The Story of *Clinton v. City of New York*:
Congress Can Take Care of Itself
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The Story of *Clinton v. City of New York*: Congress Can Take Care of Itself

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It is easy to dismiss the Line Item Veto Act of 1996 (LIVA)[1] as a mere footnote in a larger tale of inter-branch dynamics. Effective for about a year before the Supreme Court declared it unconstitutional in *Clinton v. City of New York*[2] LIVA was part of the first plank in the Republicans' Contract with America, the policy agenda that propelled them into control of the House of Representatives in 1994. Even if LIVA had survived constitutional challenge, it probably would not have been used often by a President to block major congressional initiatives.[3] Under its authority, President Clinton canceled only 82 items in 11 laws, and Congress reinstated 38 of those cancellations over the President's veto. In the end, the savings to the federal government amounted to less than $600 million over five years – a trivial sum in an annual budget of over $1.5 trillion. This cursory chronicle, however, fails to recognize the value of the story behind LIVA's enactment and judicial challenge. It provides a window into the relationship among all three branches of government.

Legal scholars and law students may miss the significance of this story because it lies in the congressional action, not in the court proceedings. First, the story of LIVA and *Clinton v. City of New York* provides a clear understanding of how Congress can delegate authority to the executive branch while retaining a great deal of control over the exercise of delegated power. A close analysis of the structure of the cancellation authority delegated to the President shows that Congress did not use LIVA to abdicate its responsibility as the branch with the main authority over spending and tax policy. Instead, Congress crafted a structure that provided legislators with continuing and

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[1] Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996) (codified as amended at 2 U.S.C. §§ 621, 681, 691 to 691f, 692).

[2] 524 U.S. 417 (1998).

[3] The General Accounting Office had predicted that the President would have used a line item veto authority to effect a maximum of $70 billion in savings over a six-year period (1984-1989). GAO, Line Item Veto: Estimating Potential Savings (Jan. 1992).

significant influence. The reality of the Act draws into question the claims of opponents that LIVA worked a fundamental change in the balance of power, severely weakening the legislature and substantially empowering the President. On the contrary, the ability of Congress to control the scope of any delegation justifies the Court's practice of allowing virtually all delegations to pass constitutional muster.[4] Congress needs no judicial protection because it has ample tools to protect itself in the political process, and it deploys those tools strategically.

Second, the story of LIVA provides a case study of congressional deliberation of thorny constitutional questions. Everyone expected a constitutional challenge to the Act because it purported to enact by statute a line item veto power, which some saw as an end-run around the constitutional amendment process. The legislative history of LIVA clearly reveals, however, that Congress did not completely resolve the constitutional objections to the law. The most sustained discussion of constitutional issues occurred during the Senate debate on a version of the statutory line item veto that was not enacted and bore little resemblance to the LIVA that became law. Instead, Congress punted final resolution of these issues to the courts, providing in the statute an expedited process for any constitutional challenge to reach the Supreme Court.[5] Congress' performance on this dimension of LIVA raises the question of whether legislators can fulfill their responsibility to consider constitutional ramifications of their actions. It may be the case that they shirk this duty not only because it takes time away from activity that constituents value more, but also because some hope the judiciary will strike certain laws down, allowing members of Congress to avoid blame for the failure to deliver on their promises in circumstances where they would prefer the status quo ante. On the other hand, the discussion in various committees and extended debate in the Senate demonstrate that members will spend some time on constitutional issues, but that constitutional arguments do not necessarily change minds.

I. State Line Item Vetoes and the Pressure for a Federal Power

[4] See, e.g., Whitman v. American Trucking Assns., Inc., 531 U.S. 457 (2001).
[5] 2 U.S.C. § 692(b), (c).

Most state constitutions allow the governor a line item veto in addition to the power to veto an entire bill. Forty-three states grant the governor the power with respect to items in appropriations bills, and one of those states, Washington, also allows the governor to eliminate items from any kind of legislation.[6] When a governor uses a line item veto, he removes the disfavored item from the bill and then he enacts the remaining provisions; the vetoed items are never enacted unless the legislature overrides the veto. Most of these states require a supermajority vote of the legislature to override.

The line item veto is seen as an adjunct to a balanced budget requirement because it provides the governor a way to enforce the mandate. The larger story of legislative budgeting is a tale of the search for ways to solve collective action problems faced by Congress and state legislatures. Part of the problem is merely a coordination challenge as many committees work to pass several pieces of legislation to produce a rational budget. A legislature is also plagued by a prisoners' dilemma when it works to balance its budget, whether because of a constitutional mandate or a political imperative. Put simply, legislators who believe that the public interest is best served by reduced government spending know that, in the absence of coordination, most of their colleagues will not resist the temptation to spend, nor would it be rational for them to do so. The cost of government programs is spread among all taxpayers, while the benefits of spending can be concentrated on a few who will reward their supporters with votes and campaign contributions. If the government can fund spending through deficits, the temptation to spend is even greater because the burden of government debt is even more diffuse than the tax burden – it extends across generations to the not-yet-born (and, more importantly, the not-yet-voting).

Even if taxpayers who favor balanced budgets want to extract an electoral price from politicians who impose costs on them, voters are likely to hold all lawmakers responsible – not just the big spenders. If that is the case, no legislator will abstain from pork barrel politics. She is going to suffer consequences (if any) of her colleagues' actions so she might as well send some programs to her constituents as well. Moreover, an individual

[6] Bruce Wetterau, Congressional Quarterly's Desk Reference on the States 43 (1999) (the only states without line item veto provisions in their constitutions are Indiana, Maine, Nevada, New Hampshire, North Carolina, Rhode Island, and Vermont). For one of the best discussions of the state line item veto, see Richard Briffault, *The Item Veto in State Courts*, 66 Temple L. Rev. 1171 (1993).

legislator can avoid responsibility for programs her constituents oppose by arguing that she had to vote for an omnibus spending bill in order to ensure passage of the special benefits her constituents want. The line item veto is a mechanism designed to ameliorate the results of this prisoners' dilemma by providing the power to rein in spending to a single actor – the governor, who can be more easily held responsible by the voters and may be less susceptible to pressure from narrow special interests since he represents all taxpayers. The line item veto thus moves important budget decisions to an elected official who cannot disclaim responsibility on the ground either of being one of a collective decision maker or of being faced with an all-or-nothing choice.

Notwithstanding the conventional view of the line item veto as a tool of fiscal discipline, it need not necessarily lead to reduced spending for two reasons. First, lawmakers may pass more spending to pander to their constituents, knowing that the governor will use his line item veto to keep the state's fiscal house in order. It is not clear, however, that legislators have much to gain by this tactic. It is hard to believe that voters will be particularly grateful at Election Day for projects that are never funded because the governor slashes them out of the appropriations bills. They are more likely to question the lawmaker's effectiveness, wondering why the champion of the program was unable to convince the governor to support it.

Second, the line item veto may increase the aggregate amount of spending because it introduces a new dynamic into budget bargaining. The item veto provides the chief executive a more credible threat in the budget process because he has a scalpel to slice out spending he disfavors while still allowing the rest of the appropriations bill to go into effect. Unlike the President, a governor with a line item veto need not take the bitter to get the sweet. Knowing that, legislators will bargain with the governor to ensure that their pet projects do not fall victim to the line item veto. This strategy may actually increase the amount of total spending if the price of the governor's forbearance is enactment of programs he favors along with the legislators' projects.[7]

Empirical work on the effect of this state constitutional tool bears out the conclusion that it will not inevitably lead to lower state spending. Most studies conclude that the

[7] For an excellent analysis of the effect of the line item veto on inter-branch bargaining, see Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 Wash. & Lee L. Rev. 385 (1992). See also Daniel Shaviro, Do Deficits Matter? 291-92 (1997).

state item veto has very little impact on the amount of spending and has not led generally to lower state appropriations. The item veto does have an effect on the mix of spending programs, however, because it empowers the governor relative to the legislature, granting the chief executive more influence over the contours of state spending.[8] In other words, the main consequence of the line item veto is on the allocation money among programs, not on the level of spending. This effect is more pronounced during times of divided government, when the preferences of the two branches are likely to be further apart.

Georgia and Texas were the first states to adopt the line item veto in 1865, and since that time Presidents have requested that Congress propose a constitutional amendment to allow them a similar power.[9] Presidents coveted the ability to excise particular items from spending bills, rather than being faced with the all-or-nothing decision required by the veto allowed by Article I, Section 7 of the Constitution. While Congress has never been willing to cede such power through the durable mechanism of a constitutional amendment, it has been more willing to consider statutory proposals that purport to delegate equivalent power to the President. Ronald Reagan's advocacy of the line item veto began the push that ended in the adoption of the Line Item Veto Act of 1996. In his 1986 State of the Union address, Reagan called for a constitutional amendment granting him the line item veto power like he had as Governor of California. "Give me the authority to veto waste, and I'll take the responsibility," he said, "I'll make the cuts, I'll take the heat."[10]

Modern Presidents have been particularly eager for a line item veto power because Congress has increasingly done its work through omnibus bills, legislation "that addresses numerous and not necessarily related subjects, issues, and programs, and

[8] See, e.g., George Abney & Thomas P. Lauth, *The Line-Item Veto in the States: An Instrument for Fiscal Restraint or Partnership?*, 45 Pub. Admin. Rev. 372 (1985); James A. Dearden & Thomas A. Husted, *Do Governors Get What They Want?: An Alternative Examination of the Line-Item Veto*, 77 Pub. Choice 707 (1993); Douglas Holtz-Eakin, *The Line Item Veto and Public Sector Budgets: Evidence from the States*, 36 J. Pub. Econ. 269 (1988). For work theorizing that the line item veto would have a similar effect at the federal level, see Nolan M. McCarty, *Presidential Pork: Executive Veto Power and Distributive Politics*, 94 Am. Pol. Sci. Rev. 117 (2000).

[9] Only Presidents Taft and Carter opposed giving the line item veto power to the President, while at least ten presidents since the Civil War explicitly requested the power. See S. Rep. No. 104-9, at 6 (1995).

[10] State of the Union Address, 22 Weekly Comp. Pres. Doc. 135, 136 (Feb. 4, 1986).

therefore is usually highly complex and long."[11] As President Clinton wrote in a letter advocating "a strong version of the line item veto," the omnibus structure empowers "special interests, who too often are able to win approval of wasteful projects through manipulation of the congressional process, and bury them in massive bills where they are protected from Presidential vetoes."[12] A president pays a high price when he vetoes an omnibus law which likely contains provisions that are vital to his policy agenda; he would be in a more powerful bargaining position if, like most governors, he could extract offending portions and enact only the remaining portions that he supports.

Several times between Reagan's call to action and the Contract with America, Congress considered legislation designed to increase the power of the President over spending that Congress had appropriated; these bills sometimes passed one house, but were never enacted. The proposals would have provided the President different kinds of rescission power; when the President rescinds, he withholds the funding that has been appropriated by Congress, thereby blocking federal funds directed at particular programs. This statutory power is similar to the governors' line item veto authority because it can be used in a targeted way against individual programs and projects. In budget terminology, there are many words to describe the power of the President to decline to spend appropriated money: rescission, cancellation, impoundment – all synonyms for the same authority to withhold federal funds.

The congressional rescission proposals were drafted as amendments to the impoundment provisions of the Congressional Budget and Impoundment Control Act of 1974.[13] This milestone of congressional budgeting was passed as a reaction to President Nixon's frequent use of policy impoundments where, without any congressionally-sanctioned authority to rescind, he declined to spend significant amounts of money for domestic programs important to the Democratic Congress. The 1974 Budget Act purported to stop this practice by denying the President the power to unilaterally declare an impoundment. Instead, he is required to submit to Congress a list of rescissions, or

[11] Barbara Sinclair, Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress 71 (2d ed. 2000). For an argument that the increase in omnibus legislation has not eroded the traditional federal veto power or the President's power relative to Congress, see Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 Case Western Res. L. Rev. 1605, 1621-23 (1997).
[12] S. Rep. No. 104-13, at 5 (1995) (quoting President Clinton).
[13] Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. §§ 681-88).

cancellations of spending enacted in appropriations bills, and Congress must approve the rescissions before they take effect.[14] Under the 1974 Act's provisions, Congress has forty-five days to consider a rescission request; if it does nothing in that time period, the money must be spent. Because lawmakers enacted the appropriations that the President seeks to rescind, it is not surprising that few of the President's recommendations pass, and that the rescission bills that do come out of Congress are often dominated by rescissions that the President did not request.[15] Schick reveals that in the first twenty-five years after enactment of the 1974 Budget Act, Presidents were forced to spend more than $50 billion of the $76 billion in spending they had recommended for rescission.[16]

Congressional proposals to strengthen the President's rescission power typically have taken one of two forms: expedited rescissions and enhanced rescissions. An expedited rescission bill speeds up the time in which Congress has to act, and often includes special procedures that require the President's rescission request to be discharged from committee and that protect it from filibuster on the Senate floor. Expedited rescission proposals typically require that Congress actually vote on the President's package; it cannot avoid the issue by inaction, although it can still fail to pass the rescission and effectively mandate the previously-enacted spending. An enhanced rescission bill works an even more significant change in the budget process. Once the President submits his list of proposed rescissions, Congress has a certain period of time to disapprove them, and if the legislature fails to act, the President is authorized to withhold spending. Because any disapproval bill is subject to the President's veto, and he is likely to exercise his veto since he prefers to cancel the appropriations, Congress must muster a two-third vote in each house to force the President to spend the money. Thus, under an enhanced rescission regime, the effect of legislative inertia is reversed; inaction means that the spending will not occur, and therefore the President's power is enhanced.

