

THE CONSTITUTION AND THE LINE ITEM VETO

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS
SECOND SESSION

APRIL 27, 2006

Serial No. 109-102

Printed for the use of the Committee on the Judiciary



Available via the World Wide Web: <http://judiciary.house.gov>

U.S. GOVERNMENT PRINTING OFFICE

27-223 PDF

WASHINGTON : 2006

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512-1800; DC area (202) 512-1800
Fax: (202) 512-2250 Mail: Stop SSOP, Washington, DC 20402-0001

COMMITTEE ON THE JUDICIARY

F. JAMES SENSENBRENNER, Jr., Wisconsin, *Chairman*

HENRY J. HYDE, Illinois	JOHN CONYERS, JR., Michigan
HOWARD COBLE, North Carolina	HOWARD L. BERMAN, California
LAMAR SMITH, Texas	RICK BOUCHER, Virginia
ELTON GALLEGLY, California	JERROLD NADLER, New York
BOB GOODLATTE, Virginia	ROBERT C. SCOTT, Virginia
STEVE CHABOT, Ohio	MELVIN L. WATT, North Carolina
DANIEL E. LUNGREN, California	ZOE LOFGREN, California
WILLIAM L. JENKINS, Tennessee	SHEILA JACKSON LEE, Texas
CHRIS CANNON, Utah	MAXINE WATERS, California
SPENCER BACHUS, Alabama	MARTIN T. MEEHAN, Massachusetts
BOB INGLIS, South Carolina	WILLIAM D. DELAHUNT, Massachusetts
JOHN N. HOSTETTLER, Indiana	ROBERT WEXLER, Florida
MARK GREEN, Wisconsin	ANTHONY D. WEINER, New York
RIC KELLER, Florida	ADAM B. SCHIFF, California
DARRELL ISSA, California	LINDA T. SANCHEZ, California
JEFF FLAKE, Arizona	CHRIS VAN HOLLEN, Maryland
MIKE PENCE, Indiana	DEBBIE WASSERMAN SCHULTZ, Florida
J. RANDY FORBES, Virginia	
STEVE KING, Iowa	
TOM FEENEY, Florida	
TRENT FRANKS, Arizona	
LOUIE GOHMERT, Texas	

PHILIP G. KIKO, *General Counsel-Chief of Staff*
PERRY H. APELBAUM, *Minority Chief Counsel*

SUBCOMMITTEE ON THE CONSTITUTION

STEVE CHABOT, Ohio, *Chairman*

TRENT FRANKS, Arizona	JERROLD NADLER, New York
WILLIAM L. JENKINS, Tennessee	JOHN CONYERS, JR., Michigan
SPENCER BACHUS, Alabama	ROBERT C. SCOTT, Virginia
JOHN N. HOSTETTLER, Indiana	MELVIN L. WATT, North Carolina
MARK GREEN, Wisconsin	CHRIS VAN HOLLEN, Maryland
STEVE KING, Iowa	
TOM FEENEY, Florida	

PAUL B. TAYLOR, *Chief Counsel*
E. STEWART JEFFRIES, *Counsel*
HILARY FUNK, *Counsel*
KIMBERLY BETZ, *Full Committee Counsel*
DAVID LACHMANN, *Minority Professional Staff Member*

CONTENTS

APRIL 27, 2006

OPENING STATEMENT

	Page
The Honorable Steve Chabot, a Representative in Congress from the State of Ohio, and Chairman, Subcommittee on the Constitution	1
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution	2
The Honorable Tom Feeney, a Representative in Congress from the State of Florida, and Member, Subcommittee on the Constitution	4
The Honorable Robert C. Scott, a Representative in Congress from the State of Virginia, and Member, Subcommittee on the Constitution	4

WITNESSES

The Honorable Paul Ryan, a Representative in Congress from the State of Wisconsin	
Oral Testimony	6
Prepared Statement	8
The Honorable Mark Kennedy, a Representative in Congress from the State of Minnesota	
Oral Testimony	11
Prepared Statement	12
Ms. Cristina Martin Firvida, Senior Counsel, National Women's Law Center	
Oral Testimony	13
Prepared Statement	15
Mr. Charles J. Cooper, Partner, Cooper and Kirk, PLLC	
Oral Testimony	20
Prepared Statement	22

THE CONSTITUTION AND THE LINE ITEM VETO

THURSDAY, APRIL 27, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:07 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. This is the Subcommittee on the Constitution and we welcome everyone here this afternoon for our oversight hearing on “The Constitution and the Line Item Veto.”

We face serious budget problems. Congress is simply spending too much money. Our national debt is now \$8.3 trillion, with hundreds of billions being added every year. That future—future generations of Americans will have to pay for this debt that continues to be built up. Fiscal sanity, the simple common sense process of not spending more than you take in, must be restored in Washington and we need to balance the budget.

We also need reform measures, such as the Stop Omnibus Pork Bill that I happen to have introduced to prohibit the bundling together of appropriations bills that leads to deficits. I and many others are committed to stopping this spending and the line item veto is a very good first start.

The notion of a line item veto has intrigued those concerned with wasteful Federal spending for a long time. Presidents at least since Thomas Jefferson have asserted that the Executive has some discretion in the expenditure of monies appropriated by Congress. Forty-three governors have some form of line item veto to reduce spending. Yet until 1996, no such mechanism existed at the Federal level.

In that year, Congress enacted the Line Item Veto Act, of which I happened to be a cosponsor, with overwhelming bipartisan support. However, the United States Supreme Court ultimately held that the Line Item Veto Act was unconstitutional because it gave the President the power to rescind a portion of a bill as opposed to an entire bill, as he is authorized to do by article I, section 7 of the Constitution.

Despite the Supreme Court’s actions, the notion of the line item veto has remained very popular. During its brief life, President Clinton used the line item veto to cut 82 projects totaling nearly \$2 billion. President Bush has repeatedly requested that Congress

enact a legislative line item veto and for the first time has submitted a specific legislative proposal. President Bush's proposal has been warmly received by such disparate editorial boards as the Washington Post and the Wall Street Journal.

That proposal embodied in H.R. 4890, introduced by Representative Paul Ryan, of which I happen to also be a cosponsor, would give the President the authority to recommend to Congress that it rescind certain dollar amounts of discretionary budget authority or any item of direct spending. The bill provides for certain expedited procedures to take up such rescission bills. The President may withhold the spending of those funds for a period of no more than 180 days. However, only Congress can pass a bill that will rescind the initial spending measures. If Congress does not act, the spending provision will still remain law.

As disappointed as many of us were with the Supreme Court's ruling on the original line item veto, many of us are heartened to see that Chuck Cooper, who argued to the Court that the 1996 law was unconstitutional, is testifying today that this bill is, in his opinion, in fact, constitutional.

However, despite Mr. Cooper's support, some have argued that provisions in this bill could potentially be abused by a President and, as such, raise certain separation of powers concerns. I know that we all look forward to hearing from all of our witnesses on how these concerns can be addressed.

We also look forward to the testimony of Congressman Mark Kennedy, who has introduced a constitutional amendment to give the President the authority to reduce or disapprove any appropriation. Congress could override the veto in the manner prescribed in Article I, Section 7 of the Constitution. This proposal, if enacted, would be clearly constitutional and would give the President the authority to directly disapprove of specific spending requests.

Again, we want to welcome all of our witnesses and look forward to hearing all your views on how Congress can effectively address its problems with rampant spending.

And at this time, I would like to yield 5 minutes to the gentleman from New York, Mr. Nadler, the Ranking Member of this Committee.

Mr. NADLER. Thank you, Mr. Chairman. I want to join you in welcoming our witnesses and especially our distinguished colleagues. Any proposed legislation that would so radically alter the balance of power between two branches of Government deserves close scrutiny by our Subcommittee. The Supreme Court has already struck down the line item veto and I think Members should think long and hard about the constitutional issues as well as the institutional issues.

I have to admit, I was a little incredulous when I saw the subject of the hearing. Didn't the Supreme Court settle this issue in 1998? But this is no laughing matter. The fact is that this Republican Congress and this Republican President have the unenviable distinction of having taken record surpluses and turned them into record deficits in record time. The Congress and President Clinton made hard and sometimes unpopular budgetary choices and tackled the deficit. We have started to tackle the national debt. If you recall the debate in the 2000 campaign was how are we to deal

with the anticipated \$5.6 trillion budget surplus over the next 10 years. They were talking about paying off the entire national debt. So we know it can be done if there is the political will.

Now, this Republican Congress and this Republican President have become spending maniacs and tax-cutting people, and when you combine huge tax cuts, mostly for rich people, with maniacal spending, you get huge deficits. Surprise. But it is not a constitutional question, it is a question of political will.

And talking about political will, why should we give a President a line item veto when he never uses the regular veto? I would suggest that it is political will and perhaps political courage that is lacking, not a line item veto.

The fault of your colleagues is not in our laws but in ourselves. The line item veto, like the balanced budget amendment, is an admission on the part of its supporters that they are incapable of doing the job they were sent here to do. Instead, we are told we need some gimmick to force us to do what we are unwilling to do ourselves. We lied to the public about our intentions. We tell them that we can have huge tax cuts and not cut the budget too much, and then we act shocked when there is a huge deficit.

Even if the line item veto would really have a substantive effect on the deficit, and all evidence indicates it will not, it is plainly unconstitutional and it will, if somehow upheld, break down the checks and balances between the branches of our Government which have preserved our freedom. The threat of a line item veto would give a President even greater ability to coerce Members of Congress into supporting his pet legislation or his pet spending priorities. If you think the arm twisting during the vote on the Medicare prescription drug benefit, for example, was a scandal, and it was a scandal according to the Ethics Committee, that will be nothing when compared with the stick we would be handing this and future Presidents. You vote for my bill to do this and that or I will veto everything in your district.

Rather than destroying our system of Government and making the Executive more powerful, which is essentially what the line item veto would do, I would encourage my colleagues to resolve here and now to do our jobs correctly. You blew the Nation's nest egg—you Republicans. We are now in hock to the Chinese. We are still arguing over whether to do something about the oil industry's ridiculously enviable tax situation, all those extra tax breaks we voted them last year because they're not making enough money. I am sure the American people will forgive you if you admit you blew it and turn over a new leaf.

I have a rather unusual perspective on earmarks. When I first came to Congress, I tried to kill an egregious earmark in my own district, a proposal to tear down a highway that had recently been rebuilt to move it a few yards inland and to bury it to accommodate the needs of a private developer, Mr. Trump. Senator Roth, take note. I was not successful. Let me repeat that. I was not successful.

Although I opposed the earmark on the floor of the House, I was not successful in stopping it, even though the vast majority of my constituents did not want this outrageous waste to go forward. In the end, the Republican majority, at the behest of a Republican Member, who was not even from New York City but for whom the

developer, Mr. Trump, had held a fundraiser, put this outrage back into the budget. What is this world coming to when you can't even kill a pork barrel project in your own district?

With that, Mr. Chairman, I want to welcome our witnesses. I want to repeat that the fault is not in the stars, not in the lack of a line item veto, but in ourselves and in the President. I look forward to the testimony of the witnesses, although I must say I think this hearing entirely unnecessary because we know all the answers. We know this is ridiculous, and I yield back the balance of my time.

Mr. CHABOT. Thank you. As you can see, we try to avoid getting political in this Committee. [Laughter.]

Are there any other Committee Members that wish—

Mr. NADLER. Mr. Chairman, can I comment on that briefly?

Mr. CHABOT. Of course.

Mr. NADLER. Let me say that the Judiciary Committee is a very political and a very ideological Committee. The other Committee I serve on, the Transportation Committee, is also a very ideological Committee, but the ideology is a different nature. Instead of debating abortion or gay rights or line item vetoes, the ideology is more money for my State, less money for yours, but that's the other Committee. [Laughter.]

Mr. CHABOT. Are there any other Members who would like to make a brief statement? Any on this side? Mr. Feeney, you are recognized for 5 minutes.

Mr. FEENEY. Yes, just briefly. I want to thank our panelists. I'm really looking forward to this discussion. I worked closely with Congressman Kennedy and Congressman Ryan and both of them, I think, have recognized that there is a problem. Mr. Nadler says it's all one party. I'd suggest that the other party's problems have been infinitely worse historically.

