

Note

The Constitutionality of an Expedited Rescission Act: The New Line Item Veto or a New Constitutional Method of Achieving Deficit Reduction?

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“Spending is out of control and it is time that Congress put its money where its mouth is when it comes to reigning [sic] in spending.”¹

Introduction

In 1998, the Supreme Court considered a challenge to the Line Item Veto Act of 1996,² which gave the President unilateral authority to rescind certain spending provisions already enacted into law, and found it unconstitutional. Nonetheless, in March 2006, President George W. Bush sent Congress legislation that would give him what he considered to be a constitutional line item veto, which would allow him to do two things: (1) reduce wasteful spending and (2) improve accountability for earmarks that are slipped into bills at the last minute.³

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¹ 153 CONG. REC. S344 (daily ed. Jan. 10, 2007) (statement of Sen. Allard).

² Line Item Veto Act of 1996, 2 U.S.C. § 691 (2000), *invalidated* by Clinton v. City of New York, 524 U.S. 417 (1998).

³ Press Release, Office of the Press Sec’y, White House, Press Briefing on the President’s

Traditional line item veto authority, like the Line Item Veto Act, provides the necessary tool to achieve those goals by granting the President great power over congressional spending.⁴ In *Clinton v. City of New York*,⁵ however, the Supreme Court found the line item veto to violate separation of powers principles because, simply put, Congress had unconstitutionally abdicated its legislative power to the President.⁶

President Bush's proposed legislation, however, is different. This legislation does not propose the same power provided by the Line Item Veto Act, but rather President Bush has requested expedited rescission power: the power to propose rescissions of spending provisions already enacted into law, which are then required to receive an up-or-down vote by Congress through a fast-track procedure.⁷ The President already has the authority to propose rescissions of enacted law to Congress under the Congressional Budget and Impoundment Control Act of 1974 ("Impoundment Control Act").⁸ The Impoundment Control Act does not, however, require that Congress vote on the President's proposed rescission package.⁹ What President Bush's proposed legislation does is simply guarantee that the proposals are voted on in a timely manner.

In addition to the President's proposed legislation, members of the House of Representatives and Senate introduced their own versions of an expedited rescission proposal in 2007 during the 110th Congress.¹⁰ Because these three expedited rescission proposals require that all savings achieved from the rescissions go to deficit reduc-

Line-Item Veto Legislation by OMB Director Josh Bolten (Mar. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/03/20060306-6.html> [hereinafter Line-Item Veto Press Briefing].

⁴ Cf. Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 324–31 (1998) (describing increased presidential power after passage of Line Item Veto Act).

⁵ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁶ See *id.* at 445–46 (finding the Line Item Veto Act unconstitutional for violating the Presentment Clause of the Constitution because it allowed the President to unilaterally amend duly enacted laws without congressional action).

⁷ See Line-Item Veto Press Briefing, *supra* note 3.

⁸ 2 U.S.C. § 683 (2000).

⁹ See *id.* § 688.

¹⁰ See Legislative Line Item Veto Act of 2007, H.R. 689, 110th Cong. (2007); Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. tit. I (2007). Additionally, members of the House of Representatives and Senate introduced versions of the expedited rescission proposal in 2006 during the 109th Congress. See Legislative Line Item Veto Act of 2006, H.R. 4890, 109th Cong. (2006); Stop Over Spending Act, S. 3521, 109th Cong. § 102 (2006).

tion,¹¹ the President, with Congress's approval, can eliminate wasteful provisions without having to veto an entire bill that contains important provisions. This authority, therefore, is essential to controlling the excessive spending that is causing the debilitating deficit in our country, which has reached \$248 billion.¹²

Although these expedited rescission authority proposals are more viable than standard line item veto authority, they still must be constitutional to avoid the fate met by the Line Item Veto Act in 1998. One potential problem is that all three proposals contain withholding provisions that permit the President to withhold allocated funds for an extended period of time beyond the time necessary for congressional action to vote for or against the President's proposal. Specifically, the President is permitted to start withholding from the time he sends his rescission proposal to Congress, but the proposals differ in the length of the withholding period, ranging from 45 days to 180 days.¹³ The withholding provisions of these expedited rescission proposals are likely unconstitutional because their practical effect is to unilaterally cancel allocated funds.

The Impoundment Control Act currently allows for the President to withhold funds for forty-five days while Congress is considering the proposals;¹⁴ therefore, this Note proposes that the Impoundment Control Act be amended so that its withholding period cannot be used in conjunction with the new expedited rescission authority, and the President may only chose one method or the other.

