CLINTON v. NEW YORK

SUPREME COURT OF THE UNITED STATES
524 U.S. 417
June 25, 1998
[6 - 3]

OPINION: JUSTICE STEVENS...The Line Item Veto Act...was enacted in April 1996 and became effective on January 1, 1997...The President exercised his authority to cancel one provision in the Balanced Budget Act of 1997 and two provisions in the Taxpayer Relief Act of 1997. Appellees, claiming that they had been injured by two of those cancellations, filed these cases in the District Court. That Court...held the statute invalid...We agree that the cancellation procedures set forth in the Act violate the **Presentment Clause, Art. I, § 7, cl. 2**, of the Constitution.

...The District Court held that the cancellations did not conform to the constitutionally mandated procedures for the enactment or repeal of laws in two respects. First, the laws that resulted after the cancellations "were different from those consented to by both Houses of Congress." Moreover, the President violated Article I "when he unilaterally canceled provisions of duly enacted statutes." As a separate basis for its decision, the District Court also held that the Act "impermissibly disrupts the balance of powers among the three branches of government."

...The Line Item Veto Act gives the President the power to "cancel in whole" three types of provisions that have been signed into law: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." It is undisputed that the New York case involves an "item of new direct spending" and that the Snake River case involves a "limited tax benefit" as those terms are defined in the Act. It is also undisputed that each of those provisions had been signed into law pursuant to Article I, §7, of the Constitution before it was canceled.

The Act requires the President to adhere to precise procedures whenever he exercises his cancellation authority. In identifying items for cancellation he must consider the legislative history, the purposes, and other relevant information about the items. He must determine, with respect to each cancellation, that it will "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." Moreover, he must transmit a special message to Congress notifying it of each cancellation within five calendar days...after the enactment of the canceled

provision. It is undisputed that the President meticulously followed these procedures in these cases.

A cancellation takes effect upon receipt by Congress of the special message from the President. If, however, a "disapproval bill" pertaining to a special message is enacted into law, the cancellations set forth in that message become "null and void." The Act sets forth a detailed expedited procedure for the consideration of a "disapproval bill," but no such bill was passed for either of the cancellations involved in these cases. A majority vote of both Houses is sufficient to enact a disapproval bill. The Act does not grant the President the authority to cancel a disapproval bill, but he does, of course, retain his constitutional authority to **veto** such a bill...

In both legal and practical effect, the President has amended two Acts of Congress by repealing a portion of each. "Repeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha (1983).* **There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.** Both Article I and Article II assign responsibilities to the President that directly relate to the lawmaking process, but neither addresses the issue presented by these cases. The President "shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient..." Art. II, §3. Thus, he may initiate and influence legislative proposals. Moreover, after a bill has passed both Houses of Congress, but "before it becomes a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, §7, cl. 2. His "return" of a bill, which is usually described as a "veto," is subject to being overridden by a **two-thirds vote** in each House.

There are important differences between the President's "return" of a bill pursuant to Article I, §7, and the exercise of the President's cancellation authority pursuant to the Line Item Veto Act. **The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law.** The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.

There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition. The procedures governing the enactment of statutes set forth in the text of Article I were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only "be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha.* Our first President understood the text of the **Presentment Clause** as requiring that he either "approve all the parts of a Bill, or reject it in toto." What has emerged in these cases from the President's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.

At oral argument, the Government suggested that the cancellations at issue in these cases do not effect a "repeal" of the canceled items because under the special "lockbox" provisions of the Act, a canceled item "retains real, legal budgetary effect" insofar as it prevents Congress and the President from spending the savings that result from the cancellation. The text of the Act expressly provides, however, that a cancellation prevents a direct spending or tax benefit provision "from having legal force or effect." That a canceled item may have "real, legal budgetary effect" as a result of the lockbox procedure does not change the fact that by canceling the items at issue in these cases, the President made them entirely inoperative as to appellees. Section 968 of the Taxpayer Relief Act no longer provides a tax benefit, and §4722(c) of the Balanced Budget Act of 1997 no longer relieves New York of its contingent liability. Such significant changes do not lose their character simply because the canceled provisions may have some continuing financial effect on the Government. The cancellation of one section of a statute may be the functional equivalent of a partial repeal even if a portion of the section is not canceled.

The Government advances two related arguments to support its position that despite the unambiguous provisions of the Act, cancellations do not amend or repeal properly enacted statutes in violation of the Presentment Clause. First, relying primarily on *Field v. Clark (1892),* the Government contends that the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the previously enacted Line Item Veto Act. Second, the Government submits that the substance of the authority to cancel tax and spending items "is, in practical effect, no more and no less than the power to 'decline to spend' specified sums of money, or to 'decline to implement' specified tax measures." Neither argument is persuasive.