But he does make a point. The culture and the organization of Congress rewards spending and irresponsible behavior, and not just on this issue, but on a host of other reforms. People like Congressman Kennedy, especially Paul Ryan, have been leaders to try to change our organization, to change our rules and change our culture. This is one part of that that I really am grateful that you're here today.

Mr. CHABOT. Thank you very much.

The gentleman from Virginia would like to make a statement, is that correct?

Mr. SCOTT. Yes. Yes, Mr. Chairman, just very briefly. I hope as we discuss this line item veto we discuss it in terms of esoteric constitutionality and not by anything that is going to do anything about the budget.

This chart shows the budget deficit over the last few years. It shows that we don't need this thing to balance the budget. We did that during the 8 years of President Clinton. And you have to show the chart, because if I tried to use an adjective to describe what happened to the budget when this Administration came in, no one would believe the adjective. You would assume that I was just exaggerating, but let this chart, as they say at the poker table, let the cards speak for themselves.

The deterioration in the budget has been from January 2001, we projected the next 10 years, \$5.6 trillion surplus. Now, after we have messed up the budget, those same 10 years are going to come in at a \$3.2 trillion deficit, a swing of \$8.8 trillion.

Now, if we are talking earmarks, let's talk earmarks. I understand you might have \$20 billion a year in earmarks. Twenty billion a year, \$8.8 trillion, well, 10 percent of \$8.8 trillion would be \$880 billion. One percent would be \$88 billion [sic]. I mean, you are into minuscule percentage of the \$8.8 trillion deterioration.

Now, you keep talking about eliminating a couple of little pork projects. You don't talk about tax cuts. You ought to be able to strike some of those out, because this blue line is expenditures. The red line is taxes. You notice that toward the end of the Clinton administration, we got the red line revenues above the blue line expenditures. The red line revenues went above the expenditures. We had a surplus. The revenues have collapsed. The spending has still gone up, and that is the problem, but you don't have anything in here where you can whack a tax cut. You just talk about the spending, which had gotten under control, so that's not—you don't have anything in there for that.

Now, if you want to balance a budget next year, this is the cost of the tax cuts for the first couple of years, and the reason you are having trouble with this year's budget is the fifth year, you all of a sudden had to incorporate this year into your 5-year budget, which means you've got to find about \$150 billion more. Next year, you've got to find another \$100 billion to deal with your budget next year. This little line item veto isn't going to be able to deal with that at all.

If you want to find \$20 billion, here is a tax cut, a couple of tax cuts, I think, can find it. This is the chart, standard deduction and itemized deductions, when fully phased in, who gets the \$20 billion. If you are a millionaire, you get \$20,000 of it. Two-hundred-thousand to \$500,000, you get a couple of hundred. On average, \$75,000 to \$100,000, you get about ten cents a week. And under \$75,000, on average, you don't get anything. So if you are looking for \$20 billion, which happens to be more than all the earmarks all together, this would be a place to look at it.

This just shows debt held by foreigners and foreign countries, what happens to the debt. That little black line there is we are going to pay off the debt by about 2013, the whole national debt, at the rate we are going. But instead, we are skyrocketing out of control with foreign debt.

Line item veto won't have anything to do with any of this, and I would hope, Mr. Chairman, that we would keep that in perspective as we discuss the esoterics of the line item veto.

Mr. CHABOT. Are there any other Members that wish to make an opening statement? If not, we will go ahead and get to our panel here, then.

We welcome the panel very much for their coming forward this afternoon. In fact, I would also like to preface that by saying, without objection, all Members will have 5 legislative days to submit additional materials for the hearing record.

Our first witness this afternoon will be Congressman Paul Ryan, who represents Wisconsin's First Congressional District. Represent-

ative Ryan is the sponsor of H.R. 4890, the “Legislative Line Item Veto Act of 2006,” which has 101 cosponsors, including many Members of this Committee. We welcome you here this morning, Congressman.

Our second witness is Congressman Mark Kennedy, who represents the Sixth Congressional District of Minnesota. Representative Kennedy has introduced H.J. Res. 71, a constitutional amendment that would give the President the authority to reduce or disapprove any appropriation made by Congress, and we welcome you here this afternoon, Congressman Kennedy.

Our third witness is Ms. Cristina Martin Firvida, am I pronouncing that right? Thank you. She is a Senior Counsel at the National Women’s Law Center, where she focuses on Federal tax and budget policy. Ms. Firvida is a graduate of Yale University and Cornell Law School. We welcome you here this afternoon.

Our fourth and final witness is Mr. Chuck Cooper, who is a partner at Cooper and Kirk. Mr. Cooper has had a long and distinguished career, including a stint as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice under President Reagan. Mr. Cooper also had the distinction of representing the plaintiffs in the two suits that challenged the constitutionality of the 1996 Line Item Veto Act.

Again, we welcome you all here this afternoon. I would draw your attention to the two boxes there. I know the Members are very familiar with that. We have what’s called the 5-minute rule. We’d ask you to keep your testimony within that time. The lights sort of help us to make that happen. The green light will be on for 4 minutes. The yellow light will be on 1 minute. The red light means you’re supposed to wrap it up. I won’t cut you off immediately, but we hope that you would try to stay within the confines of those rules if at all possible.

And finally, it’s the practice of this Committee to swear in all witnesses, including Members of Congress, who appear before us, so if you would all stand, please, and raise your right hands.

Do you each swear that in the testimony that you are about to give, you will tell the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. RYAN. I do.

Mr. KENNEDY. I do.

Ms. FIRVIDA. I do.

Mr. COOPER. I do.

Mr. CHABOT. All witnesses have indicated in the affirmative, including the Members of Congress.

We appreciate your testimony here this afternoon, and Congressman Ryan, you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE PAUL RYAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. RYAN. Thank you, Chairman, and Mr. Nadler, it is nice to be with you today. I serve on Ways and Means and the Budget Committee and I thought for a moment after hearing the opening speeches I was in one of those two Committees. We have similar dialogues taking place in those Committees. I will try and be brief,

and if I could have my written testimony submitted to the record, I'd appreciate that.

Mr. CHABOT. Without objection.

Mr. RYAN. I introduced this bill on March the Seventh. We have 102 bipartisan cosponsors, including four prominent "Blue Dog" Democrats. In 2004, I offered this as an amendment with my Democrat sponsor at the time, Charlie Stenholm of Texas. We received 174 votes on the House floor, including 45 Democrats. In the Senate, this bill has 29 bipartisan cosponsors, including the lead Democrat sponsor, Senator Kerry.

What this bill does is it provides the President with the authority to single out wasteful spending items and, to Mr. Scott's question, narrow special interest tax breaks included in legislation that the President signs into law and sends these specific items back to Congress.

I'm very excited that we have Mr. Cooper with us here today, who argued the *Clinton v. New York* case. Unlike the line item veto authority provided in 1996 to President Clinton, this one is constitutional because it brings the power back to Congress. It preserves the separation of powers and the presentment—and it conforms with the Presentment Clause because this is like an expedited rescissions process whereby the President can single out and pull out individual items, but that's not the end of the process like it was with the earlier line item veto. The President then sends it back to Congress and both Houses have—within a short period of time have to act on it and vote on it. If Congress chooses to rescind, then it is rescinded. If they choose not to rescind the particular program, then it is funded.

Now, I agree with the Supreme Court ruling in 1996. I wasn't in Congress at the time, but I agree with that Supreme Court ruling. I do believe Mr. Cooper was right in his arguments at the time. But just as that legislation was unconstitutional, I believe this particular piece is constitutional.

Let me tell you why we are proposing this. We are proposing this because earmarks have gotten out of control, because wasteful spending is getting out of control. And I am a Republican saying this. Last year, according to Citizens Against Government Waste, the FY 2006 budget included nearly 10,000 pork barrel spending items at a total cost of \$29 billion to taxpayers. That is not small change no matter what numbers you are looking at. This is a significant increase over the last 10 years, where 10 years ago the number was set at \$2 billion.

Now, many of these spending projects are inserted at the end of the process. The reason why I think this is so important is because we do have a level of accountability and transparency at the beginning of the tax and spending process. Members can go to the floor with amendments and try and go after things. Mr. Nadler had that opportunity to go after that pork project in his district. He was outvoted, but he had the opportunity to go after it.

Where we don't have that level of transparency and accountability is at the end of the process, at the conference report level. Typically, a lot of these provisions get inserted in the conference report in the conference. What do we have as Members of Congress the choice to do? We can vote up or down on the entire piece of leg-

isolation. That's it. What option does the President have? He or she can vote or can veto the entire bill or sign the entire bill. So it is at that end of the spending and taxing process where we don't have much transparency. We don't have enough accountability, I would argue. This restores that.

Now, what's important when you think of all these things is what effect will this have? I believe this will have a couple of effects. Number one, it will have us go after the truly egregious items that can't stand a full vote by Congress. Number two, I think it's going to embarrass a lot of things out of these bills in the first place. That will save money.

Now, what is the process? Here is exactly how we envision this process. The President signs a bill into law, a tax bill, spending bill, and it could be authorization or appropriations, like a transportation bill or an appropriation bill. He sends a rescission request down to Congress, where the leadership of both the House and the Senate have the opportunity to introduce a bill to pass it into law. If neither leadership introduces the bill after 2 days, on the third day, any Member of the House or the Senate can introduce a bill to approve the rescission request. The bill must be reported out of the appropriate Committee within 5 days without any significant changes, and within 10 days of its original introduction, it must be given an up or down vote on the floor with debate set so you don't have a filibuster issue. All that is required to pass or defeat the rescission is a simple majority.

So what this does is it has Congress inserted at the end of the process, as well. Congress has the final say so. Separation of powers is maintained. The Presentment Clause is conformed with. That is why I decided to do it this way. I have been pushing this version since I've been elected to Congress. Traditionally, we call these enhanced decisions.

Why is it necessary? Because the rescission process we have today is virtually meaningless because the President, no matter who the President is, can send a rescission request to Congress and Congress doesn't have to do anything. They can virtually ignore—they can ignore the rescission request. This forces us to act on these requests, but it gives us the power to make the final decision.

I will conclude with this. I have asked for comment from various interested parties. We have gotten a lot of good comments and criticisms to which I think we can address in this bill to satisfy some of the concerns from constitutionalists and others, and I'd be happy to answer those questions during the time of questions.

I thank the Committee for this very important hearing.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Ryan follows:]

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

Chairman Chabot, Ranking Member Nadler, and Members of the Subcommittee, thank you for the opportunity to testify before you today on H.R. 4890, the Legislative Line-Item Veto Act of 2006. This legislation would help the President and Congress work together to reduce our budget deficit 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. Unlike the line-item veto authority provided to President Clinton in 1996, H.R. 4890 is constitutional 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. It is important that Congress act now to give the President this tool to bring greater transparency, accountability and a dose of common sense to the federal budget process.

THE PROBLEM:

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.

Many of these pork-barrel spending projects are quietly inserted into the conference reports of appropriations bills where Congress is unable to eliminate them using the amendment process. In fact, the only time that Congress actually votes 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 an appropriations 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 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 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:

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 101 bipartisan cosponsors in the House, is based on the Administration's proposal to provide line-item veto authority to the President and is the product of discussions that I and my congressional colleagues have had with the White House since the President announced his intent to seek line-item veto authority in the State of the Union Address on January 31, 2006.

The Legislative Line-Item Veto Act is very similar to an expedited rescissions amendment that I offered during the consideration of H.R. 4663 on June 24, 2004, with my former colleague Representative Charlie Stenholm, a Democrat from Texas. 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.

If passed, H.R. 4890 would give the President the ability to put on hold wasteful discretionary spending, wasteful new mandatory spending, or new special-interest tax breaks (those that affect less than 100 beneficiaries) after signing a bill into law. The President could then ask Congress to rescind these specific items. The requirement that both the House and Senate approve all proposed rescissions means that Congress will continue to control the power of the purse and will have the final

word when it comes to spending matters. However, unlike the current rescission authority vested in the President under the Impoundment Control Act of 1974, the bill also includes a mechanism that would virtually guarantee congressional action in an expedited time frame.

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. On the other hand, 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.