Additionally, this Note proposes that either the withholding authority be stripped from the proposals completely, or that the period be shortened to a period of fifteen days from the time the rescission package is sent to Congress, or less if Congress votes on the proposal

¹¹ See H.R. 689, § 2(a) (proposed § 1011(b)(2)(A) of the Impoundment Control Act); S. 15, § 102(a) (proposed § 1021(b)(3)(A) of the Impoundment Control Act); Legislative Line Item Veto Act of 2006, S. 2381, 109th Cong. § 2(a) (2006) (proposed § 1021(b)(2)(A) of the Impoundment Control Act).

¹² Letter from Peter R. Orszag, Dir., Cong. Budget Office, to Robert C. Byrd, Chairman, Senate Comm. on Appropriations (Mar. 2, 2007), available at http://www.cbo.gov/ftpdocs/78xx/doc7836/03-02-Prelim_Analysis.pdf.

¹³ The President's proposed expedited rescission legislation permits the President to withhold funds for 180 days. See S. 2381, § 2(a) (proposed § 1021(e) of the Impoundment Control Act). The House of Representatives's proposed legislation allows for a withholding of funds for forty-five days with the possibility for extending that period by another forty-five days. See H.R. 689, § 2(a) (proposed § 1013(a)(1), (b)(1), (c)(1), (d)(1), (e) of the Impoundment Control Act). The Senate's proposed legislation only allows for withholding of funds for forty-five days. See S. 15, § 102(a) (proposed § 1021(e)(1), (f)(1) of the Impoundment Control Act).

¹⁴ See 2 U.S.C. §§ 682–683 (2000).

sooner. This shortened period of time would only allow the President to withhold funds while Congress was considering his proposed rescission package under an expedited process, thus preventing any unnecessary withholding of funds after Congress has decided against the President's proposal.

Lastly, the Supreme Court has yet to review whether the withholding period provided in the Impoundment Control Act is constitutional. If the Court were to find the forty-five day withholding period to be constitutional, then this Note proposes that the President should only be able to withhold funds from the date Congress enacts the law appropriating those funds. Thus, if the President were to send a rescission proposal ten days after Congress enacts a law, he could only withhold those funds for thirty-five more days.

Part I of this Note explains the rationale for creating line item veto authority, discusses the history of the Line Item Veto Act of 1996—summarizing the legislation and describing generally what line item authority permits—and examines the Supreme Court's finding that the 1996 law was unconstitutional. Part II then discusses the President's 2006 proposal for expedited rescission authority, as well as the House and Senate proposals that were introduced during the first session of the 110th Congress. Lastly, Part III of this Note proposes several ways to change the Senate's proposal to ensure its constitutionality, including (1) stripping the withholding authority from the proposal entirely, (2) shortening the number of days for withholding to a period of fifteen days of session, and (3) beginning the forty-five day withholding period when Congress enacts the provisions that the President is proposing to rescind.

I. The History of the Line Item Veto Act

A. The Rationale for Line Item Veto Authority

1. The Need for Presidential Line Item Veto Authority

The constantly increasing federal deficit,¹⁵ which reached \$248 billion in 2006,¹⁶ has led every President in the past twenty-five years to advocate for some form of line item veto authority to curb the growth of the deficit.¹⁷ The increasing deficit is caused by excessive

¹⁵ The deficit is defined as “[t]he amount by which the government’s spending exceeds its revenues for a given period, usually a fiscal year (opposite of surplus).” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-05-734SP, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS 43 (2005) [hereinafter GAO GLOSSARY].

¹⁶ See Orszag, *supra* note 12.

¹⁷ CBO’s Comments on S. 2381, *the Legislative Line Item Veto Act of 2006: Hearing Before*

spending, which can be attributed, in part, to both “pork-barrel legislation”¹⁸ in appropriations bills, as well as wasteful nondiscretionary spending, such as automatic expenditures in entitlement programs.¹⁹ Proponents of line item veto authority assert that because Congress cannot be trusted to control its spending, the President must be given limited authority to reduce unnecessary and wasteful spending.²⁰