For more than a decade, various enhanced and expedited rescission proposals traveled down the path to enactment but were killed at some point in the legislative process.[17]

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[14] *See* Allen Schick, The Federal Budget: Politics, Policy, Process 252-55 (rev. ed. 2000).
[15] For example, President George H.W. Bush proposed $8 billion in rescissions in 1992; Congress enacted only $2 billion of those and added its own group of more than $22 billion in rescissions from programs Bush supported. Id. at 254.
[16] Id.
[17] Mark T. Kehoe, *History of Line-Item Veto Effort*, Cong. Q., Mar. 30, 1996, at 867.

Congress also considered but did not pass joint resolutions to amend the Constitution to include a line item veto. In the mid-1990s, however, a unique set of political circumstances dramatically propelled our story forward. The momentum of the Contract with American and the desire of the new Republican House of Representatives to deliver on campaign promises, along with the strong support of a Democratic President who had repeatedly requested the power, set the stage for possible enactment. With insufficient support for a two-thirds vote in each house to amend the Constitution, advocates of a federal line item veto had to travel the parlous statutory route.

II. The Enactment of the Line Item Veto Act of 1996

As a former governor from a state with a line item veto, Bill Clinton staunchly supported a federal line item veto in his 1992 campaign for the presidency, describing it as a tool "to eliminate pork-barrel projects and cut government waste."[18] In his first budget document, *A Vision of Change for America*, Clinton requested a "modified line-item veto" as a tool to restrain unnecessary spending. The document seems to describe an expedited rescission process where the President would propose rescissions and Congress would then "cast a separate vote on those items."[19] The clear and longstanding preference of Chief Executive notwithstanding, Clinton's proposal probably would not have gotten very far in the legislature without other political developments.

After the election of a Republican House in 1994, the 104th Congress, led by Speaker Newt Gingrich (R-GA), sought to deliver quickly on its Contract with America, which had included an enhanced rescission proposal, called a line item veto, as part of its proposed Fiscal Responsibility Act. Helping to get the bandwagon rolling in the Senate was Bob Dole (R-KS), Majority Leader in the Senate, the frontrunner to challenge Clinton in the 1996 election. A top congressional leader might be expected to oppose delegating enhanced rescission authority to the chief executive – indeed, the most outspoken opponent of the legislation was Senator Robert Byrd (D-WV), a legendary defender of congressional prerogatives and former majority leader. But Dole had

[18] Bill Clinton & Al Gore, Putting People First: How We Can All Change America 23 (1992).
[19] Executive Office of the President, A Vision of Change for America, Feb. 17, 1993, at 113.

competing interests: he needed to appear to be an effective Senate leader in the run-up to the presidential election, and he wanted to augment the power he could wield if he won. When he declared his support for the bill because "[i]f we cannot control ourselves – maybe the Chief Executive can help,"[20] he was probably not thinking of Bill Clinton as Congress' savior. Given the Republicans' strong showing in the 1994 mid-term elections, a second term for President Clinton was by no means certain. This not only meant that Dole himself hoped to benefit from the delegation of enhanced rescission authority, but also that the Republican Congress believed there was a good chance that the power would be used by a Republican president.

The first ten bills introduced by the majority party at the beginning of each session of Congress highlight the key aspects of its policy agenda. In the 104th Congress that began in January 1995, the Line Item Veto Act was H.R. 2 in the House, sponsored by Rep. William Clinger (R-PA) with 160 cosponsors, and S. 4, introduced by Dole with 28 cosponsors. The House bill was referred to the Committee on Government Reform and Oversight and the Committee on Rules, and the Senate bill was jointly referred to the Committee on the Budget and the Committee on Governmental Affairs, with instructions that once one of the committees reported the bill out, the other had thirty days to report or the bill would be automatically discharged to the floor.

Much of the ensuing congressional debate focused on the form of the statutory power. Competing visions included an expedited rescission bill that would still require congressional action before any rescissions took effect, supported by Senator Pete Domenici (R-NM), chair of the Senate Budget Committee; the enhanced rescission bill that was reflected in H.R. 2 and S. 4; and a separate enrollment bill, which was ultimately the version that passed the Senate. We have previously seen the differences between expedited and enhanced rescission proposals. Under separate enrollment procedures, Congress divides an omnibus spending bill, formally enrolling as a separate bill each provision that allocates funds to particular programs. The entire group of bills is then passed by Congress, using a procedure that would not require separate votes on each bill but would deem them all passed as a group. The President can use his constitutional power to veto as many of the separate bills as he wishes, and Congress has the

[20] 141 Cong. Rec. S4483 (daily ed. Mar. 23, 1995).

opportunity to override any veto with a supermajority vote. For example, rather than one bill with 350 sections, Congress would pass 350 separately enrolled bills, and the President would sign only the bills that provide money to programs he supports.

The advantage of separate enrollment over enhanced rescission, supporters argued, is that the former technically complies with all the constitutional requirements. Dozens, even hundreds, of bills are enacted separately, enrolled, presented to the President, and then signed or vetoed using the traditional power given the President by the Constitution. Separate enrollment has its own set of problems, however, as would become clear in the Senate deliberations on this method. The logistics of dividing one bill into hundreds poses practical and perhaps constitutional problems, and separate enrollment requires that Congress put the details of spending in statute rather than appropriating in lump sums and using legislative materials to earmark funds to particular projects. The latter practice, long used by Congress in appropriations, allows agencies and Congress more flexibility to redirect funds throughout the fiscal year.

When introduced in the 104th Congress, both versions of the Line Item Veto Act were enhanced rescission proposals. The proposals delegated to the President the power to cancel budget authority[21] in discretionary spending bills without any further action by Congress. Discretionary spending bills are the laws that are enacted annually through the appropriations process. They require yearly enactment by Congress, in contrast to entitlement programs like Social Security or Medicare, which authorize spending indefinitely according to legislative formulas without any further action by Congress. Under the first versions of LIVA, before the President could cancel an item of discretionary spending, he had to determine that the rescission would not "impair any essential Government functions" or "harm the national interest."[22] The House version also required that the rescission "help reduce the Federal budget deficit," while the Senate version required that the President determine that the rescission would "help balance the Federal budget, reduce the Federal budget deficit, or reduce the public debt."[23] The

[21] Budget authority is the technical term for the legal authority to enter into obligations that will result in the spending of federal money. An appropriations bill provides an agency or other executive branch entity with budget authority, which allows it to commit to the spending (an obligation) and to actually spend the money (an outlay).
[22] H.R. 2, 104th Cong. § 2(a) (1995).
[23] Compare H.R. 2, § 2(a)(1)(A), with S. 4, § 1101(a)(1)(A).

President had 20 days after a bill was enacted to cancel items, a period shortened by the House committee to 10 days. Unless Congress passed a disapproval bill reinstating the spending items, the President's cancellations would take effect. In other words, congressional inaction would lead to cancellation, but the proposals included a fast-track procedure to make it easier for Congress to act on disapproval bills. Because the President would presumably veto any disapproval bill, Congress would need to muster a two-thirds majority in each house to ensure that the previously appropriated spending take place.

The primary difference between the initial enhanced rescission bills introduced in the House and Senate was that the House version extended the President's cancellation authority beyond appropriations bills and allowed him to "veto any targeted tax benefit" as well.[24] In this first incarnation of LIVA, a targeted tax benefit was defined as a tax subsidy that benefited five or fewer taxpayers.[25] In the House committee, this definition was expanded so that a tax provision benefiting 100 or fewer taxpayers would be eligible for the President's cancellation authority. This provision aimed at tax subsidies sometimes referred to as "rifle shots" because they provide tax relief to a very narrow group of taxpayers. These provisions are more likely to be special interest giveaways, providing a subsidy to a small group of influential people or businesses, rather than good public policy. Because they are relatively inexpensive, narrowly targeted pork-barrel tax benefits can be slipped into omnibus revenue legislation and provoke little opposition; the concern is that in the aggregate targeted tax subsidies can transfer significant money from all taxpayers to a handful of taxpayers with political clout.

Including tax benefits in LIVA reflected a recognition of the fact that lawmakers can "spend" money on programs through the tax code and thus a cancellation bill limited to annual appropriations bills would be incomplete. Indeed, tax provisions that provide favorable treatment for certain behavior by taxpayers through credits and deductions are often called "tax expenditures" to link them explicitly to other more conventional federal expenditures.[26] For example, if Congress wants to encourage home ownership, it has several options. It can work to enact a program that gives people grants of federal money

[24] H.R. 2, § 2(a).
[25] Id. at § 4(3).
[26] See Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures (1973).

when they purchase a home, and fund such a spending program through annual appropriations ("discretionary spending") or an entitlement that continues to allow disbursements of money without annual legislation ("direct spending"). Or Congress can likewise encourage home buying by providing all taxpayers a deduction for the interest they pay on their mortgages ("tax expenditure").

Not all members of Congress accept the notion of tax expenditures, so including them in LIVA's coverage was controversial. The most adamant opposition to inclusion can be found in the arguments of Senator Spencer Abraham (R-PA), otherwise a strong supporter of LIVA. He contended that "the general concept of 'tax expenditures' is fundamentally flawed because it assumes that taxpayers' income belongs to the Federal government first. … Tax dollars belong to American people first. Many of the so-called 'tax expenditures' simply allow people to keep more of their own hard-earned tax dollars." Although he would in the end support LIVA even though it applied to certain tax benefits, he emphasized his belief that "our Nation's budget deficit is caused by overspending, not undertaxation."[27]

Including tax expenditures in the House version of LIVA, and ultimately in the Senate version, was compelled by practical politics, not ideological debate over the notion of tax expenditures. Members of the Appropriations Committees insisted that other committees with jurisdiction over spending programs also be vulnerable to the President's cancellation power. The federal budget process involves many different committees with jurisdiction over some aspect of federal spending or revenue.[28] The Appropriations Committees, divided into 13 subcommittees at the time Congress was considering LIVA, oversee the annual appropriations process that provides discretionary funds to federal programs. The House Ways and Means Committee and the Senate Finance Committee have jurisdiction over tax bills, including tax expenditures, and some of the most expensive entitlement programs, like Social Security and Medicare. The Budget Committees in both houses coordinate the congressional budgeting process, but they cannot dictate the details of appropriations or revenue bills except in extraordinary circumstances.

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[27] S. Rep. No. 104-10, at 19-20 (1995).

[28] For an account of the functioning of committees in the budget process, see Elizabeth Garrett, *Accounting for the Federal Budget and its Reform*, 41 Harv. J. on Legis. 187 (2004).

Thus, the congressional budget process is always at least in part a story of jurisdictional turf wars among all these committees; LIVA is simply a salient example. Before LIVA, impoundments had been limited to programs funded through the annual appropriations bills, but the appropriators were determined that any new cancellation authority would include all the methods of federal spending. They argued that any proposal concentrated solely on discretionary spending was a very limited tool; only about one-third of all federal spending (a figure which does not include tax expenditures resulting in foregone revenue) occurs through discretionary spending; the majority of federal spending is related to entitlement programs. Neither of the introduced bills attempted to constrain entitlement spending, but H.R. 2, in contrast to S. 4, for the first time included certain tax benefits as possible targets for presidential cancellation. Thus, the House version set the stage for the final version of LIVA which applied to discretionary spending, targeted tax benefits, and some entitlement programs.

Statutory language played an important role in the story of LIVA. When describing the power delegated to the President, the bills used the term "veto" in addition to the more familiar budget terms for impoundment such as "cancel" and "rescind." For example, H.R. 2 provided that "any provision of law *vetoed* under this Act … shall be deemed *repealed*" unless a disapproval bill was enacted to require the spending.[29] This language was dangerous; the more the proposal looked like an attempt to enact through statute a new constitutional line item veto power without following Article V's requirements to amend the Constitution, the more likely the resulting bill would be successfully challenged in court. As Justice Scalia, writing in dissent in *Clinton v. City of New York*, observed, the "title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, … succeeded in faking out the Supreme Court."[30] Scalia was comparing LIVA, which the Court struck down, to other laws allowing presidential rescissions, which were more likely to be considered constitutional delegations of power

[29] H.R. 2, §. 3(a)(2) (emphasis added). See also id. at § 4(a)(B) (using "veto" to describe cancellation of targeted tax benefit).
[30] Clinton, 524 U.S. at 469 (Scalia, J., dissenting).

to the executive branch.[31] In fairness to the majority in *Clinton v. City of New York*, ambiguous terminology abounded. Beyond the title's likely-fatal statement that the Act established a line item veto, language used both in the final version and earlier incarnations was not carefully crafted to avoid constitutional red flags. Instead, the bills used language such as "veto," "repeal," and "prevent … from having legal force or effect," interchangeably with the traditional terminology of "impound," "rescind" and "cancel."

1. House Consideration of H.R. 2: Modifying Enhanced Rescission

Action on the enhanced rescission authority began in the House, which was eager to deliver on its Contract that had been signed during the 1994 campaign by more than 300 Republican candidates. At the crest of his powers, Speaker Gingrich adroitly guided the bill through the House. The House Committee on Government Reform and Oversight, chaired by the author of H.R. 2, Representative Clinger, reported the bill out favorably after making a few modifications. The period for the President to cancel items was shortened from 20 to 10 calendar days and the definition of targeted tax benefits was expanded to include subsidies benefiting 100 or fewer people (rather than five or fewer). It was left to the President to determine whether a tax benefit was a targeted one and thus susceptible to his cancellation power. There would be attempts on the House floor to broaden the definition of limited tax benefits beyond the 100-taxpayer cut-off.[32] All these amendments were defeated, diluting the effect of LIVA on tax expenditures relative to appropriations items eligible for cancellation, which had no limitation on the number of potential beneficiaries.