The process under H.R. 4890 would begin with the President identifying an item of wasteful spending or a special-interest tax break in legislation that is being signed into law. The President would then submit a special message to Congress, asking for Congress to rescind this wasteful item or items. House and Senate leadership would have the opportunity to introduce the President's rescission requests within two days following receipt of the President's message. After that time period, any Member of Congress would be able to introduce the President's rescission proposal, virtually guaranteeing congressional action. Once the bill is introduced, it would be referred to the appropriate committee, which would then have five days to report the bill without substantive revision. If the committee fails to act within that time period, the bill would be automatically discharged to the floor. The bill would have to be voted on by the full House and Senate within 10 legislative days of its introduction, with a simple majority required for passage.

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. Among the changes that I think may improve the legislation are the following: limiting the time period available to the President to make a rescission request after signing a bill into law; limiting the number of rescission requests that can be made for each piece of legislation signed into law; allowing for the bundling of rescission requests; explicitly prohibiting duplicative requests; and tightening the language that allows the Administration to defer spending while a rescission request is being considered by Congress. These changes will strengthen the bill and better ensure that the legislative branch retains all of the powers delegated to it by our founding fathers. I am committed to continuing to work with my colleagues in Congress and the Administration throughout the legislative process to make sure that H.R. 4890 is narrowly drafted in order to best achieve its goals.

CONSTITUTIONAL ISSUES:

H.R. 4890 passes constitutional muster because it requires both the House and Senate to pass rescission legislation and send it to the President for his signature before the rescissions become law. 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 this 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. Unlike the 1996 line-item veto legislation, 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.

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. In contrast, H.R. 4890 would withstand 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.

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 first step toward achieving this goal.

Mr. CHABOT. Congressman Kennedy, you are recognized for 5 minutes.

TESTIMONY OF THE HONORABLE MARK KENNEDY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. KENNEDY. Mr. Chairman, Ranking Member, as someone who spent 20 years in the business world before coming to Congress, I understand that really for any organization to be successful, it needs to have leadership that establishes priorities. The owners of the businesses big and small know this. But over the past couple of decades, Congress has decided it follows a different set of rules.

You don't have to look any further than the proliferation of earmarks, which have grown from 958 in fiscal year 1996 to nearly 14,000 in fiscal year 2005. There are many egregious examples, whether it be the \$2 million relocating a kitchen in Fairbanks, Alaska, or the \$950,000 for the Please Touch Museum in Philadelphia, or the \$150,000 for the Therapeutic Horseback Riding Program at the Lady B Ranch in California.

These no longer come as a surprise to us, unfortunately, so we shouldn't be surprised that in FY 06, spending is projected to reach an all-time high of \$23,638 per U.S. household, of which \$3,800 is being borrowed.

All of this uncontrolled spending on non-necessities has led to a budget deficit that is simply at unsustainable proportions. That's why I introduced H.J. Res. 71, the Line Item and Reduction Veto Amendment. This constitutional amendment would provide a President with a proven mechanism to cut the junk out of spending bills.

My bill would restore the same authority that was provided to President Clinton in the 1996 Line Item Veto Act. This authority already is held by 40 governors, was used by President Clinton a total of 82 times to get those nice numbers that Bobby was talking about, in part, and produced savings of nearly \$2 billion before it was ruled unconstitutional by the Supreme Court on June 25, 1998.

Both Representative Ryan's bill and my constitutional amendment would make a significant step toward restoring fiscal sanity to the Federal budget. I happen to believe a constitutional amendment is the stronger approach because it eliminates any question

of the constitutionality of a line item and will halt another round of time consuming separation of powers lawsuits. While Congress may be able to address the concerns in Ryan's bill, my legislation, which mirrors constitutional authority held by governors across the country, offers a clear and decisive answer free of tinkering from activist judges.

A line item veto in any workable form will help restore some sorely needed fiscal discipline to Washington, but I believe more needs to be done. I believe we must go further and look at other tried and true measures, including the restoration of Presidential impoundment authority. This authority was used by Presidents for almost two centuries and it reduced excessive spending by simply deciding not to spend when there is a questionable value. President Jefferson was the first to use an impoundment authority when he—and it was used by FDR in World War II to block Congressional spending he determined, quote, “interferes with the defense program by diverting manpower and materials,” unquote.

Unfortunately, the 1974 Congressional Budget and Impoundment Control Act not only stripped the executive branch of constitutional authority to impound or reduce spending, but with no one to guard the cookie jar, Congress's appetite has increased, including items that are not national priorities, relating to more waste and larger Government.

Mr. Chairman, after adjusting for inflation, since the 1974 act was enacted into law, our Federal debt has grown by over 1,600 percent. As perhaps the only former chief financial officer serving in Congress, I cannot comprehend how we expect to sustain this situation.

It is my belief that by passing the line item veto and by restoring the President's impoundment power, we would take a much needed step in the right direction of restoring spending discipline in Washington.

I thank you for the leadership in holding these hearings. We must cut wasteful spending to control our deficit so we don't burden our grandchildren with our debt.

Mr. CHABOT. Thank you very much, Congressman Kennedy. We appreciate that.

[The prepared statement of Mr. Kennedy follows:]

PREPARED STATEMENT OF THE HONORABLE MARK KENNEDY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF MINNESOTA

Mr. Chairman, as someone who spent 20 years in the business world before coming to Congress, I understand that for any business to be successful, it needs to have leadership that establishes priorities.

The owners of businesses big and small know this, but, over the past couple of decades Congress has decided to follow a different set of rules.

You don't have to look any further than the proliferation of earmarks, which have grown from 958 in FY1996 to nearly 14,000 in FY2005.

Egregious examples of waste are easy to see: \$2,000,000 to relocate a kitchen in Fairbanks, Alaska; \$950,000 for the Please Touch Museum in Philadelphia; and \$150,000 for the Therapeutic Horseback Riding Program at the Lady B Ranch in California.

These no longer come as a surprise to us. So we shouldn't be surprised that FY2006 spending is projected to reach an all-time high of \$23,638 per U.S. household, of which \$3,800 will be borrowed.

All of this uncontrolled spending on non-necessities has led to budget deficit of simply unsustainable proportions. That's why I have introduced H.J. Res. 71, the

Line Item and Reduction Veto Amendment. This Constitutional Amendment would provide the president with a proven mechanism to cut the junk out of spending bills.

My bill would restore the same authority as was provided to President Clinton through the 1996 Line Item Veto Act.

This authority, already held by 40 governors, was used by President Clinton a total of 82 times, and produced savings of nearly \$2 billion before it was ruled unconstitutional by the Supreme Court on June 25, 1998.

In addition, H.J. Res. 71, unlike the 1996 Line Item Veto Act, allows the president to reduce objectionable spending items contained in the non-legislative text of conference reports.

This mechanism, currently used by 11 states, reduces the lump-sum accounts that contain hundreds and thousands of individual items that are often hidden in unamendable form.

Both Representative Ryan's bill, H.R. 4890, and my Constitutional Amendment, will make a significant step to restoring fiscal sanity to the federal budget.

I happen to believe the Constitutional Amendment is the stronger approach because it eliminates any question of its legality and will halt another round of time-consuming separation of powers lawsuits. As CRS has noted in a recent report, there are still concerns about the enhanced rescission authority provided to the President in HR4890.

While Congress may be able to address these concerns, my legislation, which mirrors constitutional authority held by governors across the country, offers a clear and decisive answer free from the tinkering of activist judges.

A Line Item Veto Constitutional Amendment will help restore some sorely needed fiscal discipline in Washington, but there is still more we can do to stop runaway spending.

I believe we must also look at other tried and true measures, including Impoundment Authority.

This authority was used by presidents for almost two centuries to reduce excessive spending.

President Jefferson was the first to use impoundment authority in a significant way, and it was used by FDR during World War 2 to block Congressional spending he determined "interferes with the defense program by diverting manpower and materials."

Unfortunately, impounding funds ceased to be an option for presidents in 1974 when Congress passed the Congressional Budget and Impoundment Control Act.

This Act not only stripped the executive of constitutional authority to impound spending, but also increased Congress's appetite toward waste and larger government.

Mr. Chairman, after adjusting for inflation, since the 1974 Act was enacted into law, federal spending as grown by over 250 percent.

As perhaps the only former CFO serving in Congress, I cannot comprehend how we expect to sustain this situation.

It is my belief that by passing the Line Item Veto, and by restoring the President's Impoundment Power, we would take a much needed step in the right direction to restoring spending discipline in Washington.

Mr. Chairman, I thank you for your leadership in holding this hearing. We must cut wasteful spending to control our deficit so we don't burden our grandchildren with our debts.

Mr. CHABOT. Ms. Firvida, you are recognized for 5 minutes.

**TESTIMONY OF CRISTINA MARTIN FIRVIDA, SENIOR COUNSEL,
NATIONAL WOMEN'S LAW CENTER**

Ms. FIRVIDA. Thank you. Chairman Chabot, Ranking Member Nadler, and Members of the Subcommittee, thank you for this opportunity to testify on behalf of the National Women's Law Center.

H.R. 4890 would dramatically expand the powers of the President relative to Congress, presenting serious policy and constitutional questions while doing very little, if anything, to control growing deficits. This bill has sometimes been described as a means of eliminating unnecessary earmarks, but its scope is far broader than that. The rescission power granted to the President under this bill would apply not only to appropriations, which are already cov-

ered under current law, but also to direct spending, including the reauthorization of entitlement programs, such as the State Children's Health Insurance Program and the farm bill, which contains food stamps, both up for reauthorization next year.

H.R. 4890 would also give the President extraordinary power to suspend and effectively cancel provisions of law enacted by Congress and to control the legislative agenda of Congress. This power raises significant policy issues and effectively confers upon the President the power to amend or repeal duly enacted legislation, in violation of the Separation of Powers Doctrine and the Presentment and Bicameralism Clauses of Article I, Section 7 of the Constitution.

To cap it off, empirical evidence suggests that the proposed legislative line item veto would not result in substantial savings that would reduce our nation's record deficits and may paradoxically actually increase spending.

H.R. 4890 would give the President unprecedented new authority to suspend funding for a period of 180 days and possibly more after sending a rescission request to Congress, even if Congress explicitly rejected the President's decision. In addition, H.R. 4890 grants the President extremely broad discretion to determine when, in what fashion, and how often to rescind spending.

Significantly, H.R. 4890 does not prohibit the President from resubmitting a rejected rescission in a subsequent request to Congress. In contrast, both current law and the Line Item Veto Act of 1996 explicitly require that the President immediately reinstate canceled spending if Congress rejects the President's rescission request and bar the President from resubmitting previously rejected rescissions.

The extraordinary new powers that H.R. 4890 would confer upon the President raise serious constitutional powers under the Separation of Powers Doctrine. Separation of powers is a fundamental feature of our Constitution and system of Government, and as such, the Supreme Court has historically taken a very strict approach to analyzing potential violations of this doctrine. There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes. In the case that invalidated the Line Item Veto Act of 1996, the Court ruled that allowing the President to cancel spending unilaterally amounted to an impermissible exercise of the power to amend or repeal statutes, a legislative power that is explicitly and exclusively reserved for the Congress under the Constitution.

Like the power to cancel spending items already struck down by the Court, the powers granted to the President in this bill allow him to amend or repeal duly enacted legislation. Under H.R. 4890, the President can suspend provisions of law even if Congress rejects the President's proposal to do so. The President could time a package of rescissions so that he could withhold funding until the end of the fiscal year, when spending authority would cease for many items. The bill would also allow the President to resubmit already rejected rescissions, which likewise also could effectively terminate spending authority.

Because all these actions together would end duly enacted programs in both legal and practical effect, the President would have

the power to amend and repeal legislation and that is unconstitutional under the Separation of Powers Doctrine as well as under the Bicameralism and Presentment Clauses of Article I.

The fact that Congress is considering granting the President such extraordinary power does not resolve the constitutional issues. The Constitution does not authorize Congress to cede to the executive that power which is properly its own.

While no amount of deficit reduction could justify a violation of the Constitution, numerous commentators and analysts, including CBO, CRS, and George Will, have concluded that the line item veto is an ineffective tool for controlling spending and that could, in fact, increase spending under some circumstances.

In addition, H.R. 4890 is ill-equipped to eliminate special interest tax breaks and, in fact, renders broad-based tax policies funded by direct spending, such as the Earned Income Tax Credit and the Additional Child Tax Credit, vulnerable to cancellation.

In conclusion, our Constitution does not authorize the President to enact, amend, or repeal statutes. Granting the President that authority, as H.R. 4890 would effectively do, would be unwise as well as unconstitutional for the reasons set forth in this testimony.