Due to the pressures of re-election, the needs of constituents, and the persuasion of powerful lobbyist groups, members of Congress consistently place their pet projects²¹ into appropriations bills.²² For example, in 2005 Senator Ted Stevens (R-AK) and Representative Don Young (R-AK) secured \$453 million for two bridges in Alaska in the 2005 Highway Bill.²³ One of the two bridges, which critics call the “Bridge to Nowhere,” connects the small town of Ketchikan (population 8900) to the even smaller island of Gravina (population 50) and

the S. Comm. on the Budget, 109th Cong. 4 (2006) [hereinafter *CBO's Comments*] (statement of Donald B. Marron, Acting Director, Congressional Budget Office), available at <http://www.cbo.gov/ftpdocs/71xx/doc7177/05-02-LineItemVeto.pdf>; see Catherine M. Lee, Note, *The Constitutionality of the Line Item Veto Act of 1996: Three Potential Sources for Presidential Line Item Veto Power*, 25 HASTINGS CONST. L.Q. 119, 124 n.26 (1997).

¹⁸ Pork-barrel legislation is legislation passed in Congress by “securing votes for legislation by which one congressman conditions his support for a colleague’s bill on the colleague’s support for his own.” Diane-Michele Krasnow, Note, *The Imbalance of Power and the Presidential Veto: A Case for the Item Veto*, 14 HARV. J.L. & PUB. POL’Y 583, 602 n.124 (1991). In other words, pork-barrel legislation occurs when “members of Congress logroll their pet projects” into legislation. See Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469, 470 (1994).

¹⁹ See Lee, *supra* note 17, at 122–23; Petrilla, *supra* note 18, at 470–72 & n.13.

²⁰ See Gordon T. Butler, *The Line Item Veto and the Tax Legislative Process: A Futile Effort at Deficit Reduction, But a Step Toward Tax Integrity*, 49 HASTINGS L.J. 1, 7–8, 103–04 (1997); Lee, *supra* note 17, at 124–25.

²¹ Pet projects are placed into appropriations bills in the form of “earmarks.” Although there is no universal definition of the term “earmark,” the Government Accountability Office defines earmarks as either (a) a collection dedicated by law for a specific purpose or program, or (b) any portion of a lump-sum amount designated for “particular purposes by means of legislative language.” GAO GLOSSARY, *supra* note 15, at 46; see also SANDY STREETER, EARMARK REFORM PROPOSALS: ANALYSIS OF LATEST VERSIONS OF S. 2349 AND H.R. 4975 1 (Cong. Research Serv. 2006) (“Earmarks are not currently defined in law or congressional rule, nor is there a single common understanding of the term ‘earmark’ accepted by all practitioners and observers of the federal budget process.”).

²² See 142 CONG. REC. S2931 (daily ed. Mar. 27, 1996) (statement of Sen. McCain) (“Mr. President, every Congressman or Senator wants to get projects for his or her district. Everyone wants not only their fair share of the Federal pie for their States, they want more. Therein lies the problem. It is an institutional problem . . . Congress created the problem and its [sic] Congress’ responsibility to fix it.”); Petrilla, *supra* note 18, at 470–71.

²³ See Shailagh Murray, *For a Senate Foe of Pork Barrel Spending, Two Bridges Too Far*, WASH. POST, Oct. 21, 2005, at A8.

cost \$223 million.²⁴ In the same bill, a \$3 million earmark was also included to fund the production of a documentary about infrastructure advancements in Alaska.²⁵

These appropriations bills are usually passed in Congress in the form of omnibus bills, which are hundreds of pages long and filled with hidden pet projects that are placed into the bills at the last minute behind closed doors during conference.²⁶ These discretionary pet projects, which often only benefit narrow constituencies, constitute thirty-eight percent of federal spending.²⁷ Much of the funding in appropriations bills, however, is important, such as funding for education.²⁸ Therefore, when a post-conference bill comes to the floor for an up-or-down vote, members of Congress cannot risk voting down a bill that contains important, valuable funding on the basis of wasteful earmarks alone.²⁹

The President faces the same problem when an omnibus appropriations bill is placed on his desk for signature. A President typically will not use his constitutional veto authority to veto a bill containing important funding because of excessive spending on special projects—such an option would not be politically viable.³⁰ According to former

²⁴ See Michael Grunwald, *Pork by Any Other Name . . .*, WASH. POST, Apr. 30, 2006, at B1; Murray, *supra* note 23.

²⁵ 151 CONG. REC. S9400 (daily ed. July 29, 2005) (statement of Sen. McCain).