The Government Reform and Oversight Committee Report on LIVA made clear that the legislation was part of a broader strategy to reduce federal spending and balance the budget. "Enhanced presidential [cancellation] authority will be one method, used in

[31] Indeed, in *Bowsher v. Synar*, the Court had found the delegation of sequester authority (another type of cancellation) to the Comptroller-General of the General Accounting Office unconstitutional because it allowed a legislative agent to exercise an executive power. This case characterized rescission authority delegated by Congress as executive in nature, not legislative. 478 U.S. 714 (1986).

[32] 141 Cong. Rec. H1116 (daily ed. Feb. 2, 1995) (Slaughter Amendment); 141 Cong. Rec. H1168 (daily ed. Feb. 3, 1995) (Spratt Amendment).

concert with others, to move the nation toward a balanced budget."[33] The problem of omnibus legislation policed only through the blunt instrument of the constitutional veto power led to "outlandish projects and tax benefits [being] concealed in appropriations bills and revenue measures. On their own it is unlikely that these items would survive scrutiny either in Congress or when the bill reached the President's desk. Tucked away in omnibus bills, however, they survive." Targeted tax benefits were singled out for particular attack. The report described a tax bill designed to create enterprise zones in the aftermath of the Los Angeles riots. This bill emerged with several targeted tax benefits, such as "special exemptions for certain rural mail carriers, special rules for Federal Express pilots, deductions for operators of licensed cotton warehouses, exemptions for some small firearms manufacturers, and exemptions for certain ferry operators." LIVA was intended to allow the President to get rid of spending programs – in appropriations bills and through the tax code – designed for "narrow, parochial purposes." In addition, the Committee believed that the process would bring visibility to these special interest giveaways, forcing Congress to be more accountable and reducing the number of wasteful projects through increased transparency.

The Committee Report on H.R. 2 clarified that the Act did not limit the President to canceling only items in the text of the spending bills themselves; instead, the President could look through a bill to its legislative history and cancel items delineated in committee reports or joint explanatory statements that accompanied conference reports of appropriations bills. In this way, the enhanced rescission proposals did not require that Congress change its practice of enacting bills with lump sum appropriations and directing the money to particular programs and projects in the committee reports that accompanied the bills. Congress had long appropriated in relatively large lump sums, with more detailed instructions in the legislative documents associated with the laws, so that "agencies are able to make adjustments and shift funds within large appropriations accounts" without the need for additional legislation.[34] Allowing the President to cancel items identified in the legislative history meant that congressional practice could remain

[33] H.R. Rep. No. 104-11, pt. 2, at 8-10 (1995) (for all quotes in text).
[34] Id. at 12.

the same, but the President's power could be used with precision to eliminate only particular projects and programs that he considered wasteful or unnecessary.

The House Committee on Rules also reported H.R. 2 favorably and recommended passage of LIVA. Its changes were minimal, focusing on the special procedures in the House for consideration of a disapproval bill responding to any presidential cancellation. The amendments were designed to make sure that the disapproval bill included all the President's cancellations relating to a particular appropriations or tax bill so that lawmakers couldn't "cherry-pick" and disapprove only a few of the cancellations.[35] Instead, Congress would be limited to voting up-or-down to disapprove all the cancellations relevant to a spending bill or to allow them all to go into effect. In addition, the changes ensured that lawmakers could not add unrelated items to a disapproval bill. Generally, disapproval bills would receive expedited consideration in the House and Senate, and floor consideration could not be blocked by the committee with jurisdiction. The Rules Committee report contained a brief discussion of the constitutionality of this enhanced rescission bill, quoting from a Congressional Research Service ("CRS") Memorandum. This CRS Memo had concluded the Supreme Court's delegation jurisprudence set forth a practical doctrine that allowed virtually all congressional delegations of power to the executive branch to survive judicial scrutiny. It concluded that the delegation of cancellation authority in H.R. 2 would be no exception.[36]

The enhanced rescission bill was considered on the House floor for three days in early February, under an open rule. In the House, the Rules Committee determines the procedures for the floor debate of each piece of legislation; each bill is considered under a "rule" shaping the deliberation and voting. Under the Democrats, the Rules Committee had relied on rules that often prohibited any amendments that the majority party did not support or set procedures so that disfavored amendments were unlikely to be adopted. These rules are called "closed" because they allow little change of the bill on the floor; "open" rules permit longer debate and more opportunity for members to propose

[35] H.R. Rep. No. 104-11, pt. 1, at 6 (1995).
[36] Id. at 8-9 (quoting Congressional Research Service, Memorandum Regarding Constitutional Questions Respecting Bill to Grant President Enhanced Rescission Authority over Appropriations and Targeted Tax Benefits (January 9, 1995)).

amendments.[37] The Republicans had chafed under the regime of closed rules and had promised to open debate substantially when they gained control. After experiencing life under open rules, the Republicans would eventually revert to the practice of using more closed procedures; they learned quickly that much of the advantage of being the majority party consists in the ability to set the rules of debate and deliberation so that they favor particular outcomes. But LIVA was an early bill considered when the Republican leadership was still committed to "wide open rules," so the House debate was much more robust than had been the case in past Democratic Congresses and would soon be the case in Republican Congresses.[38]

Two amendments that were adopted unanimously by the House clarified that the President could only cancel amounts of funding and could not use his authority to veto substantive legislation or non-funding language often included in appropriations bills. Chairman Clinger, for example, clarified that the items subject to cancellation had to be identified specifically in legislative history or text language, not in documents produced by the executive branch. As with much of the design of LIVA, this amendment ensured that Congress retained a great deal of its power, here to define the scope of each item that might be canceled. As Clinger said in floor debate, his amendment was to ensure that Congress did not allow "a broad-ranging, free-wheeling President to go around changing all kinds of things, so it is a limited thing."[39] Clinger's amendment also stated that the rescission authority could not be used to cancel "bill language" but could only be used against "dollar amounts."[40] Another amendment by Rep. Nancy Pelosi (D-CA) prohibited the President from canceling "any prohibition or limitation of discretionary budget authority set forth in any appropriation Act," thereby insulating appropriations riders and other substantive provisions from cancellation.[41]

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[37] For discussion of the various rules, see Walter J. Oleszek, Congressional Procedure and the Policy Process 123, 126-30 (6th ed. 2004).

[38] Rep. Gerald Solomon (R-NY), Chairman of the Rules Committee, noted that the bill was considered under an open rule, in contrast to line item veto bills in Congress' recent history, in which the Democrats forced those who wanted a stronger version to pass amendments. 104 Cong Rec. H1081 (daily ed. Feb. 2, 1995).

[39] 141 Cong. Rec. H1107 (daily ed. Feb. 2, 1995).

[40] 141 Cong. Rec. H1105 (daily ed. Feb. 2, 1995).

[41] 141 Cong. Rec. H1107 (daily ed. Feb. 2, 1995).

Another amendment accepted unanimously by the House set in place a judicial review mechanism allowing members of Congress to challenge the constitutionality of the Act before a three-judge district court panel, with direct appeal to the Supreme Court and a requirement for expedited consideration. The author of the amendment, Representative Nathan Deal (R-GA) argued that "we are proceeding in a statutory form for a line item veto and not a constitutional amendment, [so] it should be obvious that until that constitutionality is clarified, it will be under a cloud."[42] Other members of Congress viewed this mechanism as setting up a way to send a "test case" to the courts for a decision before any presidential exercise of the authority.[43] Thus, rather than trying to resolve the constitutionality of enhanced rescission – or to more carefully craft a bill so that it was clearly an impoundment authority rather than a presidential power to "veto" or "repeal" enacted legislation, the House adopted a review procedure that itself was constitutionally questionable. The process edged dangerously close to asking the Court for an advisory opinion,[44] and the question of congressional standing to bring such a challenge was not clear at the time. Indeed, the Court used the first case concerning LIVA, *Raines v. Byrd*,[45] to make clear that congressional standing to bring constitutional challenges to enacted legislation was a very limited doctrine and not sufficient to allow this sort of preliminary "test case" before any actual cancellation decision.

The battle between those who supported the more aggressive enhanced rescission embodied in H.R. 2 and those who advocated only an expedited rescission authority that would still require congressional approval for any cancellation to take effect began on the House floor. Representatives Robert Wise (D-WV), Charles Stenholm (D-TX), and John Spratt (D-SC) offered an amendment in the nature of a substitute to replace the enhanced rescission approach with an expedited rescission process. They justified their preference for expedited rescission on the ground that it delegated less power to the executive branch. As Stenholm posed the decision to his colleagues: "The only question is, how

[42] 141 Cong. Rec. H1138 (daily ed. Feb. 2, 1995).
[43] 141 Cong. Rec. H1139 (daily ed. Feb. 2, 1995) (statement of Rep. Collins (D-IL)).
[44] See Neal Devins & Michael A. Fitts, *The Triumph of Timing: Raines v. Byrd and the Modern Supreme Court's Attempt to Control Constitutional Confrontations*, 86 Geo. L.J. 351 (1997) (criticizing such expedited review provisions).
[45] 521 U.S. 811 (1997) (declining to hear Senator Byrd's challenge to the Act before the President had canceled any spending item because Byrd did not have standing to sue).

much power do you wish to cede to a President. That is it."[46] Other supporters of expedited rescission voiced concerns about the constitutionality of enhanced rescission, arguing that granting a power like the line item veto to the President required a constitutional amendment. Representative Dellums (D-CA) argued that an enhanced rescission bill empowered "one-third plus one" of the Congress to make policy along with the President because unless a veto-proof supermajority of the Congress passed a disapproval bill, the President's cancellation of a previously-enacted spending item would go into effect. Thus, he warned of governance by a minority of lawmakers, suggesting that this would violate the Constitution's requirement that laws be made by a majority of each house and the President.[47]

The Committee on Government Reform and Oversight had considered and rejected the expedited rescission approach as "too weak to yield significant budget savings and too weak to discourage wasteful legislative habits."[48] Chairman Clinger reiterated this theme in the floor debate: "[W]e want to make it as difficult as possible, as difficult as possible, for this House, which has proven in the past not to be able to restrain itself, to in fact deny the President the ability to cut spending."[49] Although 342 Members of the House had voted for expedited rescission in 1994 and the approach was unquestionably constitutional, lawmakers were ready in 1996 to delegate more authority to the President and to get closer to the constitutional line. The amendment was defeated 167-246.

Finally, after three days of debate, the House passed an enhanced rescission bill by a comfortable margin of 294 in favor and 132 opposed. Final passage occurred on February 6, 1995, Ronald Reagan's 84th birthday, a fitting gift, in the eyes of House Republicans, for the President who had placed the issue on the national agenda. The stage was set for Senate consideration.

2. Senate Consideration of S. 4: Transforming Enhanced Rescission into Separate Enrollment

[46] 141 Cong. Rec. H1176 (daily ed. Feb. 3, 1995).
[47] 141 Cong. Rec. H1178 (daily ed. Feb. 3, 1995). See also INS. v. Chadha, 462 U.S. 919 (1983) (holding that legislative action, under Art. I, § 7, requires passage by both houses of Houses and then approval by the President).
[48] H.R. Rep. No. 104-11, pt. 2, at 10 (1995).
[49] 141 Cong. Rec. H1175 (daily ed. Feb. 3, 1995).

The duel between enhanced and expedited rescission bills was more prominent in the Senate consideration of LIVA; the surprise was that the Senate floor ultimately discarded both approaches in favor of separate enrollment. At the same time that S. 4, the counterpart to H.R. S and an enhanced rescission proposal, was referred to the Senate committees, an expedited rescission bill, S. 14, was also sent to those committees for joint consideration. S. 14 was very similar to the substitute proposal that Representatives Wise, Stenholm, and Spratt had offered on the House floor. In the Senate, it had a particularly powerful backer in the respected chair of the Budget Committee, Pete Domenici. Domenici's committee had jurisdiction over both proposals, and he preferred the less sweeping delegation because it would disrupt inter-branch relations less severely. As he stated, S. 14 would "guarantee the President a vote on his rescission proposals while maintaining the delicate balance of power between the two branches on spending authority."[50] The expedited rescission approach also had more Democratic support than did S. 4, with Minority Leader Tom Daschle (D-SD) an outspoken advocate of this approach in part because it preserved more congressional power and in part because it was more clearly constitutional.

The Budget Committee took the lead in the Senate, holding hearings on S. 4 and S. 14. At the same time, the Subcommittee on the Constitution, Federalism, and Property Rights of the Senate Judiciary Committee held the only sustained inquiry into the constitutionality of the various statutory approaches, although in the context of a hearing on constitutional amendments to establish a federal line item veto. The discussion in the hearing includes analysis of constitutional issues raised by statutory proposals, as well as the competing formulations for a constitutional amendment. At this point only the enhanced and expedited rescission bills were pending in committee, but Senator Joseph Biden (D-CT), Ranking Member of the Judiciary Committee, strenuously supported separate enrollment and so this method was on the table as well, although few of the witnesses addressed it. Walter Dellinger, the Assistant Attorney General in charge of the Office of Legal Counsel, reaffirmed President Clinton's preference for a strong statutory cancellation authority – enhanced rather than expedited rescission power. He assured the

[50] See S. Rep. No. 104-9, at 15 (1995) (additional views of Sen. Domenici).