I thank the Chair for scheduling this important oversight hearing and for the opportunity to testify today.

Mr. CHABOT. Thank you very much.

[The prepared statement of Ms. Firvida follows:]

PREPARED STATEMENT OF CRISTINA MARTIN FIRVIDA

Chairman Chabot, Ranking Member Nadler, and members of the Subcommittee, thank you for this opportunity to testify on behalf of the National Women's Law Center on H.R. 4890, the Legislative Line Item Veto Act of 2006. The bill would dramatically expand the powers of the President in relation to Congress, presenting serious policy and constitutional questions while doing little, if anything, to control growing deficits.

The bill has sometimes been described as a means of eliminating unnecessary earmarks, but its scope is far broader. H.R. 4890 would give the President unprecedented power to suspend, and effectively cancel, provisions of law enacted by Congress, even after Congress has rejected the President's rescission proposal. The expanded rescission power would apply not only to appropriations, currently subject to a more limited rescission authority, but also to direct spending for programs upon which millions of Americans rely, and, on its face, some targeted tax benefits. In addition, the bill would enable the President to control the legislative agenda of Congress, because the President would have the ability to control the timing and number of rescission bills sent to Congress, and the expedited rescission process would require that Congress respond. These sweeping new provisions raise significant policy issues and effectively confer upon the President the power to amend or repeal duly enacted legislation, in violation of the separation of powers doctrine and the presentment and bicameralism clauses of Article I, Section 7 of the Constitution of the United States.

In addition, empirical evidence suggests that the proposed Legislative Line Item Veto would not result in substantial savings that would reduce our nation's record deficits. Indeed, the potential for Congress to agree to fund the President's priorities in exchange for the President's promise not to exercise the veto suggests that spending may increase as a result of this legislation.

H.R. 4890 GRANTS THE PRESIDENT SWEEPING POWERS TO SUSPEND—AND EFFECTIVELY CANCEL—COVERED SPENDING AND TAX PROVISIONS

This bill would give the President the unilateral power to suspend, and in some cases, effectively cancel, spending and tax provisions enacted by Congress. This Presidential power to essentially amend or repeal duly enacted legislation is bad public policy and presents the clearest constitutional violation in H.R. 4890.

H.R. 4890 would give the President sweeping new authority to suspend covered spending and tax provisions *even after* Congress had rejected the proposed rescis-

sion. The bill would allow the President to suspend funding for a period of 180 days (and possibly more) after sending a special message to Congress seeking legislative approval of the rescission, even if Congress explicitly rejects it. This is a dramatic departure from current rescission authority. Current law gives the President authority to withhold appropriated funds for up to 45 session days while Congress considers a proposed rescission, but explicitly requires that the President's suspension of funding immediately end if one legislative house rejects the President's rescission request (or at the end of the 45-day period if no action is taken) and that budget authority be made available for obligation immediately. The Line Item Veto Act of 1996 likewise required the President to immediately reinstate cancelled funding if Congress adopted a joint resolution of disapproval. Giving the President the power to ignore the expressed will of Congress as H.R. 4890 would do is unprecedented.

In addition, H.R. 4890 grants the President extremely broad discretion to determine when, in what fashion, and how often to rescind covered provisions of law. While H.R. 4890 requires Congress to act upon a rescission request sent by the President within 13 session days, the bill permits the President to send his proposed rescissions to Congress *up to one year* after enacting a spending or tax bill. In addition, the bill allows the President to send rescissions from one spending or tax law in numerous rescission bills to Congress, or to send rescissions from several spending or tax laws in one rescission bill. Finally, in contrast to current law, the bill does not appear to prohibit the President from resubmitting the rejected rescission in a different rescission request, and continuing to suspend the operation of the provision.

The powers granted to the President under H.R. 4890, taken together, would effectively grant the President the ability not merely to delay, but to cancel provisions of law unilaterally. For example, the President could submit a package of rescissions to Congress in the spring and withhold funding until the end of the fiscal year, when spending authority would cease for many items, terminating the program even if Congress explicitly rejected the rescission. As a result of the broad new powers granted to the President in H.R. 4890, federal agencies, state and local governments, and individuals who administer or receive federal funding through a variety of programs and benefits, would be unable to rely on funding approved by Congress.

H.R. 4890 WOULD ALLOW THE PRESIDENT TO RESCIND DIRECT SPENDING AS WELL AS APPROPRIATIONS, BUT DO LITTLE TO CONTROL SPECIAL INTEREST TAX BREAKS

The breadth of the cancellation power granted to the President under H.R. 4890 is matched by the breadth of the spending items to which it can apply, compounding the constitutional and policy concerns raised by the new power. Despite the fact that H.R. 4890 has been justified as a mechanism for controlling earmarks and tax benefits for powerful special interests, the bill also would apply to broad-based items of direct spending, and render low-income recipients of mandatory spending programs especially vulnerable to program cuts.

The expanded rescission powers authorized by H.R. 4890 would apply not only to appropriations, to which more limited rescission authority currently applies, but also to new items of mandatory spending, allowing the President to override individual entitlements enacted into law. The expansion of the President's rescission authority to apply to direct spending items is especially troubling because the broad definition of "direct spending" in the bill may be claimed to allow the cancellation of *existing* entitlement spending in reauthorizations, rather than only *new* spending. For example, if H.R. 4890 were to be enacted, it is possible that a significant number of provisions in the reauthorizations next year of the State Children's Health Insurance Program and the Farm Bill (which authorizes Food Stamps) could be subject to rescission *even if* those provisions were not new and did not add to the costs of the legislation.

Conversely, the definition of targeted tax benefit in the bill is so narrowly constructed as to virtually guarantee that no carefully drafted tax benefit will be subject to the new cancellation power. The definition used in the bill would apply to tax provisions that benefit 100 or fewer beneficiaries, except that it would not apply if the provision treats all persons engaged in the same industry or activity or owning the same type of property similarly. The Joint Committee on Taxation analyzed this definition (which was included as part of the Line Item Veto Act of 1996), and concluded that the exceptions were vague and poorly defined.¹ As a result, this creates the potential to altogether exempt tax breaks from the line item veto. For example, had the Legislative Line Item Veto Act of 2006 been in effect when the 2004

¹ Staff of Joint Comm. on Taxation, Analysis of Provisions Contained in the Line Item Veto Act (Public Law 104-130) Relating to Limited Tax Benefits 20 (Joint Comm. Print 1997).

corporate tax bill was passed, the President might have been powerless to cancel special interest tax breaks for ceiling fan importers and tackle-box manufacturers,² among others, which were criticized by many observers as pork, and which presumably would be the type of targeted tax benefit H.R. 4890 is supposed to eliminate.

While some justify limiting the definition of “targeted tax benefits” to ensure that only special interest tax breaks and not broad-based tax policies are subject to cancellation, no similar limitation exists to ensure that broad-based direct spending policies are also not subject to cancellation. In fact, the only broad-based tax policies that may be subject to the Legislative Line Item Veto are those that include items of direct spending. The two most prominent tax credits that trigger direct spending are the Earned Income Credit and the Additional Child Tax Credit. Both of these credits assist low-income families. Should H.R. 4890 be adopted, the President may be authorized to cancel portions of these credits should Congress, for example, vote to extend improvements to the credits passed in 2001 and 2003. There is no justification for giving the President the authority to suspend tax provisions that help millions of poor children but not tax provisions that benefit a few thousand multi-millionaires.

H.R. 4890 ALLOWS THE PRESIDENT TO CONTROL THE CONGRESSIONAL AGENDA

The process for Congress to respond to the President’s proposed rescissions set forth by H.R. 4890 creates the potential for the President to exercise considerable control over the congressional schedule and agenda, above and beyond budget and spending bills. This ability to reorder congressional legislative priorities in and of itself will result in a bad policy outcome, and when combined with the broad authority to cancel spending granted by H.R. 4890, exacerbates the constitutional breach contained in this proposal.

Under current law, if Congress fails to approve the President’s rescission proposal within 45 session days, including by inaction, spending authority must be restored. Given that Congress has the power of the purse under our constitutional structure of separation of powers, it is appropriate to leave to Congress the discretion to act on the President’s suggested rescissions, to act instead on its own package of rescissions, or to do nothing at all. However, H.R. 4890 would strip Congress of this discretion and would amend House and Senate rules to provide for fast-track consideration of presidential rescission messages.

Under the new fast-track rules in H.R. 4890, a bill encompassing the President’s rescission package must be introduced by congressional leadership no later than two session days after the President sends a special message to Congress proposing the rescissions. If no bill is introduced by the second session day, any member may introduce the bill thereafter. Once the rescission bill is introduced, the appropriate committees are required to approve the bill without any change no later than the fifth session day, or, if the appropriate committees fail to do so by that day, the bill is automatically discharged from the committees. Both the House and Senate must have an up or down vote on the rescission bill, without amendment, by the end of the tenth session day after introduction of the bill. In summary, if the procedures are adhered to and are not waived by rule or otherwise ignored, Congress would be compelled to complete action on the President’s rescissions within 13 session days of the President’s sending the proposal to Congress.

In combination with the broad discretionary authority granted to the President to send rescission messages at any time and in any manner that the President sees fit, these fast-track procedures are an invitation to allow the President to control the entire Congressional legislative agenda. For example, a President could exercise the rescission authority as a parliamentary tool to tie up the Congressional schedule indefinitely or until the President receives the concessions he or she seeks. The President could send over a series of bills that rescind spending items from bills that were passed and signed at different times, bundling the rescission of spending items that are popular in Congress with those that are unpopular with the public, in order to compel Congress to turn away from other work and dispose of the rescissions. This would enable the President to control the timing of votes in Congress on other pending legislation. If deployed during the second half of a second session of any given Congress, the tactic could run out the clock on other pending legislation. It is important to note that H.R. 4890 could affect consideration of all pending legislation in this way, not just legislation related to spending items.

² Edmund L. Andrews, *How Tax Bill Gave Business More and More*, N.Y. TIMES, Oct. 13, 2004, at A1.

THE EXPANSIVE POWERS GRANTED TO THE PRESIDENT BY H.R. 4890 RAISE SERIOUS
CONSTITUTIONAL PROBLEMS

The extraordinary new powers that H.R. 4890 would confer upon the President raise serious constitutional problems under the separation of powers doctrine, as well as the presentment and bicameralism requirements of Article 1, section 7 of the Constitution of the United States.

The separation of powers is a fundamental feature of our Constitution and our system of government. It was designed to and does play a crucial role in safeguarding the liberties and freedoms that the Constitution created and which the founding fathers endeavored to protect. As Justice Kennedy so succinctly put it in his concurrence in *Clinton v. City of New York*:³

Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”⁴

The Supreme Court has historically taken a strict approach to analyzing potential violations of the separation of powers doctrine. A long line of cases demonstrates that the Court is extremely skeptical of any encroachment on the power of each branch and consequently will apply a strict formal analysis frequently resulting in the invalidation of the Congressional act. As the court stated in *Mistretta v. United States*:

Accordingly, we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch. For example, just as the Framers recognized the particular danger of the Legislative Branch’s accreting to itself judicial or executive power, so too have we invalidated attempts by Congress to exercise the responsibilities of other Branches or to reassign powers vested by the Constitution in either the Judicial Branch or Executive Branch.⁵

In *Clinton v. City of New York*, the Court emphasized that while some lawmaking responsibilities are assigned to the President in Articles I and II of the Constitution, “there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”⁶ In addition, the lack of a Constitutional provision assigning the President such a role was interpreted to be the equivalent of an express prohibition.⁷ The Court ruled in *Clinton* that allowing the President to cancel spending unilaterally amounted to an impermissible exercise of the power to amend or repeal statutes, a power that is explicitly reserved for the Congress under the Constitution.⁸

Like the power to cancel items of spending struck down by the Court in *Clinton*, the powers granted to the President by H.R. 4890 constitute an amendment or repeal of a statute by the President. Under H.R. 4890, the President can suspend the operation of provisions of law for 180 days even if Congress rejects the proposed rescission. H.R. 4890 gives the President the power to decide when to submit a rescission request, and, depending when the rescission is submitted, the “suspension” could result in the permanent elimination of spending authority. H.R. 4890 also would allow the President to resubmit proposed rescissions that Congress had previously rejected, which likewise could effectively terminate spending authority. Because the broad powers granted to the President by H.R. 4890 could end, as a practical matter, programs funded by discretionary spending, direct spending programs, or tax benefits previously approved by Congress, “[i]n both legal and practical effect, the President [would have] amended . . . Acts of Congress by repealing a portion of each.”⁹ As the Congressional Research Service concluded, these provisions may reach “far enough to be considered an effective grant of authority to cancel provi-

³ *Clinton*, 524 U.S. 417 (1998).