²⁶ See Jeffrey H. Birnbaum, *Earmark—It's \$\$\$, Not Body Art*, WASH. POST, Feb. 3, 2006, at A17 (“[E]armarks are regularly slipped into legislation at the very end of the process—during House-Senate conference deliberations.”); Lee, *supra* note 17, at 122–23. A conference occurs when conference committees created by the two houses of Congress meet “to resolve the differences in the respective versions of any item of legislation which they both pass.” FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK’S SENATE PROCEDURE, S. DOC. NO. 101-28, at 449 (1992).

²⁷ CBO’s *Comments*, *supra* note 17, at 3.

²⁸ Cf. 153 CONG. REC. S415 (daily ed. Jan. 11, 2007) (statement of Sen. Durbin) (noting that under proposed earmark reform legislation, discretionary funding for the No Child Left Behind Act becomes suspect).

²⁹ See 153 CONG. REC. S336 (daily ed. Jan. 10, 2007) (statement of Sen. Gregg) (“Congress ends up with the vote—and we get one vote, usually, on these types of bills; sometimes in the Senate we get more shots at it. They are not scrutinized at an intensity level that they should be.”).

³⁰ See 142 CONG. REC. S2931 (daily ed. Mar. 27, 1996) (statement of Sen. McCain) (“[T]he President can no longer say, ‘I didn’t like having to spend billions on a wasteful project but it was part of a larger bill I just couldn’t say no to.’”); Petrilla, *supra* note 18, at 472. Although rare, Presidents have vetoed appropriations bills in the past. For example, in 1999, President Clinton vetoed the Foreign Operations Appropriations Bill for the upcoming fiscal year, one of thirteen appropriations bills that year. See Charles Babington & Eric Pianin, *Clinton, GOP To Meet on Budget Fight*, WASH. POST, Oct. 19, 1999, at A1. Additionally, in 1987, President Reagan vetoed the Highway Bill because it contained too many earmarks. Richard Wolf, *‘Pork Barrel’ Projects: A Battle of Will, Wallet*, USA TODAY, May 26, 2005, available at <http://www.usatoday.com/news/>

director of the Office of Management and Budget (“OMB”), Joshua Bolten, “spending legislation usually comes to the President in the form of very large bills, many of them with tens of billions of dollars of spending in them. And it is not sufficient for [Presidents] to have authority merely to veto the entire bill.”³¹ The President might not want to veto omnibus bills because doing so may cancel funding for his own executive branch or upset his constituency by canceling funding important to them due to an unrelated earmark that was attached to the bill.³² Without another option, an omnibus bill filled with wasteful spending can become law, causing the deficit to continue to grow and putting future generations at risk.

2. *Line Item Veto Authority: A Tool to Reduce the Deficit*

Providing the President with the ability to cancel individual wasteful provisions in enacted legislation without having to veto the entire bill would provide a necessary tool for deficit reduction.³³ Critics, however, argue that line item veto authority would produce relatively small savings.³⁴ In January 1992, for example, the General Accounting Office (“GAO”)³⁵ estimated that the savings from the use of a line item veto during the fiscal years 1984 through 1989 could have been \$70 billion.³⁶ After reviewing the GAO report, however,

washington/2005-05-26-highway-legislation_x.htm?csp=N009. Congress, however, overrode his veto. *Id.*

³¹ Line-Item Veto Press Briefing, *supra* note 3.

³² See Petrilla, *supra* note 18, at 475–76. For example, the President may veto an appropriations bill that contains funding to pay federal employees at airports due to an excessive earmark to help fund a local hall of fame in Oklahoma, resulting in the angering of his constituency.

³³ See 142 CONG. REC. S2931 (daily ed. Mar. 27, 1996) (statement of Sen. McCain) (“[A] President with a line-item veto could play an active role in ensuring that valuable taxpayer dollars are spent effectively to meet our national security needs, our infrastructure needs, and other social needs without pointless pork barrel spending Under a line-item veto, no one can hide.”).

³⁴ See *Line-Item Veto: Perspectives on Applications and Effects: Hearing on H.R. 4890 Before the H. Comm. on the Budget*, 109th Cong. 28–29 (2006) [hereinafter *Hearing on H.R. 4890*] (statement of James R. Horney, Senior Fellow, Center on Budget and Policy Priorities); VIRGINIA A. McMURTY, ITEM VETO: BUDGETARY SAVINGS 3 (Cong. Research Serv. 2005); RICHARD KOGAN, CTR. ON BUDGET & POLICY PRIORITIES, PROPOSED LINE-ITEM VETO LEGISLATION WOULD INVITE ABUSE BY EXECUTIVE BRANCH 5–6 (2006), available at <http://www.cbpp.org/3-23-06bud.pdf>.