In *Field* v. *Clark*, the Court upheld the constitutionality of the Tariff Act of 1890. That statute contained a "free list" of almost 300 specific articles that were exempted from import duties "unless otherwise specially provided for in this act." Section 3 was a special provision that directed the President to suspend that exemption for sugar, molasses, coffee, tea, and hides "whenever, and so often" as he should be satisfied that any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be "reciprocally unequal and unreasonable..." The section then specified the duties to be imposed on those products during any such suspension. The Court provided this explanation for its conclusion that §3 had not delegated legislative power to the President:

> "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President...When he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. **He had no discretion...**except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress. As the suspension was absolutely required when the President ascertained the existence of

> a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws...It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

This passage identifies three critical differences between the power to suspend the exemption from import duties and the power to cancel portions of a duly enacted statute. First, the exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed: the imposition of "reciprocally unequal and unreasonable" import duties by other countries. In contrast, the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes. Second, under the Tariff Act, when the President determined that the contingency had arisen, he had a duty to suspend; in contrast, while it is true that the President was required by the Act to make three determinations before he canceled a provision, those determinations did not qualify his discretion to cancel or not to cancel. Finally, whenever the President suspended an exemption under the Tariff Act, he was executing the policy that Congress had embodied in the statute. In contrast, whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own policy judgment. Thus, the conclusion in *Field* v. *Clark* that the suspensions mandated by the Tariff Act were not exercises of legislative power does not undermine our opinion that cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, §7...

The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, §7. The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, §7, without amending the Constitution.

Neither are we persuaded by the Government's contention that the President's authority to cancel new direct spending and tax benefit items is no greater than his traditional authority to decline to spend appropriated funds. The Government has reviewed in some detail the series of statutes in which Congress has given the Executive broad discretion over the expenditure of appropriated funds. For example, the First Congress appropriated "sums not exceeding" specified amounts to be spent on various Government operations. In those statutes, as in later years, the President was given wide discretion with respect to both the amounts to be spent and how the money would be allocated among different functions. It is argued that the Line Item Veto Act merely confers comparable discretionary authority over the expenditure of appropriated funds. The critical difference between this statute and all of its predecessors, however, is that unlike any of them, this Act gives the President the unilateral power to change the text of duly enacted statutes. None of the Act's

predecessors could even arguably have been construed to authorize such a change.

...**If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become a law," such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.** *U.S. Term Limits, Inc. v. Thornton* (1995)[1]. The judgment of the District Court is affirmed.

CONCURRENCE: JUSTICE KENNEDY...I write to respond to my colleague JUSTICE BREYER, who observes that the statute does not threaten the liberties of individual citizens, a point on which I disagree. The argument is related to his earlier suggestion that our role is lessened here because the two political branches are adjusting their own powers between themselves. To say the political branches have a somewhat free hand to reallocate their own authority would seem to require acceptance of two premises: first, that the public good demands it, and second, that liberty is not at risk. The former premise is inadmissible. The Constitution's structure requires a stability which transcends the convenience of the moment. The latter premise, too, is flawed. Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.

Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty...

It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

The principal object of the statute, it is true, was not to enhance the President's power to reward one group and punish another, to help one set of taxpayers and hurt another, to favor one State and ignore another. Yet these are its undeniable effects. The law establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress. The law...enhances the President's powers beyond what the Framers would have endorsed.

It is no answer, of course, to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish. That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. Abdication of responsibility is not part of the constitutional design...

By increasing the power of the President beyond what the Framers envisioned, the statute

---

[1]Case 1-4 on this website.

compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.

The Constitution is not bereft of controls over improvident spending. Federalism is one safeguard, for political accountability is easier to enforce within the States than nationwide. The other principal mechanism, of course, is control of the political branches **by an informed and responsible electorate**.

> "By an informed and responsible electorate?" Of course, the corollary is that an uninformed and irresponsible electorate will lose control of the political branches, right? That is where ELL comes in — one community at a time.

Whether or not federalism and control by the electorate are adequate for the problem at hand, they are two of the structures the Framers designed for the problem the statute strives to confront. The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that these mechanisms, plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device. With these observations, I join the opinion of the Court.

DISSENT: JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join as to Part III, dissenting.

I

...In my view the Line Item Veto Act does not violate any specific textual constitutional command, nor does it violate any implicit Separation of Powers principle. Consequently, I believe that the Act is constitutional.