⁴ *Id.* at 450 (Kennedy, J., concurring) (citation omitted).

⁵ *Mistretta v. United States*, 488 U.S. 361, 382 (1989) (citing *Bowsher v. Synar*, 478 U.S. 714 (1986), *INS v. Chadha*, 462 U.S. 919 (1983), *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

⁶ *Clinton*, 524 U.S. at 438.

⁷ *Id.* at 439.

⁸ *Id.* at 438–441.

⁹ *Clinton*, 524 U.S. at 438.

sions of law . . . ,”¹⁰ and that was proscribed by the Supreme Court in *Clinton v. City of New York*.

In addition, because the cancellation authority the President is granted by H.R. 4890 is legislative in nature, it also violates the provisions of Article I, Section 7 of the Constitution of the United States, namely, the presentment and bicameralism clauses. These clauses provide that no law can take effect without the approval of both Houses of Congress and that all legislation must be presented to the President before becoming law. As *INS v. Chadha* makes clear, the amendment and repeal of statutes, no less than their enactment, must conform with Article I.¹¹ Pursuant to H.R. 4890, the President would have the ability to create a different law from one duly enacted by Congress and signed by the President, temporarily and possibly permanently, *without* Congressional approval and *despite* Congressional disapproval.

The fact that Congress is considering granting the President such extraordinary power does not resolve the constitutional issues. The Constitution does not authorize Congress to cede to the executive that power which is properly its own. As Justice Kennedy stated in his concurrence in *Clinton*:

That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. . . . Abdication of responsibility is not part of the constitutional design.”¹²

H.R. 4890 IS UNLIKELY TO REDUCE AND COULD EVEN INCREASE SPENDING

The experience with line item vetoes at the federal and state level does not suggest that enacting H.R. 4890 will significantly reduce the deficit. Moreover, by significantly increasing the President’s ability to negotiate for the Administration’s own budget priorities, the line item veto may actually increase spending. While no amount of savings or deficit reduction could justify a violation of the Constitution, the very poor track record of the line item veto as a tool to control spending should alone be grounds to reject the proposal.

The President’s current rescission authority has not produced significant savings over time.¹³ In fact, the current administration (in contrast to other administrations) has *never* used current rescission authority (nor the constitutional veto power) to curtail spending. Nonetheless, frustration with current rescission authority has suggested to some that a line item veto is needed to give the President the power to control spending.

However, the evidence on the effect of a more aggressive—and unconstitutional—rescission authority, the Line Item Veto Act of 1996, shows minimal impact on budget savings. According to the Congressional Research Service, the implementation of the 1996 Act produced modest savings.¹⁴ In one year, the President successfully vetoed \$355 million in spending out of a \$1.7 trillion budget. The total savings produced by President Clinton’s line item vetoes amounted to less than \$600 million over five years. The savings would have been greater had Congress approved all of the President’s request to cancel funding—but even if each and every cancellation had been accepted, the amount would still have come to well under \$1 billion over five years.

The picture from the states also provides little evidence that the line item veto is an effective means of controlling spending. Currently, 43 states have line item veto authority for their governors.¹⁵ State budget practices are fundamentally different from federal budgeting practices, in part because the constitutions of most states provide very explicit details on how budgets are to be enacted, and most give the executive branch of government a much stronger role in budgeting than is con-

¹⁰ Morton Rosenberg, *Line Item Veto: A Constitutional Analysis of Recent Proposals*, Congressional Research Service, Apr. 17, 2006, at 1, 2.

¹¹ 462 U.S. 919, 954 (1983).

¹² *Clinton*, 524 U.S. at 452 (citations omitted).

¹³ Statement of Donald B. Marron, Acting Director, Congressional Budget Office, CBO’s Comments on H.R. 4890, the Legislative Line Item Veto Act of 2006, Hearing before the Subcomm. on the Legislative and Budget Process of the House, Comm. on Rules 2 (Mar. 15, 2006), available at <http://www.cbo.gov/ftpdocs/70xx/doc7079/03-15-LinItemVeto.pdf> [hereinafter *CBO Testimony*].

¹⁴ Louis Fisher, *A Presidential Item Veto*, Congressional Research Service, Dec. 2, 2004, at 1.

¹⁵ *Budget Process in the States*, National Association of State Budget Officers, Sept. 1997, at 1.

stitutionally permissible at the federal level.¹⁶ However, even governors with significant line item veto power are unable to secure significant savings through it. Douglas Holtz-Eakin, former director of the Congressional Budget Office, in a survey of evidence from the states concluded “that long run budgetary behavior is not significantly affected by the power of an item veto.”¹⁷ In testimony last month before the House Rules Committee, the CBO renewed the observation that in some states the line item veto has not decreased spending, as the result of governors and legislatures negotiating to include a governor’s spending priorities in a state’s budget in exchange for a promise that the governor will not exercise line item veto authority.¹⁸ The CBO expressed concern that a similar dynamic at the federal level would result in higher spending.¹⁹

Indeed, the concerns expressed by the CBO have been echoed and expanded upon by other observers. George Will, in an insightful column examining the line item veto, stated that, “knowing the president can veto line items, legislators might feel even freer to pack them into legislation, thereby earning constituents’ gratitude for at least trying to deliver.”²⁰ He went on to describe how the President could buy the support of members of Congress on his legislative priorities in exchange for a promise that he would not veto the spending priorities of the members.²¹ The Congressional Research Service came to a similar conclusion in a 2005 report. Warning that savings would be very limited under a line item veto, the Congressional Research Service went on to state, “Under some circumstances, the availability of an item of veto could increase spending. The Administration might agree to withhold the use of an item veto for a particular program if Members of Congress agreed to support a spending program initiated by the President.”²² The concern that the Legislative Line Item Veto will not only fail to decrease spending but may exacerbate the record deficits that we face is one that must be taken seriously.

CONCLUSION

The separation of powers is fundamental to our Constitution and system of government. Our Constitution does not authorize the President to enact, amend, or repeal statutes. Granting the President that authority—as H.R. 4890 would effectively do—would be unwise as well as unconstitutional for the reasons set forth in this testimony. I thank the Chair for scheduling this important oversight hearing and for the opportunity to testify.

Mr. CHABOT. I commend all the witnesses so far in keeping so close to within the time limits. That doesn’t always happen, so an excellent job. You have got a high standard to follow here, Mr. Cooper. We are very pleased to have you, as well, here this afternoon and you are recognized for 5 minutes.

TESTIMONY OF CHARLES J. COOPER, PARTNER, COOPER AND KIRK, PLLC

Mr. COOPER. Thank you very much, Mr. Chairman. I appreciate that very much. I will try to keep with that tradition.

And I also very much appreciate your reference to my role in the *Clinton* case in your introduction. I do think the *Clinton* case is controlling in the analysis of the constitutionality of this measure, so I will focus substantially on that.

At issue in the *Clinton* case was the Line Item Veto Act of 1996, which provided that the President may cancel—cancel in whole the same types of provisions that are at issue in this measure. Cancellation took effect under that act when Congress received his spe-

¹⁶Louis Fisher, *Line Item Veto Act of 1996: Lessons from the States*, Congressional Research Service, Dec. 26, 1996, at 1.

¹⁷Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets: Evidence from the States 2* Working Paper No. 2531, National Bureau of Economic Research (March 1988).

¹⁸CBO Testimony, *supra* note 12, at 6.

¹⁹*Id.* at 5–6.

²⁰George Will, *The Vexing Qualities of a Veto*, N.Y. TIMES, Mar. 16, 2006, at A23.

²¹*Id.*

²²Louis Fisher, *Item Veto: Budgetary Savings*, Congressional Research Service, May 26, 2005, at 3.

cial message to that effect. The act defined cancel as “to rescind and to prevent from having legal force or effect.” The Congress used those words quite deliberately. Its purpose was to make clear that the President’s action would be permanent and irreversible, and so it was, because in order to restore a canceled item, Congress had to pass a disapproval bill, in other words, a new law which had to satisfy, obviously, bicameralism and present to the President for his approval.

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 duly enacted law, that is, bicameral passage and presentment to the President. Those words, “finely wrought,” that formulation, of course, is familiar to all legislators, I am sure, from *Chadha*.

President Clinton’s cancellation, however, and these are the Court’s words, “presented one section of the Balanced Budget Act of 1997,” the provision at issue there, “from having legal force or effect while the remaining provisions of the act continued to have the same force and effect that they had when signed into law.” So the Supreme Court concluded that, again, its words, “cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial appeals of Acts of Congress.” That failed to satisfy article I, section 7.

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 teachings in *Clinton*. The President is not authorized by that bill to cancel any spending or tax provision or otherwise to prevent such provision from having legal force and effect. To the contrary, any spending or tax provisions duly enacted into law remain in full force and effect until the bill and unless the bill is repealed in accordance with article I, section 7 process.

To be sure, this measure would authorize the President to defer or suspend 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, but the President will also be authorized to terminate that referral if he believes that continuing it would be inconsistent with the purposes of the act. At the end of the deferral period, the President would be required to make the funds or tax benefits available.

The Congressional practice of vesting discretionary authority in the President to defer or even to decline the expenditure of appropriated funds has been commonplace since the beginning of the republic and its constitutionality has never been seriously questioned. My written testimony trudges through quite a few examples of this and I won’t belabor them. But suffice it to say that when Congress has passed such 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. While the scope of that authority 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 Court as a matter for this body, for Congress itself to decide through the legislative process.

The Supreme Court in *Clinton* acknowledged Congress's venerable and non-controversial practice of vesting this kind of broad discretion in the President. But the critical difference with the Line Item Veto Act of 1996, as the Court said, is that unlike any of those prior precedents, this act gives the President unilateral power to change the text of duly enacted statutes. There is nothing of that consequence in the measure that is before you, I would submit.

The short of my testimony, Mr. Chairman, is this—and I am just going to be a few seconds over—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 the unmaking of law, on the one hand, and the power to exercise discretion in the exercise of law on the other. Congress cannot constitutionally vest in the President the former, but it can the latter, and it has done so repeatedly throughout our Nation's history. I believe that the measure that is now pending for your consideration falls safely on the constitutional side of that line.

Thank you again for having me today.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Cooper follows:]

PREPARED STATEMENT OF CHARLES J. COOPER

Good afternoon Mr. Chairman and Members of the Subcommittee. 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 Subcommittee's invitation to present my views on "The Constitution and the Line Item Veto." I shall focus my testimony 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 by Representative Paul Ryan. For reasons that I shall discuss at length below, I believe that the President's proposal is constitutional. But first I would like to outline my experience in this esoteric area of constitutional law.

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

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

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

Less than two months after the Supreme Court's decision in *Raines*, President Clinton exercised his authority under the Line Item Veto Act to cancel "one item of new direct spending" in the Balanced Budget Act of 1997, which had the effect of reducing the State of New York's federal Medicaid subsidies by almost \$1 billion. I represented the City of New York and certain healthcare associations and providers, which lost many millions of dollars in federal matching funds as a direct result of the President's cancellation, in a suit challenging the constitutionality of the Line Item Veto Act. The Supreme Court struck down the Line Item Veto Act, concluding that "the Act's cancellation provisions violate Article I, § 7, of the Constitution." *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). The *Clinton* case controls the analysis of the constitutionality of the Legislative Line Item Veto Act of 2006, and so an extended discussion of the case is warranted.

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

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

In order to restore a canceled item, Congress had to pass a "disapproval bill," 2 U.S.C. §§ 691d, 691e(6), and the Act provided for expedited consideration of such disapproval bills. 2 U.S.C. § 691d. But a disapproval bill was a new law, which had to be passed by both Houses and presented to the President in the manner prescribed by Article I, Section 7, of the Constitution.

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).