³⁵ In 2004, the name of the Government Accounting Office was changed to the “Government Accountability Office.” See GAO Human Capital Reform Act of 2004 § 8, 31 U.S.C. § 702 note (Supp. IV 2006).

³⁶ McMURTY, *supra* note 34, at 3–4.

the Congressional Research Service (“CRS”) alternatively estimated the savings to be at most \$2 to \$3 billion over that same period.³⁷

Additionally, critics argue that the line item veto does not target the chief cause of the high deficit: big entitlement programs.³⁸ Because the line item veto only permits the cancellation of new entitlement programs, permanent programs—such as the three biggest spenders: Medicaid, Medicare, and Social Security—will continue to increase the deficit.³⁹ Some critics also argue that the line item veto may even invite increased spending if the President makes agreements with members of Congress not to veto their particular pet projects in exchange for support for the President’s spending policy.⁴⁰

Although the line item veto authority would not permit the cancellation of permanent entitlement spending, significant savings could be achieved from the cancellation of other direct spending and especially discretionary spending found in appropriations bills. For example, during the Clinton administration, President Clinton used his line item veto authority to cancel several discretionary appropriations, new items of direct spending, and targeted tax benefits before the Supreme Court ruled the Line Item Veto Act unconstitutional.⁴¹ President Clinton’s cancellations totaled almost \$600 million over the period covered.⁴² The number would have been higher if Congress had accepted all of President Clinton’s cancellations.⁴³ Although this is nowhere near the \$70 billion estimated by the GAO for the five-year period in the 1980s,⁴⁴ \$600 million is still a significant amount of money saved.

This line item veto authority is even more important now due to the dramatic growth of earmarks in appropriations bills.⁴⁵ According to a report by CRS, the number of earmarks has grown from 4155 valued at \$29 billion in 1994 to 14,211 worth \$53 billion a decade later.⁴⁶ Line item veto power would give the President the ability to prevent wasteful spending in unnecessary earmarks. In sum, the line

³⁷ *Id.* at 4.

³⁸ *See, e.g., Hearing on H.R. 4890, supra* note 34, at 28 (statement of James R. Horney, Senior Fellow, Center on Budget and Policy Priorities).

³⁹ *See id.*

⁴⁰ *See id.* at 28–29; MCMURTY, *supra* note 34, at 3; KOGAN, *supra* note 34, at 6.

⁴¹ MCMURTY, *supra* note 34, at 4.

⁴² *See id.*

⁴³ *Id.*

⁴⁴ *See supra* text accompanying note 36.

⁴⁵ *See* Line-Item Veto Press Briefing, *supra* note 3 (“Since 1996, when the [Line Item Veto Act] was struck down, earmarks have increased dramatically . . .”).

⁴⁶ Birnbaum, *supra* note 26.

item veto produces savings, even if a small amount, which is better than no savings at all.⁴⁷

B. Summary of the Line Item Veto Act of 1996

In 1996, Congress passed the Line Item Veto Act, which President Clinton signed into law on April 9, 1996.⁴⁸ The Act significantly expanded the President's veto power. Normally, once Congress passes a bill,⁴⁹ the bill is presented to the President for signature.⁵⁰ The President may choose to sign the bill into law or veto the entire bill by sending it back to Congress.⁵¹ If the President vetoes the bill, the bill can only be enacted into law if Congress overrides the veto by a two-thirds vote in each House.⁵²

Under the Line Item Veto Act, however, the President could re-examine all bills after they had been enacted into law and cancel three types of provisions contained therein⁵³: any dollar amount of discretionary budget authority,⁵⁴ any item of new direct spending,⁵⁵ and any

⁴⁷ See Petrilla, *supra* note 18, at 472 (“However, more savings would be achieved with the item veto than without it Over the long term, the savings would add up.”).

⁴⁸ Line Item Veto Act of 1996, 2 U.S.C. § 691 (2000), *invalidated* by *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁴⁹ As required by the Constitution, a bill must pass both the House of Representatives and the Senate to be presented to the President for signature. See U.S. CONST. art. I, § 7, cl. 2.