Senators that "S. 4 in my view is clearly constitutional. It does not raise a Presentment Clause issue, because the President would sign the omnibus bill into law. …. What S. 4 really is is a very strong delegation of authority to the President."[51] Although he acknowledged that the expedited rescission bill was even more clearly constitutional, he, like the CRS lawyers cited by the House, analyzed the bill under delegation principles, a doctrine that was unlikely to convince the Supreme Court to nullify an enhanced rescission law. He did warn lawmakers that the language of "veto" and "repeal" in the current version of H.R. 2 was problematic and should be replaced with terms like "suspend" so it would not appear that the President was unilaterally making law. Even Louis Fisher, a CRS lawyer who had grave doubts about the wisdom of enhanced rescission, agreed that the Court would likely uphold S. 4 as a constitutional delegation of power to the executive branch.[52]

At the end of February, the Senate Budget Committee reported S. 4 out of committee, but without recommendation. This procedural move allowed the bill to move to the next committee, and then to the floor.[53] But the absence of a positive recommendation from the committee signaled that the Act still faced significant problems and lacked the support of some key Republicans like Domenici. The significant sticking point remained the disagreement between enhanced rescission supporters, with Dole and John McCain (R-AZ) at the forefront, and expedited rescission advocates, led by Domenici and supported by many Democrats. The committee adopted two amendments to S. 4. First, Domenici added a sunset to the legislation so that it expired on September 30, 2002, and would have to be re-enacted if Congress wished to continue to delegate cancellation authority to the President. Supporters of the amendment understood that unless the Act included a sunset provision, a repeal of LIVA would presumably be vetoed by the President who would not willing cede the statutory line item veto power that his predecessors had sought for decades. Thus, if Congress changed its mind and wished to retrieve the power it delegated to the President under LIVA, it would be required to do so

[51] *The* Line-Item Veto: A Constitutional Approach: Hearings before the Subcomm. on the Constitution, Federalism, and Property Rights of the Comm. on the Judiciary, 104th Cong., 1st Sess. 34 (1995). See also id. at 44-49 (Dellinger's prepared statement's analysis of delegation).
[52] Id. at 86.
[53] 141 Cong. Rec. S4192 (daily ed. Mar. 20, 1995) (remarks of Sen. Domenici) (noting that had the bill not made it out of Committee, it would have need 60 votes in order to defeat a point of order, a number it would have been hard-pressed to obtain).

with a two-thirds vote of each house. A termination date, however, ensured that it would require an affirmative act of only a majority of both houses to continue the delegation, and the vote would occur after some experience with the new arrangement.

Second, Senators Kent Conrad (D-ND) and Olympia Snow (R-ME) clarified that any money saved by cancellations would be placed in a "lockbox" for deficit reduction. A budgetary lockbox is a method to ensure that any savings effected by a rescission actually reduce the deficit rather than freeing up money for additional spending. The purpose behind delegating cancellation authority to the President was not to change the allocation of money among federal programs, but to allow the President to eliminate special interest and pork-barrel spending so that overall federal spending would be reduced. Using the mechanism of a budgetary lockbox concretely demonstrated that LIVA was a tool to force deficit reduction and lower federal spending.

The Committee on Governmental Affairs also quickly passed S. 4 out of committee, also without recommendation. Democrats on the committee strongly objected to the Chair's decision, supported by the Republican committee members, to oppose all amendments in committee.[54] At this point, Senate leaders were focused on getting the bill to the floor and demonstrating that they could deliver on their promise to enact some sort of line item veto power just as Newt Gingrich's House Republicans had. The two versions of the enhanced rescission bill – the House-passed version and the Senate Budget Committee's version – were very similar except that the House bill included targeted tax benefits in the items eligible for presidential cancellation. Interestingly, S. 14, the expedited rescission bill, which was also reported out of both Senate committees without recommendation, did apply to targeted tax benefits that applied to 100 or fewer taxpayers.

Days before both bills were to be considered on the Senate floor, the Senate defeated a constitutional amendment to balance the budget by one vote – that of Republican Mark Hatfield (R-OR).[55] Immediately, unflattering comparisons were drawn between Speaker Gingrich, who seemed to be moving the Republican agenda effortlessly through his chamber, and Majority Leader Dole, who did not manage to hold his party together to

[54] S. Rep. No. 104-13, at 11-13 (1995) (additional views of Senators Glenn (D-OH), Nunn (D-GA), Pryor (D-AR), and Akaka (D-HI)).
[55] S.J. Res. 1, 104th Cong. (1995) (Amendment); 141 Cong. Rec. S3314 (1995) (vote).

pass a key part of the Republican agenda – the balanced budget amendment – and could not get his party members to stop squabbling about what form the Line Item Veto Act should take.[56] As one Republican flatly acknowledged, "Bob Dole had to have a victory; he could not lose another one."[57] Dole also faced the threat of a filibuster by Democrats who favored expedited rescission over stronger versions of the line item veto and who knew that, even though both proposals had emerged from committee, Senate leadership would bring S. 4 to the floor first. Not only was Daschle threatening a filibuster, which would require 60 votes to end, but the venerable and long-winded Senator Byrd signaled his support of delaying tactics to force compromise.

In a surprise move, Dole chose to discard both forms of rescission and immediately offered on the floor an amendment in the form of a substitute that turned S. 4 into a separate enrollment bill.[58] Under this amendment, after an omnibus bill had been passed, the enrolling clerk would separate the bill into its separate spending items, enroll each of these items into separate bills, and the package of separately-enrolled items would be "deemed" to have been enacted by Congress. They would be presented as individual bills to the President to sign or veto. Dole portrayed his amendment as the product of "the efforts of those on both sides of the aisle to reach a consensus after all these years of arguing."[59] Its main objective, however, was to unite Republicans behind one proposal so that Dole could begin to work to gain the additional votes he needed to head off a filibuster. With only 52 Republicans in the Senate, he would need some Democratic support to ensure passage, and that seemed a likely prospect since separate enrollment had been advocated by Biden and others and had received Democratic support when it was considered in 1985.[60] Dole's separate enrollment substitute succeeded in his goal of party unity; for example, Senator Domenici, who had opposed enhanced rescission, strongly supported the compromise. Domenici noted approvingly that "this bill is built around conventional, ordinary vetoes that Presidents have had the authority to do forever." He argued that Dole's approach "significantly expands the President's

[56] Louis Fisher, Congressional Abdication of War and Spending Powers 148 (2000).
[57] Helen Dewar, *Senate Approves Line-Item Veto Bill, 69-29*, Wash. Post, Mar. 24, 1995, at A1.
[58] 141 Cong. Rec. S4188 (daily ed. Mar. 20, 1995) (Amendment No. 347).
[59] 141 Cong. Rec. S4189 (daily ed. Mar. 20, 1995).
[60] 141 Cong. Rec. S4194 (daily ed. Mar. 20, 1995) (statement of Sen. Lott (R-MS)) (noting the past support of current Democrats for line item veto legislation).

authority over spending without unduly disrupting this delicate balance of power" between the two branches.[61]

Although separate enrollment had been mentioned by Biden in the hearing on constitutional issues in the Judiciary Subcommittee, there had been no committee hearings on the proposal, nor were there any committee reports to explain the substitute. But Dole argued that the Senate had been considering various versions of a statutory line item veto for nearly a decade and that the deliberations had included discussion of separate enrollment. To this, Senator Byrd responded: "No printed hearings. No committee report. The amendment comes before us much like Minerva, who spring from the brain of Jove, or Aphrodite, who sprang from the ocean foam. It is the product of a collective fertile mind, and from it will flow fertile confrontations, fertile vetoes and, in all likelihood, it will undoubtedly prove to be a fertile field for exploitation by the lawyers of this country."[62] Byrd later referred to separate enrollment as a "hybrid monstrosity."[63] During the course of the long Senate debate, the substitute amendment went through substantial change so that the ultimate bill sent to the conference committee for reconciliation was written in substantial part on the floor rather than through the traditional committee process.

The main objections to the separate enrollment procedure were practical. Congress did not tend to itemize in appropriations bills, a reality which had led drafters of the enhanced rescission alternative to allow the president to look through the statute to cancel items identified in legislative documents like conference committee reports. But separate enrollment would require that itemization appear in the statute so that a clerk could break the bill into separate paragraphs and sections, making each of these a separately-enrolled bill for the president to sign or veto. Not only was this a daunting logistical task for the clerks, but it also would reduce the flexibility of agencies to transfer money over the course of the year between various programs and activities. If bills were sufficiently detailed for separate enrollment to be meaningful, then any change in the use of money by an agency would require new legislation. Under current practices where itemization occurred in legislative documents but not statutes, reprogramming of funds occurred

[61] 141 Cong. Rec. S4193 (daily ed. Mar. 20, 1995).
[62] 141 Cong. Rec. S4228 (daily ed. Mar. 21, 1995).
[63] 141 Cong. Rec. S4412 (daily ed. Mar. 23, 1995).

more informally, typically through agreement between the relevant committee and the agency. This sort of re-allocation of money was controversial, and some supporters of separate enrollment claimed a byproduct of its enactment would be greater congressional involvement in reprogramming decisions.

Senator McCain answered some of the practical objections to separate enrollment by describing an experiment with the previous year's longest appropriations bill. Using a computer program, his staff had divided the bill into 500 separate bills in about four hours.[64] Byrd responded that other appropriations bills would have been divided into 2,000 bills (Energy and Water Development Appropriation Act), 800 bills (VA/HUD Appropriation Act); 757 bills (Agriculture Appropriation Act); and so on. He proposed to call them "act-lettes" or "mini-bills" and claimed that in the preceding year, there would have been 9,625 such "law-lettes" had separate enrollment been in effect.[65] Senator Levin (D-MI) worried that when larger acts were divided into parts by a computer program or the enrolling clerks, some of the individual bills would be nonsensical. For example, many provisions refer back to other provisions in the same Act, a drafting convention that makes sense when each provision is part of a larger bill but one that would lead to incomprehensible laws when each provision is enacted separately.[66]

Although supporters of separate enrollment like Senator Biden thought it more likely to be constitutional because it complied with the formal constitutional requirements, others thought the Court might look through the form to the substance of the procedure and hold it circumvented Article V's requirements to adopt a constitutional line item veto.[67] A supporter of the amendment, Senator Dan Coats (R-IN) included in the *Congressional Record* a lengthy analysis of the constitutionality of separate enrollment prepared by Johnny Killian, an analyst with the Congressional Research Service.[68] The key constitutional question was whether the deeming provision in the separate enrollment

[64] 141 Cong. Rec. S4157 (daily ed. Mar. 20, 1995).
[65] 141 Cong. Rec. S4231 (daily ed. Mar. 21, 1995).
[66] 141 Cong. Rec. S4251 (daily ed. Mar. 21, 1995).
[67] 141 Cong. Rec. S4160 (daily ed. Mar. 20, 1995) (statement of Sen. Reid (D-NV)) (objecting primarily to Congressional delegation of bill division to enrolling clerks). See 131 Cong. Rec. S4232, 4245 (daily ed. Mar. 21, 1995) (Senator Byrd's reference to Walter Dellinger's statement before the Judiciary Subcommittee).
[68] 141 Cong. Rec. S4214-17 (daily ed. Mar. 21, 1995) (providing all quotes from the CRS Report in text).

bill was constitutional. "How is it, then, it may be asked, which in their subsequent form have not passed both Houses, may be deemed bills that have passed both Houses and are then properly presented to the President?" This report noted the traditional judicial deference to the Congress when a house has exercised its authority under the Constitution's rulemaking provision,[69] and it observed that the courts might well use the political question doctrine to avoid looking behind the formal appearance of enrollment that all the separate bills would exhibit and thus avoid questioning the manner in which they were actually enacted.

The CRS report also examined the merits of any constitutional arguments, both because courts might not defer and because Congress is supposed to exercise independent judgment on the propriety of its Acts. It noted that the way the omnibus bills were broken into parts was the most problematic aspect of the process. Each separate bill had to conform to some part of the omnibus bill so that the smaller bills were identical to the bill previously passed. That would require Congress to change the way it appropriated, eschewing lump sum appropriations for more detailed bills. Leaving too much to the discretion of enrolling clerks might be viewed as an unconstitutional delegation of lawmaking power to an agent of the legislature.[70] The report concluded that because there were not many applicable precedents, a conclusion about the constitutionality of separate enrollment could not be confidently reached. "In the end, Congress must exercise a constitutional judgment when deciding on passage of the proposal." A great deal of the debate over the six days of Senate deliberation focused on the constitutional issues raised by separate enrollment, providing both the views of the senators themselves and views of legal scholars who had provided their assessments of the constitutional issues.[71]

The details of Dole's substitute amendment reflected some of the deliberation in the House and Senate committees on the enhanced rescission proposal. First, his separate

[69] U.S. Const., Art. I, §5, cl. 2. The deeming provision of the separate enrollment provision was an internal matter, "subject to alteration by simple resolution at any time in either House." 141 Cong. Rec. S4216 (daily ed. Mar. 21, 1995).
[70] See Bowsher v. Synar, 478 U.S. 714 (1978) (requiring that Congress delegate only to executive branch officials power to execute laws that it passes).
[71] See, e.g., 141 Cong. Rec. S4445-50 (daily ed. Mar. 23, 1995) (Sen. Moynihan (D-NY) inserting letter of Professor Michael J. Gerhardt and Report of the Association of the Bar of the City of New York into the Record).

enrollment proposal allowed the President to veto targeted tax benefits and also new direct spending programs, an addition targeted at changes in entitlement programs that would increase federal spending.[72] His substitute defined "targeted tax benefit" more broadly than the House version. A targeted tax benefit was a provision that lost revenue and had "the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers."[73] Supporters of this broader language argued it would reduce games by sophisticated taxpayers, aided by their wily tax lawyers, to make sure that any tax provision benefited at least 101 taxpayers and thus escaped the scope of the House's version of LIVA. Second, Dole retained a sunset provision, although he moved the expiration forward to September 30, 2000.[74] This would allow five years experience with LIVA before Congress would consider whether or not to re-enact it.