II

I approach the constitutional question before us with three general considerations in mind. *First*, the Act represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power. In that time period, our population was less than four million; federal employees numbered fewer than 5,000; annual federal budget outlays totaled approximately $4 million and the entire operative text of Congress's first general appropriations law read as follows:

> "Be it enacted...that there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon

> the several states, or from the duties on import and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids."

At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million; the Federal Government employs more than four million people; the annual federal budget is $1.5 trillion; and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. **Thus, the question is whether the Constitution permits Congress to choose a particular novel *means* to achieve this same, constitutionally legitimate, *end.***

Second, the case in part requires us to focus upon the Constitution's generally phrased structural provisions, provisions that delegate all "legislative" power to Congress and vest all "executive" power in the President. The Court, when applying these provisions, has interpreted them generously in terms of the institutional arrangements that they permit...

Indeed, Chief Justice Marshall, in a well-known passage, explained,

> "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch v. Maryland* (1819).[2]

This passage...calls attention to the genius of the Framers' pragmatic vision, which this Court has long recognized in cases that find constitutional room for necessary institutional innovation.

Third, we need not here referee a dispute among the other two branches. And, as the majority points out,

---

[2]Case 1-7 on this website.

> "When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons."

Youngstown Sheet and Tube Co.[3] **(Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress...[and when] the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum")...**

The background circumstances also mean that we are to interpret nonliteral Separation of Powers principles in light of the need for "workable government." *Youngstown*. If we apply those principles in light of that objective, as this Court has applied them in the past, the Act is constitutional.

III

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

> Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws.
>
> Minor Premise: The Act authorizes the President to "repeal or amend" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law.
>
> Conclusion: The Act is inconsistent with the Constitution.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled" the two appropriation measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply *followed* the law, leaving the statutes, as they are literally written, intact.

To understand why one cannot say, *literally speaking*, that the President has repealed or amended any law, imagine how the provisions of law before us might have been, but were not, written. Imagine that the canceled New York health care tax provision at issue here, had instead said the following:

> Section One. Taxes...that were collected by the State of New York from a health care provider before June 1, 1997 and for which a waiver of provisions [requiring payment] have been sought...are deemed to be permissible health care related taxes...provided however that the President may prevent the just-mentioned provision

[3]Case 2-13 on this website.

from having legal force or effect if he determines x, y and z**.** (Assume x, y and z to be the same determinations required by the Line Item Veto Act).

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who "prevents" the deeming language from "having legal force or effect" has either *repealed* or *amended* this particular hypothetical statute. Rather, the President has *followed* that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say referenced by an asterisk, with a statement that it applies to every spending provision in the act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier-enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula...

Literally speaking, the President has not "repealed" or "amended" anything. He has simply *executed* a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution. *Field v. Clark (1892)* (President's power to raise tariff rates "*was a part of the law itself, as it left the hands of Congress*.")...

This is not the first time that Congress has delegated to the President or to others this kind of power -- a contingent power to deny effect to certain statutory language...

Examples omitted due to length...

All of these examples, like the Act, delegate a power to take action that will render statutory provisions "without force or effect." Every one of these examples, like the present Act, delegates the power to choose between alternatives, each of which the statute spells out in some detail. None of these examples delegates a power to "repeal" or "amend" a statute, or to "make" a new law. Nor does the Act. Rather, the delegated power to nullify statutory language was *itself* created and defined by Congress, and included in the statute books on an equal footing with (indeed, as a component part of) the sections that are potentially subject to nullification. As a Pennsylvania court put the matter more than a century ago: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power." *Locke's Appeal(1873)...*

IV

Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles -- principles that arise out of the Constitution's vesting of the "executive Power" in "a President," U.S. Const., Art. II, § 1, and "all legislative Powers" in "a Congress," Art. I, § 1. There are three relevant Separation of Powers questions here:

(1) Has Congress given the President the wrong kind of power, *i.e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the citizen's representatives in Congress," upon which JUSTICE KENNEDY properly insists. And with respect to *this* Act, the answer to all these questions is "no."

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority -- to spend or not to spend appropriations, to change or not to change tariff rates -- that Congress has frequently granted the President, any differences being differences in degree, not kind.

The fact that one could also characterize this kind of power as "legislative," say, if Congress itself (by amending the appropriations bill) prevented a provision from taking effect, is beside the point. This Court has frequently found that the exercise of a particular power, such as the power to make rules of broad applicability...or to adjudicate claims...can fall within the constitutional purview of more than one branch of Government. *Wayman v. Southard (1825)* (Marshall, C. J.) ("Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself"). The Court does not "carry out the distinction between legislative and executive action with mathematical precision" or "divide the branches into watertight compartments" for, as others have said, the Constitution "blends" as well as "separates" powers in order to create a workable government...