President Clinton's cancellation, however, "prevented one section of the Balanced Budget Act of 1997 . . . 'from having legal force or effect,' "while the remaining provisions of the Act "continue 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 provisions duly enacted into law remains in full force and effect under the bill unless or 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. But the President would also 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 At the end of the deferral period—which, again, cannot exceed 180 days—the President would be required to make the funds or tax benefits available. 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 congressional practice of vesting discretionary authority in the President to defer, and even to decline, expenditure of appropriated funds has been commonplace since the beginning of the Republic, and its constitutionality cannot seriously be questioned. Indeed, the First Congress enacted at least three general appropriations laws that appropriated “sum[s] not exceeding” specified amounts for the government’s operations. See Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1579 (1974). By appropriating sums “not exceeding” specified amounts, Congress gave the President discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. See, e.g., H.R. Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) (“Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity.”)

The First Congress also enacted laws providing for “lump-sum” appropriations—that is, appropriations for the operation of a department that do not specify the particular items for which the funds were to be used. The President was thereby given discretion not only with respect to the amount of the appropriated sum that would be spent, 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. In-

stead, 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.

The Supreme Court in *Clinton* acknowledged Congress's venerable and non-controversial practice of vesting the President with "broad discretion over the expenditure of appropriated funds," but it concluded that the President's cancellation power under the Line Item Veto Act crossed the constitutional line between 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. In contrast, nothing in the Legislative Line Item Veto Act of 2006 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 accorded the President on numerous occasions throughout the Nation's history. Again, a deferral under the Bill can last no more 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 that the appropriation authority could lapse during the period in which spending has been deferred is of no constitutional moment, as the historical precedents described above make clear.

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. Surely no one would question the constitutional authority of Congress to condition the expenditure or obligation of federal funds in this matter. 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 Subcommittee.

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.

Mr. CHABOT. We appreciate all the witnesses' testimony. The Members of this panel up here now will have an opportunity to ask questions and we will try to stay within the 5-minute rule, as well, and I recognize myself for that purpose at this time.

Congressman Ryan, let me start with you, if I can. In your written testimony, you state that the current rescission procedures in the Impoundment Control Act of 1974 have been largely ineffective at controlling Congressional spending. How would your bill encourage greater fiscal restraint and prevent wasteful spending?

Mr. RYAN. In one major way. Congress couldn't ignore it. The President can send a rescission authority. Let's just assume we have divided Government. We've had these requests before. President Reagan sent to Congress a large rescission request. Congress just ignored it. Under this system, Congress can't ignore it. Congress has to act on it and deliberate. Congress will have the final say so with a majority vote in both Houses, but Congress will have to act on these rescission requests within 10 days of introduction.

Mr. CHABOT. Thank you very much.

Congressman Kennedy, let me move to you at this point, if I can. As you note in your testimony, your proposed constitutional amendment has the advantage of clearly being constitutional. Could you please amplify your remarks on how your approach would differ from the line item veto that was found unconstitutional in the *Clinton* case, as we have previously referred to, as well as the line item veto that we're referring to here today, the act?

And then, finally, Congressman Phil English had talked to me a number of times over the years about his line item veto, and I think Congressman Andrews also had one, and I believe Bill Archer had one years ago, as well. Is yours along those lines or are there differences, and if you don't know, we can follow up on that later.

Mr. KENNEDY. Well, Chairman, I don't really understand the key differences between some of the other ones you mentioned, but let me just say relative to the *Clinton* veto power that was set aside by the Supreme Court, this, being a constitutional amendment, therefore would be constitutional, but the difference is that it lets you reach within the non-legislative text of the bill and instead of having to veto a whole category, can dip down and more easily find the specific item to veto. So it has that improvement for really targeting the need to control spending, which I think is also shared in Congressman Ryan's proposal, as well.

The difference, I think, was really outlined by Mr. Cooper. Whereas under this constitutional amendment, once the President vetoes it, it is vetoed and no longer would have effect, Congress would have to act in order for that to be put back into place, would have to pass new legislation, whereas under Congressman Ryan's approach, there would be still the need for Congress to act or, in fact, the spending item to be terminated, and that would be the key differences between Congressman Ryan and my own.

Mr. CHABOT. Thank you very much.

Ms. Firvida, let me turn to you, if I can. In your written testimony, you argued that a line item veto might have little budgetary effect. Is it your position that such savings, regardless of their size

relative to an admittedly astronomical Federal budget, are just not worth having?

Ms. FIRVIDA. No. I think the point that we are trying to make is that it is not worth assuming the risk of violating the Constitution, especially when the savings are so limited. It is never justified to, of course, pass an unconstitutional act, but especially when what is before you is balancing a proposal that might present these constitutional questions and you are looking at limited savings, that should really give everyone pause.

In addition, there already exists many constitutional means of reducing the deficit. For example, the President easily could veto bills, but for reasons that I would not want to get into because I don't know what they are, he does not. Certainly, Congress in its rulemaking capacity could reinstate some budget rules that were very effective in the mid-1990's and were not declared unconstitutional, like the pay-go rule, and that would result also in greater savings.

So there's any number of constitutional tools available that we know save more money than this one, and this one may present constitutional issues and may not save that much money.

Mr. CHABOT. Thank you, and let me conclude with you, Mr. Cooper, in the time that I have remaining. I think you've had the opportunity to review in the Congressional Research Service their critique of this particular piece of legislation. Could you comment on two issues that were raised in that report? One, should there be a limitation on the President's ability to submit multiple rescission requests with respect to a single item of spending? And second, is the President's 180-day hold on funds automatically terminated upon Congress's rejection of the President's rescission request?

Mr. COOPER. First, with respect to your first question, it's not altogether clear to me that the President would have authority to submit a second or serial rescission proposal with respect to the same item. The statute doesn't prohibit that, but it certainly doesn't explicitly authorize it and it's—I think it could be interpreted as being possibly inconsistent with the general purpose of this measure.

But assuming that the President would have discretion to submit such serial proposals, whether or not Congress should prevent that from happening, it seems to me that is entirely up to Congress as a matter of policy. I think Ms. Firvida has identified some scenarios under which a willful President could abuse the authorities that this statute affords to him in a method that—in a manner that a limit on the President's ability to send serial proposals would prevent.

By the same token, one might be able to envision a situation in which a President would be perfectly in good faith, even after, say, a body in Congress had negatively voted on one of his rescission proposals, to resubmit it, and that would be if some unusual circumstance took place to change the—possibly change the legislative attitude with respect to that matter.

Mr. CHABOT. Okay. Thank you very much. My time has expired. The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you. Congressman Ryan, you talked about the abuse where we never have the opportunity to vote on things

because they're put in at the last moment in the conference Committee and we can only vote yes or no. But isn't the simple way to fix that to amend the rules of the House so that you can—so that, in fact, our rules are followed, which they haven't been because they're waived all the time, and the conference Committee can only deal with conferenceable items, that is, items where the two Houses differ—

Mr. RYAN. Yes.

Mr. NADLER [continuing]. And that nothing can be put in that wasn't in one House or the other at that point?

Mr. RYAN. I think there are a number of things we can do to address those issues. We call these air-dropped earmarks. That is something that wasn't in the House or the Senate—

Mr. NADLER. Air dropped?

Mr. RYAN. Yes.

Mr. NADLER. So why don't we just prohibit air drops, period, never mind earmarks in the conference—

Mr. RYAN. Because I think there are situations that arise where Congress needs to maintain its discretion. And we are not talking about just appropriation bills. We are talking about tax legislation, we are talking about authorization legislation where new evidence may come to light—when you pass a bill through the House and the Senate and go to conference, that can take an entire year. Congress probably, I believe, needs to have the discretion to be able to address circumstances that occur in those times in conference reports.

Mr. NADLER. Let me just say—

Mr. RYAN. To ban the ability of Congress to put something in a conference report—

Mr. NADLER. Let me just say I disagree with you. We break those rules routinely, but we shouldn't, and I think if something happens, you should go back to the House and the Senate.

Second question, Congressman Kennedy. Your testimony is that we shouldn't be surprised that the spending is projected to reach an all-time high of \$23,000 per household with \$3,800 to be borrowed, but given what Congressman Scott pointed out, that the earmarks, which is what you're talking about, are less than 1 percent of the budget, isn't this a red herring, as if the earmarks are really a substantial part of the deficit case when the real problem is either that we're overall spending too much or that we're, not with earmarks but overall, or that our tax cuts are too high? In other words, if you took care of all these earmarks, you're dealing with 1 percent of the problem.

Mr. KENNEDY. I would agree with what Congressman Ryan said before, that there's a cultural issue there that says, are you for more spending or are you for less spending, that it would have a chilling effect on some of the non-earmarked ones where they just wouldn't bring it forth.

You brought up some other budget control measures that we ought to be looking at it in terms of identifying who has requested an earmark and those other things.

Mr. NADLER. We should.

Mr. KENNEDY. But if you look at, for example, the impoundment authority, really, the line item veto is kind of impoundment author-

ity on a diet. We need to make sure that when you're looking at which way do the rules tilt, do they tilt toward more spending or less spending, that it is putting some constraints—

Mr. NADLER. Okay. I hear your answer—

Mr. KENNEDY [continuing]. On spending and this is a step in the right direction—

Mr. NADLER. Let me just say that I think the rules should not tilt toward more spending or less spending. The rules should tilt toward transparency. People should vote for Congressmen they want to who will do more or less spending, as the people want. The President, ditto. And it ought to be transparent and Congressmen ought to be able to vote on these things and not have them air-dropped into conference reports at the end. The rules should not tilt, because when the rules tilt one way or another, you are inhibiting the democratic ability, with a small "d", of people to get what they want out of Congress and the President.

Mr. KENNEDY. In—

Mr. NADLER. That's not a question, it's a statement, because I want to ask a few more questions.

Ms. Firvida, could you discuss briefly the kinds of programs that might be vulnerable under this legislation? Is it limited to earmarks in appropriations bills?

Ms. FIRVIDA. No. This extends current rescission authority to a far broader set of spending programs, including entitlement programs like the SCHIP program, like the food stamps, other programs that—anything, essentially, that is reauthorized after the enactment of this line item veto would be subject to that power as long as it had some budgetary effect. In other words, it would not even have to result in new spending. It would not need to be a new benefit.

Mr. NADLER. Right. So it would just tilt the power to the President in that. How could this bill be applied in the tax arena, Ms. Firvida?

Ms. FIRVIDA. There are provisions here that would get to some targeted tax breaks. However, the term is so narrowly defined—for the benefit of fewer than 100 individuals—that almost no tax benefit, if it was carefully crafted by the appropriate Committees would ever meet that definition. And, in fact, we know that the Joint Committee on Taxation analyzed this very definition, which was in the veto of '96, and stated that it was so vague and poorly defined, it was problematic.

Mr. NADLER. Let me ask Congressman Ryan the last question I'll have time to ask, which may illustrate what Ms. Firvida was just saying. In your bill, Congressman, you have on page 15 two provisions. You say, the term targeted tax benefit means any revenue losing provision that provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries, et cetera. And then a few lines down, you say, a provision shall not be treated as described in the paragraph I just read if the effect of that provision is that all persons in the same industry or engaged in the same type of activity receive the same treatment. That sounds wonderful.

However, a special tax benefit given to the oil industry, it is given to fewer than 100 beneficiaries because there are less than 100 large oil companies. There are, in fact, five or six of them. And

yet if ExxonMobil and Shell were treated the same way, or engaged in the same type of activity and received the same treatment, it would seem that a special tax break that would be given only to the five big oil companies or to the—well, to the five big oil companies or to the entire industry—

Mr. RYAN. Sure.

Mr. NADLER [continuing]. Would not be subject to the line item veto.

Mr. RYAN. No—

Mr. CHABOT. The gentleman's time has expired, but you can answer the question.

Mr. RYAN. No, ExxonMobil has thousands of shareholders. Those tax benefits would accrue to all those shareholders, so it wouldn't—this doesn't limit it to, say, five oil companies—individual people, taxpayers, shareholders.

Mr. NADLER. But the benefit—

Mr. RYAN. A tax benefit like that—

Mr. NADLER. But the benefit goes to the company, not to the individuals.

Mr. RYAN. No, the way our legislative counsel—the intention of this and our interpretation of this is that we are talking about individuals. It would not apply in a case like that where you're talking about, say, five companies. We're talking about individuals.

Mr. NADLER. That's not what it says.

Mr. RYAN. As a Member of Ways and Means, I can tell you, there are tax laws that pass that accrue to small numbers of individual taxpayers. Those are the targeted types of tax breaks that we're talking about.

Mr. NADLER. But it doesn't say individuals. It says beneficiaries.