Dole still had to fight off an amendment on the floor to change the proposal back to an expedited rescission, this time made by Senator Daschle. Daschle defended his amendment as simpler than separate enrollment, clearly constitutional, and more consistent with majority rule than enhanced rescission because a majority of Congress would have to agree to a cancellation before it could take effect. Hard-liner McCain dismissed Daschle's amendment as an unprincipled alternative that represented "some kind of sham or charade or false line-item veto."[75] Supporters of Dole's approach also noted that the Democratic President had indicated that he wanted the strongest power possible, thereby undermining the Democrats' attempt to characterize the choice between the two versions of the statutory line item veto as a partisan issue. Ultimately, the expedited rescission amendment was tabled by a vote of 62-38, a parliamentary move that effectively kills a proposal. No Republican voted in favor of the expedited rescission proposal, even though it was based on Domenici's S. 14; ten Democrats crossed over to oppose Daschle's amendment. This vote was noteworthy not only because it defeated the Democratic alternative, but also because it demonstrated that Dole had the 60 votes necessary to cut off a filibuster.

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[72] 141 Cong. Rec. S4484 (daily ed. Mar. 23, 1995) (§ 2(b) of the substitute).
[73] 141 Cong. Rec. S4485 (daily ed. Mar. 23, 1995) (§5(5)(B) of the substitute). The final version slightly changed the revenue loss requirement but maintained the definition of targeted tax benefits.
[74] 141 Cong. Rec. S4301 (daily ed. Mar. 22, 1995) (Amendment No. 403).
[75] 141 Cong. Rec. S4154 (Mar. 20, 1995).

The Senate agreed to several amendments of the Dole substitute. Perhaps most importantly, the Senate adopted an expedited judicial review section very similar to the one adopted on the House floor. Its author, Paul Simon (D-IL), explained that the Congress should not "live in limbo. We have people like John Killlian of CRS and Prof. Larry Tribe of Harvard who believe it is constitutional. You have others like Louis Fisher of CRS and Walter Dellinger, who believe it is not constitutional. I do not know who is right. The courts have to make that determination."[76] At Senator McCain's urging, a severability clause was also added to the Act so that if a minor provision was declared unconstitutional, the rest of LIVA would remain in effect.[77] This expedited judicial review section was added notwithstanding the relatively lengthy debate about constitutional issues in the Senate – debate which included legal opinions from CRS and other constitutional law experts, as well as extended analysis from senators such as Byrd, Coats, and Biden. In the end, there were sufficient reservations about separate enrollment, and a majority voted in favor of the Simon amendment.

After the defeat of Daschle's expedited rescission substitute, everyone knew that the Senate would pass separate enrollment, and the two very different approaches to LIVA would have to be reconciled in conference committee. A few other amendments were added to Dole's substitute before its inevitable passage. For example, the Senate accepted a lockbox amendment offered by Senator Exon (D-NE) that would ensure money saved by cancellations be used for deficit reduction not new spending.[78] This amendment, as well as the debate, reflected the view that LIVA was designed as a tool to rein in spending and reduce the deficit. Like their counterparts in the House, Senators did not view LIVA as encouraging the President to cancel large spending items. Rather, they viewed this budget weapon as one mainly designed to reduce pork-barrel spending and tax subsidies that benefited the few at the expense of all taxpayers. McCain argued that the President would "take a sterner view of public expenditures – be they in the form of appropriations or tax concessions – which serve the interests of only a few or which cannot be reasonably argued as worth the expense given our current financial difficulties," but he did not expect the line item veto authority to solve the country's

[76] 141 Cong. Rec. S4244 (daily ed. Mar. 21, 1995).
[77] 141 Cong. Rec. S4259 (daily ed. Mar. 21, 1995).
[78] 141 Cong. Rec. S4326 (daily ed. Mar. 22, 1995) (acceptance of Exon lockbox amendment).

deficit problem.[79] As in the House, supporters hoped LIVA would make tax and spending provisions benefiting organized special interests more visible because they could be singled out by the President.

Even though most lawmakers clearly understood that the authority given to the President could not be used to implement sweeping changes in spending, some supporters characterized LIVA as a way, in the words of Fred Thompson (R-TN), to "change fundamentally the way we make decisions and the way we spend taxpayers' dollars." In the same breath, Thompson acknowledged that the bill was aimed at "targeted items, specifically designated items that go to provide a benefit for a particular class of individuals, small group of individuals, which cannot be defined in any sense in the national interest."[80] The rhetoric about fundamental change was, like the title of the Act, doubtlessly designed for public consumption, particularly because the Senate had failed to deliver on the plank in the Contract with America that would have represented significant change in budget practice, the constitutional amendment requiring a balanced budget. Senator Coats acknowledged that LIVA was hardly the extensive change that the balanced budget amendment would have been. "The line-item veto is a pale shadow in comparison to the balanced budget, but it is the only other game in town – the only other game in town other than what we have been doing for 25 straight years, and that is running deficits."[81]

Nonetheless, some opponents of LIVA seized on the rhetoric characterizing separate enrollment as a monumental change in budgeting and governance. As the debate drew to a close, Senator Byrd and other Democrats continued to object to the Act as an unprecedented shift in the balance of power. Byrd's oration was lengthy and dramatic. The old warrior, fighting a cold, began by declaring: "Oh, that my voice would carry to the hills or the mountains, and though I had to be brought into this Chamber on a stretcher, I would still fight for this Constitution and its system. This is not a process. Process. This is the Constitution that we are talking of here. This is the constitutional system that we are about to imperil."[82] In the end, Bryd, in a speech full of references to

[79] 141 Cong. Rec. S4474 (daily ed. Mar. 23, 1995).
[80] 141 Cong. Rec. S4220 (daily ed. Mar. 21, 1995).
[81] 141 Cong. Rec. S4230 (daily ed. Mar. 21, 1995).
[82] 141 Cong. Rec. S4226 (daily ed. Mar. 21, 1995).

Rome, the Founders, and his own book on the Constitution, concluded that the great leaders of the Senate would be "ashamed, ashamed, to see the Senate without a fight, and a long fight, accept a piece of junk like this."[83] Despite his rhetoric, on March 23, S. 4, now called The Separate Enrollment and Line Item Veto Act of 1995, passed the Senate with a decisive vote of 69 in favor and 31 opposed; all the Republicans and 17 Democrats supported the Senate's version of LIVA. Byrd's impassioned opposition suggested that the fight was not over; he would continue to rail against whatever emerged from Congress and he signaled that he would resort to the courts if he lost in the legislature.

3. Conference Committee: Choosing Enhanced Rescission

The bicameralism requirement of the Constitution mandates that a bill pass both houses in the same form before it can be sent to the President for his signature. Conference committees, made up of members from both the House and the Senate, work to reconcile two versions of a bill and send a consensus proposal, explained in a conference report, to each house for passage. The conference committee for the Line Item Veto Act faced a daunting task. The two versions of the bill were very different, and enhanced rescission, the approach taken by the House, had been discarded in the Senate because it faced some Republican opposition and was vulnerable to a filibuster threat. On the other hand, the House had not considered separate enrollment, and many were dubious that the process could work given longstanding congressional practice of enacting bills with lump sum appropriations and leaving the details to the legislative materials.

Chairman Clinger made clear that he expected a difficult conference in his statement on the floor when the House received S. 4 from the Senate, struck out all its language and replaced it with the text of H.R. 2, and called for a conference. He referred to the Senate version as a "weaker bill" and a logistical challenge because it "would require the enrollment of thousands of bills to pass appropriations in discrete line items requiring thousands of signatures and guaranteeing future Presidents an amazing case of writer's cramps as they deal with this as well as creating some significant amount of

[83] 141 Cong. Rec. S4472 (daily ed. Mar. 23, 1995)

paperwork."[84] But he acknowledged that the House version was vulnerable to a potential constitutional challenge, so neither bill was unproblematic. Clinger would serve as Chairman of the conference committee and lead the House side of negotiations with Dole and the Senate leadership.

It took five months just to appoint members to the conference committee. The delay was likely caused by the distance between the two bills, as well as the worry of some Republicans that whatever they passed would empower a Democratic President with different budget priorities. Continued gridlock was unacceptable, however. Dole needed the legislation for his presidential bid, Republican Senators wanted to pass a piece of budget reform legislation to regain ground after having killed the balanced budget amendment, and Gingrich and his House Republicans were determined to deliver on a plank of their Contract. By September, a conference committee had been appointed. The Director of the Office of Management and Budget Alice Rivlin wrote to Senator Dole that the President preferred the House's enhanced rescission proposal to the Senate's separate enrollment. She provided recommendations to improve the legislation, some of which were reflected in the final version. Rivlin supported the Senate's decision to apply the line item veto power to direct spending as well as discretionary spending and targeted tax benefits; she urged that lawmakers be careful in their use of terminology, avoiding words like "veto" and "repeal" and using traditional words of impoundment like "suspend"; and she urged inclusion of a severability provision.[85]

Negotiations between the two houses did not move quickly. House Republicans offered a compromise during the first of November based largely on the enhanced rescission model of H.R. 2, but accepting some elements of the Senate proposal such as including direct spending within the Act's scope and the lockbox amendment.[86] The Joint Committee on Taxation (JCT), a committee with members from the Senate Finance Committee and House Ways and Means Committee, was also working on a more workable definition of targeted tax benefit. After weeks of inaction, President Clinton

[84] 141 Cong. Rec. H5091 (daily ed. May 17, 1995)
[85] Joint Appendix, at 91, Raines v. Byrd, 521 U.S. 811 (1997) (Letter from Alice Rivlin, to Robert Dole (Sept. 11, 1995)), *available at* 1997 WL 33487254.
[86] See Virginia A. McMurtry, Congressional Research Service Issue Brief for Congress: Item Veto and Expanded Impoundment Proposals 7 (Mar. 1, 2001).

called for passage of LIVA in his January 1996 State of the Union address.[87] Negotiations resumed seriously once Congress returned to work later that month, and Republicans reached a compromise in mid-March. The conference report that provided the terms of the agreement and the final legislative language was filed on March 21, 1996, nearly a year after the Senate passed its version of LIVA.[88] Representative Robert L. Ehrlich, Jr. (R–Md.) explained the agreement, " 'We're one team, one team' that's all we hear these days. It kind of happened overnight. There's obviously been some kind of meeting of the minds between our top leaders in the House and Dole."[89]

The main decision made in conference was to go the enhanced rescission route rather than separate enrollment. The conference report revealed the purpose of LIVA: "to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits." The scope of LIVA was broader than any other impoundment authority previously delegated to the President. He could cancel discretionary spending items, new limited tax benefits, and new direct spending. Items of discretionary spending could be identified in an appropriations law or in accompanying committee reports or joint explanatory statements, eliminating the need for statutory line itemization that separate enrollment demanded. The conference committee adopted an entirely new approach of identifying limited tax benefits. They were defined as revenue-losing provisions that provided a benefit to 100 or fewer beneficiaries, unless all similarly-situated taxpayers received the same treatment. Unlike discretionary and direct spending items, the President could only cancel limited tax benefits that were identified as such in a list of eligible provisions assembled by the Joint Committee on Taxation and accompanying the conference report of any revenue bill. The JCT also had the option of issuing a report stating that a revenue bill contained no limited tax benefits, in which case the President could not cancel anything. Only if the JCT failed to issue any report at all could the President use his discretion to determine which provisions were limited under LIVA and therefore eligible for cancellation.

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[87] President William J. Clinton, State of the Union Address, Jan. 23, 1996, reprinted in 1 Public Papers of the Presidents of the United States: William J. Clinton 79, 85 (1997).
[88] H.R. Rep. No. 104-491 (1995).
[89] Karen Hosler, *Dole Unites GOP Forces in Congress with One Goal; Leadership Retools for White House Bid*, Balt. Sun, Mar. 24, 1996, at 1A.

The President could exercise his cancellation power only after signing and thereby enacting the bill containing items. He could cancel only dollar amounts of discretionary spending, direct spending items (a specific provision of newly-enacted law that would increase the deficit), or limited tax benefits (identified as such by the JCT). He had five days to exercise his authority, and he had to determine that each cancellation would reduce the deficit, "not impair any essential Government functions" and "not harm the national interest." He was to inform Congress of all cancellations of items contained in a particular law in one special message that would identify the canceled items in that law, explain the cancellations, and provide "all facts, circumstances, and considerations relating to or bearing upon the cancellation[s]."