If there is a Separation of Powers violation, then, it must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant Separation of Powers objective. The Act does not undermine what this Court has often described as the principal function of the Separation of Powers, which is to maintain the tripartite structure of the Federal Government -- and thereby protect individual liberty -- by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."...

In contrast to these cases, one cannot say that the Act "encroaches" upon Congress' power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply...Congress also retained the power to "disapprove," and thereby reinstate, any of the President's cancellations. And it is Congress that drafts and enacts the appropriations statutes that are subject to the Act in the first place -- and thereby defines the outer limits of the President's cancellation authority. Thus *this* Act is not the sort of delegation "without... sufficient check" that concerns JUSTICE KENNEDY. Indeed, the President acts only in response to, and on the terms set by, the Congress...

Nor can one say the Act's grant of power "aggrandizes" the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from

generally applicable tax law from taking effect. These powers, as I will explain in detail, resemble those the President has exercised in the past on other occasions. The delegation of those powers to the President may strengthen the Presidency, but any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld...

The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. The Constitution permits Congress to "seek assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to act is directed to conform." *J. W. Hampton*.

The Act before us seeks to create such a principle in three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts or...items...for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things, "the legislative history, construction, and purposes of the law which contains those amounts or items, and...any specific sources of information referenced in such law or...the best available information..."

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and...special tax breaks."

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit;...not impair any essential Government functions; and...not harm the national interest."

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader...The case before us...is limited to one area of government, the budget, and it seeks to give the President the power, in one portion of that budget, to tailor spending and special tax relief to what he concludes are the demands of fiscal responsibility. Nor is the standard that governs his judgment, though broad, any broader than the standard that currently governs the award of television licenses, namely "public convenience, interest, *or* necessity." To the contrary, (a) the broadly phrased limitations in the Act, together with (b) its evident deficit reduction purpose, and (c) a procedure that guarantees Presidential awareness of the reasons for including a particular provision in a budget bill, taken together, guide the President's exercise of his discretionary powers...

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment,

repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.

CONCURRENCE/DISSENT: JUSTICE SCALIA, with whom JUSTICE O'CONNOR joins, and with whom JUSTICE BREYER joins as to Part III...I find the President's cancellation of spending items to be entirely in accord with the Constitution...

I do not believe that Executive cancellation of this item of direct spending violates the Presentment Clause.

The Presentment Clause requires, in relevant part, that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it," U.S. Const., Art. I, § 7, cl. 2. There is no question that enactment of the Balanced Budget Act complied with these requirements: the House and Senate passed the bill, and the President signed it into law. It was only *after* the requirements of the Presentment Clause had been satisfied that the President exercised his authority under the Line Item Veto Act to cancel the spending item. Thus, the Court's problem with the Act is not that it authorizes the President to veto parts of a bill and sign others into law, but rather that it authorizes him to "cancel" -- prevent from "having legal force or effect" -- certain parts of **duly enacted statutes**.

Article I, §7 of the Constitution obviously prevents the President from cancelling a law that Congress has not authorized him to cancel. Such action cannot possibly be considered part of his execution of the law, and if it is legislative action, as the Court observes, "repeal of statutes, no less than enactment, must conform with Art. I." But that is not this case. It was certainly arguable, as an original matter, that Art. I, §7 also prevents the President from cancelling a law which itself *authorizes* the President to cancel it. But as the Court acknowledges, that argument has long since been made and rejected...The Tariff Act of 1890 authorized the President to "suspend, by proclamation to that effect" certain of its provisions if he determined that other countries were imposing "reciprocally unequal and unreasonable" duties. This Court upheld the constitutionality of that Act in *Field v. Clark...*

As much as the Court goes on about Art. I, §7, therefore, that provision does not demand the result the Court reaches...It is this doctrine [of unconstitutional delegation of legislative authority], and not the Presentment Clause, that was discussed in the *Field* opinion, and it is this doctrine, and not the Presentment Clause, that is the issue presented by the statute before us here. That is why the Court is correct to distinguish prior authorizations of Executive cancellation, such as the one involved in *Field*, on the ground that they were contingent upon an Executive finding of fact, and on the ground

that they related to the field of foreign affairs, an area where the President has a special "degree of discretion and freedom." These distinctions have nothing to do with whether the details of Art. I, §7 have been complied with, but everything to do with whether the authorizations went too far by transferring to the Executive a degree of political, law-making power that our traditions demand be retained by the Legislative Branch.

