on the spending patterns of Medicare, Medicaid and Social Security.

And I see that our ever-able chairman with his gavel is gaveling me down.

Mr. RYUN. Very good.

At this time, I would like to yield 5 minutes to Mr. Campbell.

Mr. CAMPBELL. Thank you. Hello. Oh, there we are. Thank you, Mr. Chairman.

I think I heard a general consensus from the panel that you really don't see a major constitutional issue on the proposal as it is written. But what I think I did hear was some concern about whether it will accomplish the goals and objectives for which it is intended.

I think, Professor Dinh, you suggested that you didn't think it was a constitutional issue, but you had some question as to its effectiveness.

I think you, Mr. Fisher, directly suggested that it would have—could perhaps result in increased spending rather than reduced spending.

I am not sure you opined on this, Mr. Cooper, but I will ask you to do that, I suppose, now.

So given that—in spite of some of the comments that have happened in this committee during this hearing from the dais up here, I don't think given that—what is it, we, Congress, in something like 33 out of the last 37 years has spent more than revenues through Congresses of both parties, presidents of both parties, and virtually every combination thereof. I don't think anyone can really disagree legitimately with the fact that we need more spending discipline, some structural discipline around the spending process.

Starting with you, Professor Dinh, do you have any suggestions relative to the bill, the proposal as it stands, that, in your view, would make it more effective as a spending control without trodding on any constitutional grounds?

Mr. DINH. No. They are only the amendments at the margins.

I guess one of the things that Mr. Ryan telegraphed at the beginning of the hearing is perhaps to limit the number of times that

the President may do it in order to take care of some of the concerns for abuse.

One way to address the problems of constitutional abuse while at the same time maintain the kind of procedural rigor is to make the limit effective with respect to deferrals, but continue the fast track procedures for any number of items that the President may wish to propose to rescind. Because the real constitutional issue, if there is any, is on the number and the length of the deferrals and not on what gets into your internal fast track procedures. So even if one limits the number of deferrals that are eligible, there is really no constitutional reason to limit the number of rescission proposals to go into the fast track pipeline.

Mr. CAMPBELL. Mr. Cooper.

Mr. COOPER. Yes, sir. I honestly don't have any advice with respect to how the measure might be modified to more directly or more effectively address budget concerns.

I do have some thoughts, however, and I have discussed some thoughts with some of the Members of this body about how it might be modified to address some of the concerns about, such as we have heard from Mr. Spratt, about possibilities of abuse by a manipulative President. I would be happy to share those with you if you are interested in them.

But in terms of budgetary issues, I honestly don't have any expertise to qualify me or to, otherwise, share with you.

Mr. FISHER. Spending constraint is important. Under this bill, the Executive would be the only one going after, probably, legislative add-ons. So if you want spending constraint, and you want to rethink and reconsider what has happened in the past, then I think you need a process that allows Congress to go after money that had already been appropriated to the executive branch and that Congress now thinks it probably was a bad idea. You need more of a mix so that both branches carry some of the burden.

Mr. COOPER. If I could just footnote that point.

Congress is in session every day, and every day it can do whatever it wants in that respect. There is no limit that I am aware of on Congress' ability to discipline the President in such ways, and his spending authority, in—however it pleases.

Mr. CAMPBELL. Mr. Fisher, last word on that?

Mr. FISHER. No. Just to make sure that if there is a list of programs to be cut and cancelled that had already been enacted, do it not just on the legislative side but on the executive-side programs and the agencies and departments. That is the way the 1992 procedure worked, and you may want to take a look at that.

Mr. CAMPBELL. Thank you, Mr. Chairman.

Mr. RYUN. Thank you, Mr. Campbell.

I would like to thank the panel, Mr. Cooper, Mr. Dinh and Mr. Fisher, for their time and their energy, their willingness to answer questions, their insight.

And we are expecting a vote momentarily, so this meeting, this hearing, is adjourned.

[Whereupon, at 11:08 a.m., the committee was adjourned.]

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