The conference report is replete with discussions of the cancellation authority clearly designed to deflect judicial challenge of the delegation. For example, it noted that the definition of items susceptible to cancellation "make clear that the President may only cancel the entire dollar amount, the specific obligation to pay, or the specific tax benefit. … This means that the President cannot use this authority to modify or alter any aspect of the underlying law, including any restriction or condition on the expenditure of budget authority…. If the President desires a broader result, then the President must either ask Congress to modify the law or exercise the President's constitutional power to veto the legislation in its entirety."[90] In another passage, the conferees described the power delegated as "narrowly defined and provided within specific limits."[91] Finally, the report noted that the definitions it drafted signaled the intent of the conferees that "the President may use the cancellation authority to surgically terminate federal budget obligations."[92]

Heeding the advice of Dellinger and Rivlin, the conference report was more careful in the language used to define the cancellation power. It did not include terms like "repeal" or "veto" in anything other than the title of the Act and instead relied as much as possible on terms long used in the budget context. That strategy was possible in the case of discretionary spending because this had been the traditional target of impoundment authority in the past. The conference report noted that in this context, to cancel means "to rescind…. The term rescind is clearly understood through long

[90] H.R. Conf. Rep. 104-491, at 20 (1995).
[91] Id. at 19.
[92] Id. at 20.

experience between the Executive and Legislative branches with respect to appropriated funds."[93] Unfortunately, there was no long experience with respect to cancellations of direct spending or limited tax benefits, and there it was defined to mean preventing the provisions from "having legal force or effect." The conference report clarified that these definitions were intended to ensure that the power given to the President was "very narrow" and that he could not use it to "change, alter, or modify any other aspect" of the underlying law.[94]

The conference agreement retained the Senate's addition of a sunset, but set it at January 1, 2005. The report noted that "[g]iven the significance of this delegation, the conference report includes a sunset of [the cancellation] authority."[95] Interestingly, the Act would not take effect until January 1, 1997, which meant that there would be a presidential election, and the possibility of a Republican victory, before the President would be able to exercise the new authority. The effective and termination dates meant that the Act would be effective for eight years, if it survived any judicial challenge. Another Senate provision retained in the conference agreement was the lockbox provision to ensure any savings from the cancellations would reduce the deficit and not become available for new spending or tax benefits.

Just as in the House version, cancellations would take effect unless Congress passed a disapproval resolution within 30 days of receiving the President's special message. Since the President would undoubtedly veto the disapproval bill, the money would be spent or the tax benefit would take effect only with two-thirds support in each house. LIVA provided for expedited procedures to consider disapproval bills, including time limits for debate in the Senate, and it severely reduced the ability to amend the disapproval bills in either chamber. If Congress failed to pass a disapproval bill within the 30 days allowed, the items in the President's special message would be canceled, effective on the date the special message had been received by the House and Senate.

Finally, the conference report version of LIVA included an expedited judicial review provision, although it did not require a three-judge panel to hear the initial challenge. Any member of Congress or any individual adversely affected by the statute

[93] Id. at 29.
[94] Id.
[95] Id. at 19.

could challenge its constitutionality in the U.S. District Court for the District of Columbia. The Act authorized a direct appeal of the district court decision to the Supreme Court and instructed both courts to expedite their consideration. The severability clause added in the Senate was inexplicably not part of the conference agreement.

The Senate moved first on the conference report, taking it up on March 27, 1996. One of the first speakers, Senator Domenici, had opposed enhanced rescission a year before when the Senate had first considered the line item veto proposal in the 104th Congress. Although he clearly understood that the conference report "essentially adopts the House's enhanced rescission approach," he indicated that he had changed his position and decided that "the time is now to give line item veto a chance, to get it over to the President who will sign it."[96] Other senators who had opposed this approach, such as Ted Stevens (R-AK),[97] also changed their positions, providing various reasons for the shift that provided Dole and the Republicans with a victory to take into the presidential campaign. These speeches signaled that Republican resistance in the Senate to enhanced rescission had crumbled, so the only remaining question was whether Byrd and the Democrats had the strength to filibuster the compromise.

Byrd spoke at length, but he lacked the support to mount a filibuster. After an unsuccessful motion to recommit the bill (a parliamentary tactic to kill the conference report and force renegotiation), the result in the Senate was a foregone conclusion. The conference report passed 69 to 31. A day later the House followed suit, a less surprising outcome because the conference report so closely followed the House-passed version of LIVA. Again, there was an unsuccessful motion to recommit the conference report, followed almost immediately by final passage of LIVA by a vote of 328 in favor and only 91 voting against it.

On April 9, 1996, President Clinton signed the Line Item Veto Act into law, characterizing it as a bipartisan accomplishment long sought by presidents. He stated: "For years, presidents of both parties have pounded this very desk in frustration at having to sign necessary legislation that contained special interest boondoggles, tax loopholes

[96] 141 Cong. Rec. S2932-3 (daily ed. Mar. 27, 1996).
[97] 141 Cong. Rec. S2955 (daily ed. Mar. 1996).

and pure pork. The line item veto will give us a chance to change that, to permit presidents to better represent the public interest by cutting waste, protecting taxpayers and balancing the budget. … This law gives the president tools to cut wasteful spending, and, even more important, it empowers our citizens, for the exercise of this veto or even the possibility of its exercise will throw a spotlight of public scrutiny onto the darkest corners of the federal budget."[98] He would not be able to immediately use the new cancellation power because it took effect only the next year, a compromise he said he had accepted without hesitation in order to gain the power for the Executive Branch. In the end, President Clinton would be the only President to exercise cancellation authority under LIVA before the Supreme Court struck it down as unconstitutional.

III. LIVA: Hardly an Unprecedented Shift of Power

The main theme sounded by opponents of the stronger versions of LIVA – enhanced rescission and separate enrollment – was that the budget reform would shift substantial power from Congress to the President. Byrd sounded the alarm in the final debate on the conference report: "The legislative branch sleeps but there stands the President at the head of the executive branch, ever ready … to seize upon every advantage which presents itself for the extension and expansion of the executive power. And now, we are preparing here in the Senate to augment the already enormous power of an all-powerful chief executive [by shifting power to him] that will be used against the legislative branch, to be used against the elected representatives of the people. … It is as if the legislative branch as been seized with a collective madness."[99] Surely even Senator Byrd knew that this rhetoric was hyperbole. LIVA was not a sign of legislative madness; on the contrary, the design of the enhanced rescission bill demonstrates that lawmakers can be coolly rational when they delegate power to the executive that might weaken their relative clout in the long run. LIVA was constructed so that Congress kept great control over the President's future use of the cancellation power.[100]

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[98] William J. Clinton, Statement on Signing the Line Item Veto Act, 1 *Pub. Papers* 559 (April 9, 1996).
[99] 142 Cong. Rec. S2940 (daily ed. Mar. 27, 1996).
[100] Some of this discussion is drawn from Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 Cardozo L. Rev. 871 (1999).

One way for Congress to control the extent of a delegation is to set out "intelligible principles"[101] in the statutory text that constrain the executive branch's discretion. Congress then relies on third parties, like the courts, to police the executive branch by applying the standards provided in the substantive law. LIVA provided little by the way of intelligible principles. The text of the statute required only that the President find that a cancellation would reduce the deficit (which all cancellations necessarily did, at least as long as the country was running a deficit), would "not impair any Government functions," and would "not harm the national interest." This directive boils down to "Don't do anything terrible." It provides no positive guidance to the President during the five days he considers which items in a spending or tax bill to cancel.

The statutory standards can be supplemented by the congressional purposes behind enactment that are revealed in the legislative history and the context of enactment. Mirroring the debate, the conference report cited the growing public outcry for "greater fiscal accountability" and indicated that the cancellation authority should be used "to eliminate wasteful federal spending and to cancel special tax breaks."[102] The main target seemed to be pork-barrel programs or rifle shot tax subsidies. But there is no generally accepted or objective definition of pork barrel spending. One person's "pork" is another person's vital federal program aimed at meeting important public policy goals. Although the statutory definition of limited tax benefit in the House version and the conference report, as well as the debate surrounding the meaning of spending "items," suggested that Congress was focused mainly on narrowly targeted programs, not all such spending is necessarily unjustified. For example, tax subsidies for the blind, while limited to a relatively small, discrete group of taxpayers, might be universally acknowledged as good public policy, while some large public works projects, such as spending for particular weapons systems, might be considered wasteful. Although LIVA directs the President to consider "the legislative history, construction, and purposes of the law which contains [the spending items, and] any specific sources of information referenced in such law or … the best available information,"[103] it is very unlikely that congressional materials

[101] See J.W. Hampton Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to lay down "an intelligible principle to which the person or body authorized to fix such rates is directed to conform").
[102] H.R. Conf. Rep. No. 104-491, at 15 (1996).
[103] 2 U.S.C. § 691b(a) & (b).

relating to an appropriations or revenue bill will label particular items as wasteful, unnecessary, or pork-barrel. On the contrary, the legislative history is likely to contain explanations for each item designed to characterize it in its best light. In the end, the guidance from legislative history adds very little to the relatively empty statutory standards.

LIVA also required that the President provide reasons for his cancellations in his special message. Although the Supreme Court has ruled that delegation concerns cannot be answered by standards adopted by the executive branch to limit its discretion,[104] the requirement that the President justify his decisions could reduce the chance of arbitrary determinations. In addition, the explanations could aid Congress in exercising its oversight of the cancellation authority. Indeed, there was evidence that lawmakers used the information provided in President Clinton's special messages when they considered disapproval bills. In the one year that LIVA was in force, Clinton canceled 82 items in eleven laws. Thirty-eight of these cancellations, totaling $287 million, related to items in the Military Construction Appropriations Act of 1998.[105] In his special message, Clinton informed Congress that these projects met three additional substantive criteria: they would not improve the quality of life for members of the military; they had not been requested by the military; and they did not contribute to national defense. When Congress overrode these rescissions by veto-proof majorities in both houses,[106] members stated that they had applied these standards to the canceled items and found that all passed muster.

Nothing in the Act required the President to set forth additional standards to constrain his use of the cancellation authority, and after Clinton's experience with the military construction bill cancellations, a President might think twice about fuller explanations. So substantive standards – whether provided in the Act, the legislative history, or subsequently in special messages – were not the main tool through which Congress exercised control over the delegated power. Congress retained continuing control, however, because it could always exempt spending or tax bills from the President's

[104] *Whitman*, 531 U.S. at 472-73.
[105] See Cancellation Nos. 97-4 to -41, 62 Fed Reg. 52,452 (1997).
[106] See H.R. 2631, 105th Cong. (1997) (disapproving the cancellations transmitted by the President on October 6, 1997, regarding Pub. Law 105-45).

cancellation power, and, even more importantly, Congress retained the power to determine what provisions would be considered items susceptible to rescission. Moreover, House amendments retained by the conference committee clarified that the cancellation power could not be used to suspend conditions of spending or nullify substantive legislation sometimes included in spending bills. Congress presumably learned these techniques from state legislatures, which had long manipulated the scope of "items" in order to reduce the vitality of the Chief Executive's line item veto.[107]

Because the President had to sign, and thereby enact, any bill before he could cancel items in it, Congress could effectively specify in the spending bill itself that particular projects could not be canceled or even that the entire bill was "cancellation-proof." Such a straightforward waiver of LIVA by Congress was probably unlikely, however. First, most such bills could have been filibustered by LIVA supporters in the Senate. All appropriations bills can be filibustered, and some tax and direct spending bills are subject to the filibuster, although many of those vehicles now take the form of budget reconciliation bills which are governed by time limits on Senate debate.[108] Thus, a determined minority of fiscal conservatives could block most, but not all, explicit waivers. Second, the political costs of waivers might be substantial. A waiver would only highlight any exempted project or bill, and voters might perceive a waiver as inconsistent with fiscal discipline and accountability. Of course, even explicit waivers might be overlooked in some of the massive omnibus appropriations bills passed hurriedly in the final days of a legislative session. Furthermore, waivers attached to large projects that lawmakers believed could be persuasively portrayed to voters as important policy and not pork might provoke very little political fall-out.[109]

But lawmakers did not have to rely only on high-profile waivers of LIVA to insulate spending programs or tax subsidies. They had more subtle tools at their disposal. With respect to discretionary spending items, LIVA required that the President cancel the dollar amount of an item entirely; he could not reduce an appropriation. Congress could not defeat the cancellation authority by appropriating in large lump sums, because LIVA

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[107] See Louis Fisher, State Techniques to Blunt the Governor's Item-Veto Power (1996) (CRS Report No. 96-996 GOV); Briffault, supra note 6, at 1181.
[108] See Sarah A. Binder & Steven S. Smith, Politics or Principle: Filibuster in the United States Senate 192 (1997).
[109] See Robert D. Reischauer, *Line Item Beef: Little Beef and Mostly Bun*, Wash. Post, Apr. 10, 1996, at 1C.

allowed the President to look through a lump sum in a statute and identify particular items through managers' joint explanatory statements and committee reports. To understand how this look-through provision worked, consider an appropriations bill that provided budget authority of $50 million for agricultural research. The committee report might instruct the Department of Agriculture to allocate $400,000 of this lump sum to wheat utilization research at the University of Oklahoma. In that case, the President could cancel the $400,000 project without canceling the rest of the research projects funded by the lump sum. The ability to use legislative materials to delineate items was a major consideration in the conference committee's decision to discard the Senate's separate enrollment format for the enhanced rescission mechanism favored by the House.