Mr. RYAN. That is what—that is the intention and our interpretation of that language.

Mr. CHABOT. The gentleman's time has expired. Never argue with a Member of the Ways and Means Committee on a tax issue.

Mr. NADLER. Whether he is right or wrong.

Mr. CHABOT. Whether he is right or wrong is right. [Laughter.]

The gentleman from Arizona, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman. You know, there was some previous discussion related to the tax breaks that passed in this Congress as having a negative effect, and it just occurred to me that that debate is really over, given the fact that we have nearly \$100 billion more in revenues than we did prior to those tax breaks. I just—it occurs to me that that's the way that we really affect the deficit, is to spur the economy to greater productivity and greater tax revenue.

Having said that, Ms. Firvida in her testimony said that a line item veto might have little budgetary effect and cites as evidence the fact that President Clinton only effected savings of about \$600 million over 5 years with his use of the line item veto. Of course, the Wall Street Journal and others have said that it might do a lot more. But none of these really amounts to anything more than \$2 or \$3 billion. But you have given testimony that you think that the ancillary effects could be significantly more than that. Could you just go ahead and reexpand on that a little?

Mr. RYAN. Sure. Two points I would make. Number one, there are a lot more earmarks these days than there were in those days.

Number two, it depends on the President. It depends on who the President is and how aggressive they want to go after individual line item spending provisions, tax provisions. If the President is aggressive and pursues this aggressively, the President can save billions of dollars. If the President chooses not to use it, he can't.

One more point on this, on foods like SCHIP and things like that. Congress will have the final say so. If Congress passes a broad-based program like refundable tax credit for low-income taxpayers, if they pass SCHIP for health care for low-income children, that's a bill Congress passes. If the President tries to veto that, Congress by a simple majority will rescind that veto.

So again, I do not believe this tips the power in the hands of the President. This preserves the power of the Congress, but it gives the President and the Congress the ability to go after wasteful spending items with a scalpel instead of a meat axe and vetoing an entire piece of legislation.

Mr. KENNEDY. And if I may add, if you take the Clinton example as the only case you are looking at, I think the number is close to \$2 billion. But again, you have got a comparison there from a Republican Congress versus a Democrat President. If you had the reverse of that, you might see that there might be a dramatically higher impact from having this power.

Mr. RYAN. Good point.

Mr. FRANKS. Congressman Kennedy, let me just ask you, then, constitutional amendments are pretty notoriously difficult to pass and certainly you have the advantage, once it passed, the constitutional argument goes away because it becomes part of the Constitution itself. Having said that, do you favor the passage of H.R. 4890 along with the effort to pass your constitutional amendment?

Mr. KENNEDY. I absolutely favor the proposal that Congressman Ryan has put forth, but I would also suggest that if you look at the impoundment authority that the President had for 200 years, it would grant far broader ability for the President to control spending than even what Congressman Ryan is proposing. That would be something that was within our power to rescind what we took away from the President that he had for 200 years as part of the 1974 Budget and Impoundment Act and something, if we are not going to go the full length of a constitutional amendment, some further step that we ought to be taking to keep control of spending.

Mr. FRANKS. Maybe just to expand that, would your constitutional amendment apply only to discretionary spending or could the President use it, the authority, to strike new mandatory spending or perhaps ongoing mandatory spending related to the so-called entitlements and the special interest tax breaks, and if so, how does it differ from Congressman Ryan's bill?

Mr. KENNEDY. My interpretation of it is that it would apply to both discretionary as well as mandatory. As crafted, though, Congressman Ryan's goes further in having the ability to reach into specific tax proposals and rescind those, as well.

Mr. FRANKS. Thank you. Mr. Cooper, I might get this last question with you, sir. You indicate that the fact that an appropriation authority of this type could lapse during the 180-day period in

which the President is authorized to defer spending is of, quote, “no-constitutional moment.” Can you give the less intelligent among us a little explanation of that?

Mr. COOPER. I am happy to try to do that, Congressman. The central point of my testimony is that Congress has throughout history given the President the power not to spend. And when he doesn't spend, the money doesn't leave the Treasury. And so the basic proposition is that if through operation of this mechanism Congress, with eyes wide open, created a mechanism through which the President through the good faith exercise of his discretionary powers ends up suspending a spending measure while Congress is considering it and the authority to spend expires during that period, it is the equivalent of the President simply exercising his discretion which Congress could give him not to spend at all. That's the reality of it.

The difference is this. The President could spend—could exercise his discretion, which this body would give him, to spend right up until that moment. That was not true under the Line Item Veto Act. After the President canceled the law on the sixth day, he could not change his mind. The only thing that could change that was this body passing a new law. Here, the President has that authority right up until this body acts to rescind the statute, if it decides to do that, or by operation of the spending provision itself, the authority lapses. But either way, the law is in place. It's in full force and effect.

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

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman from Virginia, the man with the charts, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman. Mr. Chairman, we keep talking about the President can only sign or veto. He can actually veto and resend the bill back with instructions, like I told you I wasn't going to sign a bill with more than \$100 billion in it. You sent it \$110. Here is a veto. Get \$10 billion out and I will sign it. Or, he can say, I will sign it with these provisions not in it. Just give the message back and you are essentially right back where we are if one of these things had passed. So he can do pretty much, if the President really wanted to get tough on the budget, then create this purple line up here, as President Clinton did, vetoing it, even closing down the Government if you keep sending back stuff he's not going to sign, or you can just sign what's sent to you and get that red line.

Let me ask a question. Mr. Ryan, you say he could line item veto the narrow special interest tax cuts. What about a big, fat, irresponsible tax cut? [Laughter.]

Mr. RYAN. If it's a big, fat, irresponsible tax cut that applies to 100 or fewer beneficiaries, the answer is yes. If it's a big, fat, irresponsible tax cut that he did sign into law that applies to more than that, the answer is no. I just wanted to be clear with you.

Mr. SCOTT. I'm sorry. He could not veto a big, fat, irresponsible—

Mr. RYAN. Well, he can veto an entire tax bill. He wouldn't be able to line item an individual tax cut within a tax bill that applied to more than 100 beneficiaries. Shareholders are beneficiaries—

Mr. SCOTT. Just to be clear, if he gave—if we sent up there a provision that had a tax cut just for ExxonMobil, nobody else—

Mr. RYAN. Well, remember, ExxonMobil has shareholders. It's a publicly-traded company.

Mr. SCOTT. Okay. So he couldn't line item that. So Exxon—

Mr. RYAN. I don't know how you would write—I literally would not know how you would write a tax cut to apply to just ExxonMobil unless you literally put in law only ExxonMobil gets this tax cut.

Mr. SCOTT. You can do it that it applies—

Mr. RYAN. I write a lot of tax bills, I can tell you.

Mr. SCOTT [continuing]. To only those oil companies with revenues over—with profits more than \$40 billion. It would only apply to ExxonMobil. They get the big fat tax cut. That would be okay. He couldn't touch it because they've got more than 100 shareholders.

Mr. RYAN. Well, if you're passing a tax bill like that, then you'd pass a tax cut for ExxonMobil. Congress would have to pass that. Then the President would have to sign that. You basically would have that power to veto it by signing it or not signing it in the first place.

Mr. SCOTT. If it was just part of the bill. When you talk about these earmarks and the fact that they cost \$20-some-billion, a lot of the earmarks are earmarks that out of the \$300 million, \$1 million goes to this project. That is a million-dollar earmark. If you didn't have that earmark, you would still have the \$300 million, so you didn't save any money or spend any money more than would be spent, is that right?

Mr. RYAN. Sure. In your example, yes. I think the issue at stake here is the culture of Congress and a culture that is growing where, to borrow a phrase from a Senator from Oklahoma, earmarks are the gateway drug to more spending. I think earmarks and the proliferation of earmarks are—

Mr. SCOTT. The point I am making, just—

Mr. RYAN [continuing]. Putting a bias toward much, much higher spending in Congress, and I think that bringing more transparency and accountability to the earmarking process will do more than just cut out wasteful earmarks. I think it will do a lot to bring more transparency and accountability to all of the dollars we spend.

Mr. SCOTT. Which means, in answer to my question, just because you have an earmark did not mean you increased spending. If out of the \$300 million, \$1 million goes to my special project—

Mr. RYAN. If you got rid of the \$1 million earmark, you would then spend \$299 million and you would reduce spending.

Mr. SCOTT. No, you would spend the \$300 million and I just wouldn't be guaranteed at getting the first million.

Mr. RYAN. It depends on how you write it.

Mr. SCOTT. That is how they are written a lot.

Mr. RYAN. Well, just to answer your question specifically, if there's a \$300 million spending bill and there's a \$1 million earmark in it, the President sends the rescission on the \$1 million, Congress passes that rescission, then you save \$1 million and you end up spending only \$299 million.

Mr. SCOTT. Does this bill allow you to reduce the spending, or you have to eliminate the whole line? Do you have to eliminate the whole line?

Mr. RYAN. I don't understand the question.

Mr. SCOTT. Can you reduce the item, or do you have to just—

Mr. RYAN. Oh, no, it is eliminate. Yes. You can't change the spending numbers. Right. You mean, so could you make the \$1 million a \$500,000 earmark?

Mr. SCOTT. Yes.

Mr. RYAN. No.

Mr. SCOTT. Okay. Ms. Firvida, you said you might actually increase spending. What in the legislation would produce that result?

Ms. FIRVIDA. Well, it goes a little bit to this problem of the culture of spending that Congressman Ryan is talking about. The culture would change in the following way, and we already see this in the State legislatures. The President, by simply threatening veto action, can essentially exact a legislation tax from Congress and say, I will not line item these particular projects or these important compromises that you have reached in your bill as long as you give me my spending priorities, and overall, spending increases because the President gets his spending priorities and Congress continues to maintain their spending priorities. This is a dynamic that is a recipe for disaster and increased deficits.

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

The gentleman from Florida, Mr. Feeney, is recognized for 5 minutes.

Mr. FEENEY. I thank all of you for your testimony.

Congressman Ryan, on your bill, since one Congress can't bind a future Congress, and even in Mr. Cooper's testimony on page 13 he says that Congress may exempt any given appropriation bill or a given provision from the act, I mean, theoretically, every appropriations bill we see in the future may contain some phrase that basically says, you know, notwithstanding any provision of the Congressional Impoundment or Control Act as amended by the Ryan Act, the President is not able to rescind any spending in the bill herein. I mean, is that a practical possibility?

Mr. RYAN. I don't think, because that would be a rule change. I don't think that that would be a practical possibility because this is a statutory change that gives the President the ability to pull out specific items. Then Congress passes a rescission bill. And so Congress will follow up with a new law that will rescind the taxing or taxing—

Mr. FEENEY. Well, maybe Mr. Cooper understood my question. Supposing we passed the Ryan Act tomorrow, and I am a cosponsor. I love the idea of what we are trying to get at here. But can't the next appropriations bill that comes down the pike just say, we are exempted from the Ryan Act?

Mr. COOPER. I believe it could.

Mr. FEENEY. I think so. I think—

Mr. RYAN. Congress can always undo what it does.

Mr. FEENEY. Yes. I think that is the point of—

Mr. COOPER. I don't think this Congress could prevent a future Congress from doing exactly like that. So the lesson of that point,

it seems to me, is that any legislation depends upon the good faith of all the branches.

Mr. FEENEY. Well, the Members are going to have to exercise some self-discipline and say things like, we are not going to vote for an appropriations bill that excludes ourselves from the Ryan proposal.

Congressman Ryan, you said that you couldn't veto a portion of a spending item. On page three of the act, subsection (i), it says the President could send a rescission message concerning the amount of budgetary authority or the specific item of direct spending. That would imply to me, and maybe you will want to take a look at the language as we move forward, the President theoretically could veto half of the bridge to nowhere as opposed to the whole bridge to nowhere if we are not careful here. We need to decide what exactly it would empower him to do.

Congressman Ryan, do you think that your bill, and for that matter, Congressman Kennedy's constitutional amendment, which is also a great idea, do you think it might have a chilling effect, talking about the culture in Congress, of people who are thinking about building a museum to Groundhog Punxatawney Phil or a bridge to nowhere or a railroad to nowhere? Do you think there may be a sort of a chilling effect? My colleague from New York was concerned about a road or a tunnel or a bridge built for a developer in his district. Do you think somebody in Mr. Nadler's position may be happy to know that there's one more whack at the apple, and not only that, but Congress may, in fact, discipline itself knowing that the President may pick on and outrage and embarrass the entire proposal? Maybe both the Congressmen can comment on that.