I turn, then, to the crux of the matter: whether Congress's authorizing the President to cancel an item of spending gives him a power that our history and traditions show must reside exclusively in the Legislative Branch. I may note, to begin with, that the Line Item Veto Act is not the first statute to authorize the President to "cancel" spending items. In *Bowsher v. Synar,* we addressed the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985, which required the President, if the federal budget deficit exceeded a certain amount, to issue a "sequestration" order mandating spending reductions specified by the Comptroller General. The effect of sequestration was that "amounts sequestered...shall be *permanently cancelled*." We held that the Act was unconstitutional, not because it impermissibly gave the Executive legislative power, but because it gave the Comptroller General, an officer of the Legislative Branch over whom Congress retained removal power, "the ultimate authority to determine the budget cuts to be made," "functions...*plainly entailing execution of the law in constitutional terms*." The President's discretion under the Line Item Veto Act is certainly broader than the Comptroller General's discretion was under the 1985 Act, but it is no broader than the discretion traditionally granted the President in his execution of spending laws.

Insofar as the degree of political, "law-making" power conferred upon the Executive is concerned, **there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the Founding of the Nation.** From 1789-1791, the First Congress made lump-sum appropriations for the entire Government -- "sums not exceeding" specified amounts for broad purposes. From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. In 1803, it appropriated $50,000 for the President to build "not exceeding fifteen gun boats, to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require." President Jefferson reported that "the sum of fifty thousand dollars appropriated by Congress for providing gun boats remains unexpended. The favorable and peaceable turn of affairs on the Mississippi rendered an immediate execution of that law unnecessary." Examples of appropriations committed to the discretion of the President abound in our history. During the Civil War, an Act appropriated over $76 million to be divided among various items "as the exigencies of the service may require." During the Great Depression, Congress appropriated $950 million "for such projects and/or purposes and under such rules and regulations as the President in his discretion may prescribe" and $4 billion for general classes of projects, the money to be spent "in the discretion and under the direction of the President," Emergency Relief Appropriation Act of 1935. The constitutionality of such appropriations has never seriously been questioned. Rather, "that Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriations and other acts of

Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies." *Cincinnati Soap Co. v. United States (1937).*

Certain Presidents have claimed Executive authority to withhold appropriated funds even *absent* an express conferral of discretion to do so. In 1876, for example, President Grant reported to Congress that he would not spend money appropriated for certain harbor and river improvements because "under no circumstances would he allow expenditures upon works not clearly national," and in his view, the appropriations were for "works of purely private or local interest, in no sense national," 4 Cong. Rec. 5628. President Franklin D. Roosevelt impounded funds appropriated for a flood control reservoir and levee in Oklahoma. President Truman ordered the impoundment of hundreds of millions of dollars that had been appropriated for military aircraft. President Nixon, the Mahatma Ghandi of all impounders, asserted at a press conference in 1973 that his "constitutional right" to impound appropriated funds was "absolutely clear." Our decision two years later in *Train v. City of New York (1975),* proved him wrong, but it implicitly confirmed that Congress may confer discretion upon the executive to withhold appropriated funds, even funds appropriated for a specific purpose. The statute at issue in *Train* authorized spending "not to exceed" specified sums for certain projects, and directed that such "sums authorized to be appropriated...shall be allotted" by the Administrator of the Environmental Protection Agency. Upon enactment of this statute, the President directed the Administrator to allot no more than a certain part of the amount authorized. This Court held, as a matter of statutory interpretation, that the statute did *not grant* the Executive discretion to withhold the funds, but required allotment of the full amount authorized.

The short of the matter is this: Had the Line Item Veto Act authorized the President to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead -- authorizing the President to "cancel" an item of spending -- is technically different. But the technical difference does *not* relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which *is* at issue here, is preeminently *not* a doctrine of technicalities. 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, has succeeded in faking out the Supreme Court. The President's action it authorizes in fact is not a line-item veto and thus does not offend Art. I, §7; and insofar as the substance of that action is concerned, it is no different from what Congress has permitted the President to do since the formation of the Union.

I would hold that the President's cancellation of §4722(c) of the Balanced Budget Act as an item of direct spending does not violate the Constitution. Because I find no party before us who has standing to challenge the President's cancellation of §968 of the Taxpayer Relief Act, I do not reach the question whether that violates the Constitution. For the foregoing reasons, I respectfully dissent.