The problem with this look-through mechanism, designed to facilitate the use of the cancellation authority, is that Congress could legislate in lump sums and specify funding for particular projects in ways that would be immune from rescission. For example, the committee report could instruct in one sentence that $4 million of the lump sum should go to wheat utilization research conducted by universities in several states. This strategy would force the President to cancel more projects with wider consequences, thereby irritating more members of Congress and their constituents. Or Congress could dispense with detailed instructions in the committee reports or joint explanatory statements in the *Congressional Record* and communicate its preferences on itemization through means not listed in LIVA. If the committee wanted to assure that the Agriculture Department allocated $400,000 of the lump sum to O.U. but protect that project from cancellation, it could send a letter, signed by all committee members, to the relevant agency official. If backed by enough lawmakers, such a letter could provide virtually the same incentive to the agency to comply with congressional wishes as does a committee report. Neither has the force of law. Executive branch officials follow committee instructions, in whatever their form, because they know they must return to the same committee for funding in the next fiscal year and because some of the lawmakers also sit on the committees with oversight responsibilities. As Senator Sam Nunn (D-GA) observed during debate on separate enrollment, "The likely effect of the [Dole] substitute will be to drive pork into underground shelters where it will be hidden from scrutiny. … [T]he really egregious earmarks will no longer be set forth in committee reports. The earmarks will be

described in … letters from committees, or even phone calls from committee chairmen to the heads of agencies."[110] This observation is true of the enacted LIVA as well.

Congress' continuing control over cancellation of limited tax benefits was even stronger. First, with respect to both tax benefits and direct spending programs, the President could only cancel new items. Unlike appropriations which must be re-enacted each year, tax laws and entitlement programs do not have to be revisited each year but continue to operate without further action by Congress. The President was not given authority to re-assess existing programs and cancel items that were already part of the law. Second, the conference committee adopted new language concerning limited tax benefits that severely circumscribed the President's cancellation power over tax expenditures. The President was restricted to canceling only provisions that the JCT had expressly identified during the legislative process. While Congress was considering a tax bill, the JCT had two options: It could state that LIVA would apply to specifically-identified limited tax benefits, or it could state that LIVA would not apply to any provision in the Act. In the latter case, the President could not cancel any provision in the bill even if it met the definition of a "limited tax benefit." In short, any provision that JCT did not list was immune from cancellation.[111] Only if the Committee failed to produce any statement at all could the President independently determine whether the bill contained limited tax benefits and then choose to cancel some or all of those provisions.

In the only experience with the cancellation authority in the context of tax bills, JCT exercised its authority to list limited tax benefits vulnerable to cancellation. In the Taxpayer Relief Act of 1997, the Joint Committee on Taxation listed eighty of the provision as limited tax benefits,[112] a miniscule number of provisions in a law which required 550 pages of general explanation.[113] Among this relatively small universe of tax benefits eligible for rescission, presumably there were some that the President supported

[110] 141 Cong. Rec. S4344 (daily ed. Mar. 22, 1995).
[111] Again, lawmakers were aware of the impact of this provision. See 141 Cong. Rec. S2992 (Mar. 29, 1996) (statement of Sen. McCain) ("The JCT declaration is more than a piece of paper. It is a declaration of immunity for what could very well be a limited tax benefit. It is an inoculation against a Presidential line-item veto. It is the magic bullet for tax lobbyists.").
[112] See Conference Report on H.R. 2014, Taxpayer Relief Act of 1997, 142 Cong. Rec. H6623, 6640-43(Memorandum of Kenneth J. Kies to Members of the Conference Committee Regarding Provisions in H.R. 2014 Which Are Subject to the Line Item Veto).
[113] See Staff of Joint. Comm. on Taxation, 105th Cong., General Explanation of Tax Legislation Enacted in 1997 (Comm. Print 1997) (JCS-23-97).

and thus were not likely targets for cancellation. In the end, the President canceled only two of the eighty eligible benefits, describing the disfavored subsidies as "opportunities for abusive tax planning" and likely to result in "tax-haven abuses."[114] One of these cancellations, a tax benefit permitting preferential capital gains treatment to sales of certain stock to farmers' cooperatives, provided the basis for one of the challenges heard in *Clinton v. City of New York*.

Congress self-consciously protected itself in another way. The conference committee, following the lead of the Senate, provided that LIVA would terminate after eight years and would continue only if Congress re-enacted the authority. This sunset provision ensured that a majority of Congress could reclaim the authority it had delegated if it determined that LIVA caused an undesirable shift in the balance of power. As the debate in the Senate reveals, Congress was well aware that a sunset was required to protect its power; otherwise, any attempt to repeal LIVA would require a two-thirds majority in each house to overcome a certain presidential veto. Although LIVA passed both houses by a substantial margin, suggesting that re-enactment would have been a foregone conclusion, lawmakers began to complain about the Act once Clinton actually canceled a few programs. Senator Robert Bennett (R-UT) told reporters, "I was a proponent. I campaigned for it vigorously. But when I saw the way that President Clinton abused the line-item veto, I ate crow publicly."[115]

Given Clinton's relatively restrained use of cancellation, it is hard to imagine how Bennett would approve of any President's exercise of his delegated power – or at least, of any Democratic President's use of it. Representative Jose Serrano (D-NY) observed of his colleagues, "I've never seen a vote taken where more people wanted their vote back."[116] Congress' ability to refuse to extend LIVA would have depended on the deficit situation at the time; current projections of historically large deficits suggest that lawmakers would have found it difficult to avoid re-enacting LIVA when it would have expired in 2008. But their willingness to let LIVA die, or to cut it back, would have primarily turned on the inter-branch dynamics that would have played out over the eight

[114] See Cancellation Notices 97-1 and 97-2, H.R. Doc. No. 105-116 (1997).
[115] Lyle Denniston & Jonathan Weisman, *Line-Item Veto Voided by Justices*, Balt. Sun, June 26, 1998, at A1.
[116] Guy Gugliotta & Eric Pianin, *Line-Item Veto Tips Traditional Balance of Power; Capitol Hill Plots Strategy to Counter President's Pen*, Wash. Post, Oct. 24, 1997, at A1.

years of experience. At least the sunset allowed them the ability to judge whether the costs of LIVA were worth its fiscal and political benefits.

The story of LIVA does not prove that Congress always protects itself when it delegates authority to the President, but it does demonstrate that Congress has ample tools at its disposal to retain its influence vis-à-vis the executive branch when it drafts legislation and that it knows how to use them. Thus, the story supports the current state of the delegation doctrine in courts, where judges do not overturn broad delegations as unconstitutional abdications of congressional authority but apply a pragmatic doctrine that seeks to limit the scope of delegation where possible but essentially leaves the policing of the nondelegation doctrine to Congress itself. It is interesting that Congress built into LIVA so many safeguards because the Act did not delegate to the President a particularly robust authority to radically transform spending priorities or substantially reduce the size of government. Thus, it is not clear that all the protections were necessary in this particular law. The total savings from Clinton's cancellations during the fiscal year in which LIVA was effective were only $600 million over five years; even if all 82 cancellations had gone into effect (rather than 44 which remained after the enactment of the disapproval bill relating to the military constructions projects), the total amount saved over five years would have been just under $1 billion.[117] Moreover, the purpose behind LIVA – to allow the President to go after narrowly targeted programs – suggests that the rescissions would necessarily be limited in size.

Perhaps Congress feared that the President would grow bolder over time, and it was certainly possible for him to aggressively wield the cancellation power with respect to discretionary spending items because they did not have to be limited to only a few beneficiaries in the same way that eligible tax expenditures were. Moreover, Congress had some experience with sweeping rescissions: The 1974 Budget Act had been prompted, after all, by President Nixon's use of policy impoundments to undermine congressional priorities relating to the environment, housing and other domestic

[117] Line Item Veto Act After One Year: Hearings before the Subcomm. on Legislative and Budget Process of the Comm. on Rules, 105th Cong. 6 (1998) (statement of June E. O'Neill, Director, Congressional Budget Office).

programs.[118] President Clinton may have used cancellation sparingly in the first year to try to avoid provoking a judicial challenge of a law that even its drafters were not convinced was constitutional; perhaps he would have changed his tactics if it became apparent that a judicial challenge was either unlikely or unsuccessful. If his strategy was to avoid a judicial showdown, however, he would have been advised to cancel only items in appropriations bills, where the power of impoundment was relatively uncontroversial. It is not accidental that the cancellations giving rise to *Clinton v. City of New York* were related to a tax benefit and a direct spending program. The well-established presidential power of congressionally-sanctioned impoundment was limited to rescissions of discretionary spending; the use of the power was more suspect when it was aimed at tax benefits or entitlement programs. On the other hand, Clinton's wariness may have been more a consequence of the need for congressional reauthorization than his worry about judicial challenge. How strong a moderating influence the sunset provision would have exerted is unclear; LIVA would not have expired until 2008, long after Clinton left office.

Although the story of LIVA shapes the way we think about the nondelegation doctrine and the judiciary's hands-off approach to broad congressional delegations, the Court's majority opinion in *Clinton v. City of New York* did not view this case as posing a delegation question. Rather it framed the constitutional issue more formally, asking whether the President's power to cancel tax benefits and direct spending programs was a power to repeal a law without congressional involvement. Answering that question "yes" meant that the Constitution's requirement of bicameralism was violated and LIVA was unconstitutional. This decision, and the fact that the case took place pursuant to special expedited judicial review provisions, raises the second important aspect of our story: Did Congress adequately consider the constitutional issues presented by LIVA and work to avoid those difficulties, or did it just punt the hard questions to the courts?

IV. LIVA: A Mixed Story of Congress' Ability to Analyze Constitutional Issues

[118] See Allen Schick, Congress and Money: Budgeting, Spending, and Taxing chapter 2 (1980) (terming the period 1966-1973 as the "Seven-Year Budget War"). When Nixon's impoundments, which were not sanctioned by Congress in the way that LIVA permitted cancellations, were challenged in court, the President usually lost. See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part II: Judicial and Legislative Responses*, 63 Geo. L.J. 149 (1974). But Congress' victories in court came too late for spending to be effective, so it enacted the impoundment control measures in the 1974 Budget Act.

It did not surprise members of Congress that LIVA was challenged in Court soon after enactment, and it probably did not surprise many that the Act did not survive the second challenge in *Clinton v. City of New York.* The congressional debate clearly demonstrates that members knew the Act was close to the constitutional edge, if not over it, and the expedited judicial review provision invited challenge and ensured speedy resolution. After all, Congress was trying to use a statute to create a power similar to the constitutional line item veto authority exercised by most governors. The task itself was explicitly designed to circumvent Article V's onerous requirements to amend the Constitution and to adopt a solution less durable than a constitutional change. Moreover, throughout the 1980s, lawmakers had adopted a variety of creative responses to the conflicting pressures to send pork home and to reduce the deficit, and a few of these devices had been struck down on separation-of-powers grounds.[119]

Although many have indicted Congress as insufficiently attentive to constitutional issues or institutionally incapable of serious constitutional analysis,[120] the debate concerning LIVA reveals that members spent time in committee and on the floor talking about constitutional concerns. There was relatively extensive discussion, certainly in the Senate which held a hearing in a Judiciary subcommittee and which engaged in substantial debate on the constitutionality of its separate enrollment approach, and also in the House where the Rules Committee received an analysis by CRS and some members highlighted concerns in floor debate. Members also referred to discussion in past Congresses about the constitutionality of various statutory approaches to the line item veto, indicating that some members had thought about these issues before. Despite the recognition of a serious question of constitutionality, however, neither House seems to have confidently resolved it.

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[119] In addition to *Clinton v. City of New York*, see also Bowsher v. Synar, 478 U.S. 714 (1978) (striking down provision in the Balanced Budget and Emergency Control Act (Gramm-Rudman-Holllings) that allowed Comptroller-General of the General Accounting Office to implement a sequester). In addition, budget laws had contained legislative vetoes, an oversight mechanism ruled unconstitutional by INS v. Chadha, 462 U.S. 919 (1983).

[120] Abner Mikva, a former member of Congress and then federal appellate judge, scathingly attacked Congress' ability to consider constitutional issues thoughtfully and well. See Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. Rev. 609 (1983).

There could be many reasons for the failure to continue the deliberation, and more than one could have been operating. Lawmakers might have believed the Court would not be influenced by more substantial debate and analysis; getting a rough sense of the right answer was the best they could do, and then judges would independently resolve the question. Further discussion might not have changed minds or eliminated constitutional doubts in some members' minds; after all, this was a close constitutional question. Or perhaps they did not care what happened to LIVA once it left the House and Senate chambers since they mainly wanted credit for delivering on the Contract with America and for enacting a symbolic, but not very potent, law to appear responsive to public concerns about out-of-control spending. In that case, they did not value more constitutional discussion for its own sake and only engaged in the some constitutional discourse for strategic reasons or to appear to constituents to be taking their responsibilities seriously. The debate might also have been a way to communicate to voters that the main obstacle to achieving this part of the Contract with America was not legislative, but judicial, so Congress could shift the blame to the courts if LIVA was blocked.

Although there is ample reason to be cynical about congressional deliberation on constitutional arguments, Congress could be genuinely interested in constitutional issues for several reasons. First, anticipating possible constitutional attacks allows lawmakers to craft a bill more likely to survive challenge if they actually want to enact a change in policy. Certainly, some lawmakers did want to establish a stronger rescission power and thus to devise a law that would withstand judicial attack. The constitutional concerns about enhanced rescission were two-fold. First, members wondered whether the delegation to the President contained sufficient standards. The House Rules Committee received an opinion from the American Law Division of CRS that characterized the judicial nondelegation doctrine as requiring "the most minimal of policy direction and statement of goals" and concluded that H.R. 2 was "constitutionally permissible."[121] Witnesses before the Senate Judiciary Subcommittee reached the same conclusion. Accordingly, Congress never amended LIVA to provide more specific guidance than the three, relatively empty criteria discussed above. In fairness to the CRS and other legal

[121] H.R. Rep. No. 104-11, pt. 1, at 8-9 (1995).

analysts, had the Court analyzed LIVA under delegation principles, as did the dissenters in the case, it seems likely that LIVA would have survived judicial challenge. Congress' failure was in predicting accurately which approach the Court would take.