Mr. RYAN. I believe it will have that effect because at the end of the process, a Member is able to slip in a spending item which doesn't go through general order, doesn't go through a hearing process, doesn't go through ordinary scrutiny, cannot be susceptible to an amendment on the floor, and that is where a lot of the more unjustifiable spending items occur. I think this will have the practical effect of embarrassing those things out because these items may have to be voted on. The Member will have to go to the floor to defend these things.

There are a number of points that are brought up, if I could just quickly—

Mr. FEENEY. Well, I will tell you what. I will recognize you. This is my time's over, so I can get one more in.

Mr. RYAN. Yes.

Mr. FEENEY. Congressman Kennedy?

Mr. KENNEDY. You know, I would say the same thing. There is a difference between having some talk show folks point out that this is ridiculous as opposed to having the President with the big light that shines on it saying that this is not a priority. So I do believe it would have a chilling effect. It would reach beyond just those that he vetoed and call for more responsible spending.

Mr. FEENEY. Madison, when he describes the separation of powers, actually gives credit to Montesquieu, a French philosopher, and even Publius, going back to Roman days. But separation of powers, we don't have three branches that do not interact. There is a lot of gray and overlap. I would like to point out that this is

certainly true in the spending area. I think Mr. Cooper's entire testimony is devoted to the overlap between the executive and the Congress which appropriates.

I would like to point out and then get Mr. Ryan to comment on my experience at the State level. Some 40 governors have some version of a line item veto. I once got basically, in my view, held hostage by a Senate President who refused to pass an appropriations bill unless he had certain largess equivalent in the State of Florida to bridges to nowhere. He had a bunch of them. I basically picked up the phone when I was the Speaker of the House and told the governor that we needed an appropriations bill and I was stuck, being held hostage. I thought that some of these things were jokes. Would he take a look at them?

My governor looked at him and he said, "You know, I think they're jokes, Speaker Feeney." I said, well, what happens if I pass this appropriations bill with these jokes in there? Will you veto it? And he said, "Speaker, I'm not going to make a commitment to you. That might be a little disingenuous. But I'll tell you, I think they're jokes and I've got a good record of vetoing jokes." It actually helped the process move along. Otherwise, we might have had a long hot summer not doing an appropriations bill. Me knowing that we had one more whack at the things that Mr. Nadler was concerned about in his district and in a lot of Congress has been—so, Congressman Ryan, how else can this bill perhaps help the culture in Congress?

Mr. RYAN. The deferral question. This has been raised quite a bit. It's important to remember that the President has deferral authority right now. He has a 45-day decision authority.

Why did we pick 180 days? We chose 180 days because we believe we have to have a calendar deadline. My preference was 30 legislative days. The reason I wanted to do that is because you have to go over recesses. Often, we have large appropriation bills that we pass at the end of the legislative session in the fall. Then we go into recess. There's Thanksgiving, Christmas, don't come back until January for a pro forma session for the State of the Union. Then in February, we start legislating. You have to have the ability to defer over those long recess periods. Otherwise, Congress could just stall out the clock and over-wait, you know, outlast the President's deferral authority.

Now, I think that there are other ways of probably accomplishing this. The more important point is once Congress acts, the President's done. I mean, if Congress decides to spend the money, the money's spent. If they decide to rescind it, it's rescinded.

I think a way of probably addressing this that I'm looking at is limiting the amount of time in which after a bill is passed the President could submit a rescission request to Congress. That's something I don't have in the bill but something we're looking at, which is after a certain number of days—the President couldn't wait 100 days and defer and defer.

I also think there's an important part of duplication. Mr. Cooper mentioned our bill doesn't have a provision expressly repealing or preventing duplication. That is not the intention, to encourage duplication. I think that's obviously something we could figure out.

The other thing that I think is really important are politics. That's the other mention. Can a President use leverage over a

Member of Congress with this power? The President has all sorts of ways of using leverage over a Member of Congress. If the President abuses this, it will be seen as that abuse and Congress will act accordingly. President Clinton was repudiated with some of his in the mil con bill in 1996.

So I believe that this is a tool that will be visible. It's a tool that the President can use to effect a culture of change and save taxpayer dollars. And ultimately, at the end of the day, Congress will have the final say so. If things are outright political, if things are hostage-taking political events, Congress will have the ability to repudiate that kind of activity, and I think in the end of the balance, a good cause will be served.

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

Before we get to the final questioner here, Mr. Van Hollen from Maryland, the gentleman from New York is recognized for 2 minutes to ask a quick question and get a quick response from two of the witnesses.

Mr. NADLER. Thank you. I'd like to ask Mr. Cooper and Ms. Firvida the following question. Let's assume that Congressman Kennedy's constitutional amendment were adopted or that Congressman Ryan's legislation were adopted. If a Congressional majority had the intention to do the following, could they do it? Let's assume you pass the budget and it said that, with respect to the following 600 items, if any of these 600 items end up reduced, the White House budget is hereby reduced by 80 percent. [Laughter.]

Would that be effective or would there be something constitutionally stopping you? In other words, could the line item veto be totally frustrated by what could become boiler-plate language in a budget where the Congress said, well, here's our list of things we're worried about. You touch that, you have no budget for the White House or for the Central Intelligence Agency or whatever. Would that be constitutional? Is there anything that—

Ms. FIRVIDA. For myself, I would say I would want to have more time to consider that, but it certainly presents some—it's a conundrum. That presents some curious questions.

Mr. COOPER. I, too, would— [Laughter.]

I would appreciate more time to consider that more carefully, but off the top of my head, I can't think of a reason why that—I can't think of anything in the Constitution that would prevent that, and I do think the Congress could much more, you know, in a much more straightforward fashion exempt either items within an appropriations measure or the appropriations measure as a whole from the reach of this bill in the future. That's—

Mr. NADLER. Or this constitutional amendment, in effect?

Mr. COOPER. No, no, it couldn't do that.

Mr. NADLER. No, no, but under the constitutional amendment, could it do what I just suggested, and as a practical matter, make it impossible for a President to exercise the line item veto?

Mr. COOPER. I was focusing on Mr. Ryan's proposal. Again, I would want to think that through.

Mr. NADLER. Thank you.

Mr. CHABOT. Thank you very much.

The gentleman from Maryland, Mr. Van Hollen, is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you. Thank you, Mr. Chairman. Thank you and Mr. Nadler for holding this hearing. Thank you to all our witnesses. I appreciate your testimony.

Let me just ask a couple of questions, if I could, with respect to your proposal, Mr. Ryan, and first, let me just agree with many of the comments that were made by Mr. Nadler with respect to the air-dropping issue and the fact that if we were serious within our institution, without any Presidential activity, we could pass some rule changes that would address the many air drops in the middle of conference, and I think you acknowledged that fact.

I am concerned about the ability of the President, who already, of course, has lots more tools, but giving even more tools with respect to the ability to exert political pressure on Members of Congress, and I understand your argument about the self-correcting aspect of that over time. I am not sure of that.

But in that regard, let me ask you, as I understand your proposal, there is no time limit with respect to when the President has to submit. Why not? I mean, why let him—and second, if you could address the issue of at least there is nothing in the bill that prohibits the serial air-dropping by the President—

Mr. RYAN. Sure.

Mr. VAN HOLLEN [continuing]. Of different provisions.

Mr. RYAN. Those are two suggestions that I think would be improvements to the bill. I think the serial issue, it wasn't our intention to encourage it. We didn't outright specifically prohibit it. Mr. Cooper believes that it still may be prohibited, or he doesn't know if it's prohibited or not. I think we should just explicitly prohibit that you can't duplicate rescission messages to Congress. That would be an improvement in this bill, I think.

I also think the time limit—we ought to insert a time limit as to when the President—how many days the President has to act, to send a rescission message to Congress. I think that would be an improvement in this bill, as well.

Mr. VAN HOLLEN. Good.

Mr. RYAN. Another question that a lot of people have mentioned to me, appropriators especially, is what if the President sends 500 rescission requests. That is that many hours of debate. That is that many considerations. That is that many bills. They could just tie us up. I think that is a legitimate concern.

So I think we need to—we're looking at different ways of allowing—either limiting the number of rescission messages the President can send to the Congress or allowing possibly some bundling of these things. I think there are some pitfalls in the way we would do that, but some bundling of these requests so that a President couldn't tie Congress up in the works. Those are the other concerns that I think are very legitimate that have been raised where I think we can make improvements in this bill.

Mr. VAN HOLLEN. Well, not just tie Congress up, but, I mean, the political mischief that would be involved with sending up a series of small bundles and negotiating on different—

Mr. RYAN. Sure. I think there are ways of fixing those.

Mr. VAN HOLLEN. It seems to me one bundle, maybe.

Let me ask you a question with the differential treatment here with respect to appropriation provisions and tax breaks, and let me

make sure I understand your bill. If the President wanted to essentially use a veto over a tax break, the President could only do that with respect to tax breaks that benefit ten or fewer—

Mr. RYAN. Right.

Mr. VAN HOLLEN. Is that right?

Mr. RYAN. Yes.

Mr. VAN HOLLEN. And then there's even an exception to that if they're treated equally, is that right?

Mr. RYAN. Right.

Mr. VAN HOLLEN. But as I understand it, with respect to spending provisions, there is no such numerical limit, is that right?

Mr. RYAN. The intention—

Mr. VAN HOLLEN. Okay.

Mr. RYAN. No, I think I—

Mr. VAN HOLLEN. Here's my question. I mean, as I understand it under this bill, if you passed a tax break that benefitted the 101 wealthiest people in this country, that would not be subject to Presidential veto. But if you passed the SCHIP bill to help thousands of families, low-income families, that would be eligible for it. And if the objective here is deficit reduction, it seems to me I'm not sure I understand the differential treatment.

Mr. RYAN. Because there is a big difference between tax law and tax bills and spending law and spending bills. I think if you expanded that tax policy—and believe me, I'm a Member of the Ways and Means Committee who put this provision in there, not at the request of the Ways and Means Committee, I'll tell you that—I believe that you could radically change Congress's intent under the entire tax law. If you widen the scope of this type of tax policy where the President could veto that tax bill, you could substantially change the entire economic policy, the effect of the entire tax bill.

It doesn't work that way with spending. On spending, the President has to go after a line item program and that line item program which Congress could choose to rescind or not to rescind affects that program. It doesn't affect the rest of the bill.

You see, tax policy affects other tax policy. It ripples through the entire code and ripples through the entire economy. Spending policy affects that spending program and it doesn't ripple through the rest of the bill. Let's say it's SCHIP—

Mr. VAN HOLLEN. Let me just, because I don't know how much time I've got. I understand your argument, but if the—all right. Let me ask it this way. Look, the President could wipe out the education funding, I understand, but your whole argument has been—

Mr. RYAN. Okay. Let me—

Mr. CHABOT. Thirty seconds.

Mr. VAN HOLLEN. All right. Your whole argument has been that Congress gets that extra bite at the apple.

Mr. RYAN. Yes. The Congress—

Mr. VAN HOLLEN. If the President is going to exercise this authority to affect thousands of taxpayers, as you said, he's still got to come back to the Congress. So why the differential treatment between programs—

Mr. RYAN. The point—

Mr. VAN HOLLEN [continuing]. That help lots of low-income people and——

Mr. RYAN. The point of this——

Mr. CHABOT. The gentleman's time has expired, but the gentleman can respond.

Mr. RYAN. The point of this is not to change radical policy changes and give the President the power to go after radical policy changes. The point is to go after pinpoint spending and pinpoint tax cutting or tax increasing. That's the point. So the point is to go after line item individual items, not to radically change the policy of these bills, which is what you would do if you broadened that definition.

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

We want to thank the witness panel for excellent testimony, all four of you, this afternoon. I think on both sides of the aisle, Members of Congress agree that there is a spending problem, has been under Republican control or under Democratic control. We might disagree somewhat on who's more responsible for that, but nonetheless, it's an issue that needs to be dealt with and I would commend these Members of Congress for their efforts in doing something about it and I'd also commend these witnesses for participating in this discussion this afternoon.

If there's no further business to come before this Committee, we're adjourned. Thank you.

[Whereupon, at 3:30 p.m., the Subcommittee was adjourned.]