The second concern, and the one that ultimately convinced the majority of the Supreme Court to strike LIVA down, was that the President's cancellation effected a repeal of law without congressional involvement. This constitutional argument is based in the Court's assessment of the legislative veto in *INS v. Chadha*.[122] The legislative veto, a process whereby one house of Congress or sometimes one committee could block regulatory action, had been ruled unacceptable because it allowed a part of Congress to make law, bypassing bicameralism and presentment. The President's cancellation could be attacked on similar grounds; if cancellation was the equivalent of repealing a law, then the President was making law without the involvement of Congress. The record clearly shows that legislators knew of this possible constitutional infirmity. Democratic representatives had sounded the alarm in the House Government Reform Committee's report, worrying that enhanced rescission shifted power to the President and a "one third plus one" minority in each house (the number needed to block enactment of a disapproval bill over the President's veto). In debate on the floors of both houses on the expedited rescission substitutes offered by Democrats, supporters of the amendments argued that they were more clearly constitutional than any of the other statutory line item veto alternatives because they did not raise the specter of a *Chadha*-like challenge.[123] In the Senate, where the debate on constitutional issues was more substantial than in the House, *Chadha* concerns were raised during consideration of the conference report.[124]

Particular attention was paid to the testimony of Assistant Attorney General Walter Dellinger before the Senate Judiciary Subcommittee. He argued that words like "veto" and "repeal" in the original H.R. 2 raised concerns that the Act violated "the plain textual provision of Article I, clause 7 of the Constitution, governing the manner in which federal

[122] 462 U.S. 919 (1983).
[123] See, e.g., 141 Cong. Rec. H1185 (daily ed. Feb. 3, 1995) (statement of Rep. Spratt); 142 Cong. Rec. S4249 (daily ed. Mar. 27, 1996) (statement of Senator Byrd) (raising *Chadha* concern about separate enrollment); 142 Cong. Rec. S4353 (daily ed. Mar. 22, 1995) (statement of Sen. Daschle).
[124] 142 Cong. Rec. S2944-45, 48-49 (daily ed. Mar. 27, 1996) (statement of Senator Byrd and letter by Professor Gerhardt).

laws are to be made and altered."[125] The conference committee eliminated these particularly problematic words from the final version of the bill, although for political and symbolic reasons, it left the troublesome title of the bill unchanged. Senator Levin argued that eliminating the words that raised red flags without altering the underlying process would not solve the constitutional problem.[126] As it turned out, he was right, and his analysis was similar to that used by the Court.

One reason given for Dole's decision to substitute separate enrollment for enhanced rescission on the Senate floor was to respond to concerns that enhanced rescission was unconstitutional. Indeed, the consideration of constitutional issues in the Senate is much more extensive than that in the House, although on the floor it is mainly focused on separate enrollment, a method killed in conference committee. The more extended debate in the Senate may reflect the reality that separate enrollment was really no less constitutionally problematic than enhanced rescission, and, given its deeming provision that allowed all the little bills to pass without separate votes on each, its constitutionality was perhaps more dubious.

Senators had ample outside analyses of the constitutional issues to inform their debate, and these assessments were available to House members as well. The testimony about constitutional issues raised by expedited and enhanced rescission proposals before the Senate Subcommittee on the Constitution, Federalism, and Property Rights in the Judiciary Committee occurred in January 1995, early in the legislative process. In addition, the American Law division of CRS produced a memo on the constitutionality of separate enrollment that members frequently referred to.[127] This CRS document suggests that separate enrollment would either escape judicial review because of the political question or other related doctrine of deference; it is less definite on the issue whether the deeming process in separate enrollment is consistent with the Constitution's requirements to enact a bill. Senator-lawyers provided their own views of separate enrollment, most notably Senator Biden, a high-ranking member of the Judiciary Committee, who believed it constitutional,[128] and Senator Byrd, an author of a book on the Constitution,[129] who

[125] 141 Cong. Rec. H1174 (daily ed. Feb. 3, 1995) (quoting Dellinger).
[126] 142 Cong. Rec.S2964-65 (daily ed. Mar. 27, 1996).
[127] See, e.g., 141 Cong. Rec. S4156 (daily ed. Mar. 20, 1995) (statement of Senator McCain).
[128] See, e.g., S. Hrg. 104-478, at 8-9 (Jan. 24, 1995).

vehemently contested that conclusion.[130] Finally, senators on both sides of the issue had gathered the views of various constitutional law scholars, primarily again on separate enrollment[131] but also on the enhanced rescission bill that was ultimately enacted.[132]

Non-strategic debate on constitutional issues is relevant in a second way to legislative decision making. Some lawmakers may make up their minds to support or oppose a law based on their views of its constitutionality. They do so because their constituents want them to act consistently with constitutional mandates, because they take an oath to support the Constitution, because they value the Constitution, or because of some combination of these factors.[133] In that case, we might expect to find lawmakers stating that although they favored or disfavored LIVA on policy grounds, they were nonetheless voting in the opposite way because of their views on constitutionality. In our story, it is impossible to find such statements in committee reports or *Congressional Record*. Certainly, members of Congress appear to change their minds over the course of the debate. Senator Domenici consistently opposed enhanced rescission in committee and on the floor of the Senate until the conference committee sent its enhanced rescission proposal to the floor. Although some of Domenici's early statements hinted that part of his initial position was driven by constitutional concerns,[134] he discussed the balance of power as the primary reason for his positions, and he does not explicitly link that argument to constitutional mandates.

Senator Exon came closest to articulating a gap between his constitutional views and policy preferences. He clearly favored some line item veto with relatively sharp teeth, but in the floor debate he sounded constitutional concerns about any method other than

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[129] Robert C. Byrd, The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism (1995).
[130] See, e.g.**,** 141 Cong. Rec. S4228-29, 4232-44 (daily ed. Mar. 21, 1995).
[131] 141 Cong. Rec. S4160 (daily ed. Mar. 20, 1995) (Iowa Law Review); 141 Cong. Rec. S4238-9 (daily ed. Mar. 21, 1995) (Judith Best), S4232 (Dellinger); S4248 (Fisher); S4249 (Mikva and Flanagan); S4445 et seq (Gerhardt, etc.).
[132] 142 Cong. Rec. S2974 (daily ed. Mar. 27, 1996) (additional references to Professor Gerhardt's letter); 142 Cong. Rec. S2965-66, 2971 (daily ed. Mar. 27, 1996) (references to Professor Lawrence Tribe's letter to Senator Bill Bradley (D-NJ)).
[133] See Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L.J. 1277, 1288-89 (2001) (discussing why lawmakers could value constitutional lawmaking). See also Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 Stan. L. Rev. 585 (1975) (discussing the way lawmakers should approach constitutional questions raised by legislative proposals).
[134] S. Rep. No. 104-9, at 14 (1995); 141 Cong. Rec. S4193 (daily ed. Mar. 20, 1995).

expedited rescission.[135] Was he convinced to change his mind on the constitutional issues? It does not appear so. When he stated that he would vote for the conference report, he also noted that he has "some possible constitutional questions and concerns." Even those senators who mainly focused on constitutional aspects of LIVA, such as Senator Levin[136] and Senator Thompson,[137] appeared also to reach the same conclusions on policy grounds, so it is difficult to determine how much of an independent role constitutional issues played.

Perhaps the expedited judicial review provision added to LIVA by Nathan Deal in the House and Paul Simon in the Senate made it easier for lawmakers to vote their policy preference despite any lingering concerns about constitutionality. Both houses eagerly adopted these provisions as amendments on the floor, and a version was retained in the conference report. Interestingly, Senator Simon recognized one likely problem with the provision, that only allowed a member of Congress to challenge the Act in Court, and counseled the conference committee also to provide standing to bring a "test case" to "any person adversely affected by the act."[138] The conference committee wisely adopted this suggestion in the final version. Simon's concerns about congressional standing were well-founded; the Court dismissed the first challenge to LIVA brought by members of Congress before the President had exercised his cancellation authority on the ground that members of Congress lacked a concrete injury and thus did not have standing to sue.[139] Only when individuals and entities adversely affected by presidential cancellations brought a challenge did the Court reach the merits of the case. The Court did not discuss in either case, nor did Congress find problematic, that this expedited review provision could essentially ask the Court for an advisory opinion – a possibility hinted at in statements by lawmakers that cases brought under the provision would serve as "test cases." Because *Clinton v. City of New York* concerned actual cases – a hospital in New York would suffer financial hardship because of the cancellation of a change in the Medicaid law, and a farmer would lose the ability to take advantage of a targeted tax

[135] 141 Cong. Rec. S4330-32, (daily ed. Mar. 22, 1995); 141 Cong. Rec. 4411 (daily ed. Mar. 23, 1995).
[136] 142 Cong. Rec.S2964 (daily ed. Mar. 27, 1996).
[137] 141 Cong. Rec.S4475 (daily ed Mar. 23, 1995).
[138] 141 Cong. Rec.S4476 (daily ed. Mar. 23, 1995).
[139] Raines v. Byrd, 521 U.S. 811 (1997).

benefit – the Court was not faced with the possibility that it was being asked to give an advisory opinion.

Did the expedited review provision encourage lawmakers to shirk their responsibility to make independent judgments about LIVA's constitutionality? Some certainly argued that was the case. Senator Byrd contended, "We should be resolving these questions on our own. All of us take an oath of office to support and defend the Constitution. During the process of considering a bill, it is our duty to identify – and correct constitutional problems. … It is irresponsible to punt to the courts."[140] The general tone of the Senate debate, however, suggests that most members had reached some conclusion about the constitutionality first of separate enrollment and then of enhanced rescission, based on opinions of outside experts, CRS lawyers, and the debate of their colleagues. Nonetheless, they acknowledged uncertainty about their legal conclusion by supporting a provision allowing early judicial resolution.

Did the expedited review also allow those with doubts to vote for the bill? Probably. Senator Exon supported Simon's amendment because, although he thought Congress should "exercise a constitutional judgment"[141] when voting, the availability of speedy judicial review would ease the concerns of those with constitutional doubts. Would Congress have engaged in more searching constitutional analysis without the provision? That seems unlikely, particularly in the Senate, because there was a great deal of debate devoted to such arguments. Did the provision allow those who secretly hoped the Act would be struck down to cast a politically convenient vote for LIVA? It is hard to answer that question with confidence. As the previous analysis suggested, LIVA was crafted so it could not substantially shift power away from Congress and to the executive branch, so the additional protection of expedited judicial challenge of a statute close to the constitutional borderline might not have been a deciding factor for many lawmakers. Furthermore, even with the expedited review provision, parties adversely affected by a cancellation could have challenged the constitutionality of the Act in court, although they would not have been guaranteed direct and speedy appeal to the Supreme Court.

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[140] 142 Cong. Rec. S2943 (daily ed. Mar. 27, 1996). See also Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 St. Louis U. L.J. 931, 1003 (1999).

[141] 141 Cong. Rec. S4260 (daily ed. Mar. 21, 1995) (Senator McCain, quoting Congressional Research Service memo of Johnny Killian).

Although academic criticism of Congress' constitutional performance with respect to LIVA and the expedited review provision has been pointed,[142] a close reading of the debate does not necessarily reflect unfavorably on lawmakers. However, the debate also does not demonstrate that constitutional concerns are the deciding factor in any lawmaker's vote, nor do constitutional arguments appear to change the decision that members would make on policy or partisan grounds. Constitutionality loomed as a concern but did not fundamentally shape the final legislation. As some wished and others feared, the Court ultimately decided the fate of LIVA. With a divided vote and strongly worded opinions that demonstrated that the justices also found *Clinton v. City of New York* to be a close case, the Court struck down LIVA, at least to the extent it allowed cancellation of limited tax benefits and new direct spending programs.[143]

V. Conclusion

After *Clinton v. City of New York*, the Line Item Veto Act of 1996 was no long part of the federal budget process, but the story of its enactment should not be forgotten. In fact, the story may yet have a sequel. Since the Supreme Court struck down the President's use of cancellation directed toward tax expenditures and entitlement programs, the President has continued to request some sort of line item veto power in the Budget he sends each year to Congress. President Bush has sometimes asked for a constitutional amendment to give him the same power that state governors have; in other years, he has asked Congress to delegate him some sort of enhanced rescission power that would act like a line item veto. It is possible that Congress could still comply with his second request either by using the Senate's separate enrollment mechanism that has not been considered by the Court, or by applying enhanced rescission authority only to annually appropriated items which are the traditional targets of presidential cancellation power and were not explicitly considered by the Court.

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[142] See, e.g., Fisher, supra note 140; Devins & Fitts, supra note 44.

[143] No cancellation of discretionary spending was challenged in court, and the Supreme Court did not take a position on this part of the Act. McCain's severability clause, which the Senate had attached to Simon's judicial review amendment, was dropped without explanation in conference committee, but the Supreme Court explicitly did not consider whether cancellation of discretionary spending was severable from the rest of the statute. *Clinton*, 524 U.S. at 448 n. 43. All have assumed, however, that LIVA in its entirety was struck down.

Whether Congress will pass such a bill now is unclear; it is certainly more likely in a period of substantial federal deficits. Moreover, Congress is apt to seriously consider this sort of delegation to the executive branch when the same party controls both houses of Congress and the presidency. The story of the first LIVA will provide guidance about the possible obstacles in such a bill's way. At the very least, Congress has probably learned a valuable lesson in choosing titles for its budget process innovations: any new enhanced rescission bill should be named something other than "The Line Item Veto Act." Beyond that, the end of the federal line item veto story is yet to be written.