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See 2 U.S.C. § 691(a) (2000), *invalidated* by *Clinton v. City of New York*, 524 U.S. 417 (1998). By allowing the President to reject individual provisions of a law, the Line Item Veto Act expanded the President's constitutional authority, which only permits the President to veto an entire bill.

⁵⁴ An amount of discretionary budget authority refers to the “level of budget authority, outlays, or other budgetary resources (other than those which fund mandatory programs) that are provided in, and controlled by, appropriation acts.” GAO GLOSSARY, *supra* note 15, at 46. An appropriations act is “[a] statute, under the jurisdiction of the House and Senate Committees on Appropriations, that generally provides legal authority for federal agencies to incur obligations and to make payments out of the Treasury for specified purposes.” *Id.* at 13.

⁵⁵ Direct spending is an “entitlement authority, the Food Stamp program, and budget authority provided by law other than appropriations acts.” *Id.* at 44–45 (citing Balanced Budget and Emergency Deficit Control Act of 1985, 2 U.S.C. § 900(c)(8) (2000)). An entitlement authority includes “the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law.” Impoundment Control Act, 2 U.S.C. § 622(9)(A) (2000). Budget authority is “[a]uthority provided by federal law to enter into financial obligations that will result in immediate or future outlays involving federal government funds.” GAO GLOSSARY, *supra* note 15, at 20.

limited tax benefit.⁵⁶ To cancel any of these provisions, the Act required the President to send a “special message” to the House of Representatives and the Senate notifying Congress of the cancellation within five calendar days of the law’s enactment.⁵⁷ The cancellation would then take effect upon Congress’s receipt of the President’s special message.⁵⁸ The Act thus provided the President with two veto opportunities: first, the President could veto an entire bill when presented to him for signature, and second, the President could veto specific provisions of a bill after signing the bill into law.

Similar to a normal veto, Congress could “override” the President’s line item veto by passing a disapproval bill if it did not agree with any of the cancellations.⁵⁹ The disapproval bill, however, still had to be signed into law by the President.⁶⁰ The President, therefore, had the ability to veto the disapproval bill. If the President vetoed a disapproval bill, Congress could have overridden the veto with a two-thirds vote, like in the normal veto-and-override process.⁶¹ If, however, a disapproval bill became law, the President was prohibited from canceling the specific items included in the disapproval bill again.⁶²

C. Clinton v. City of New York

Despite its value as a deficit reduction tool, the Supreme Court found the Line Item Veto Act unconstitutional by a 6–3 decision in *Clinton v. City of New York*.⁶³ The city of New York, and others,⁶⁴ sued federal officials and President Clinton in a consolidated case af-

⁵⁶ A limited tax benefit is “(i) any revenue-losing provision which provides a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries under [the Internal Revenue Code] in any fiscal year for which the provision is in effect; and (ii) any Federal tax provision which provides temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year from a change to [the Internal Revenue Code].” 2 U.S.C. § 691e(9)(A) (2000), *invalidated on other grounds by Clinton v. City of New York*, 524 U.S. 417 (1998).

⁵⁷ *Id.* § 691(a)(B).

⁵⁸ *See id.* § 691b(a).

⁵⁹ *See id.* The Line Item Veto Act provided an expedited process for congressional consideration of a special message to disapprove of the President’s cancellations. *See id.* § 691d. The Act provided Congress a review period of thirty calendar days of session beginning on the first calendar day of session after receiving the President’s special message. *Id.* § 691d(b)(1). For either House to consider a disapproval bill, it had to be introduced no later than the fifth calendar day of session following the thirty-day review period. *Id.* § 691d(c)(1).

⁶⁰ *See id.* § 691b(a).

⁶¹ *See id.* (stating that a disapproval bill must be “enacted into law”); U.S. CONST. art. I, § 7, cl. 2.

⁶² *See id.* § 691(c).

⁶³ *Clinton v. City of New York*, 524 U.S. 417 (1998).

⁶⁴ Other plaintiffs included a hospital, two hospital associations, two health care employee unions, a farmers’ cooperative, and an individual farmer. *Id.* at 425.

ter the President exercised his line item veto authority.⁶⁵ The Court held that the Line Item Veto Act violated Article I, Section 7 of the Constitution.⁶⁶

The Court found that the Constitution expressly authorizes the President to participate in the enactment process but is silent on whether a President may unilaterally act to either repeal or amend parts of duly enacted law.⁶⁷ After reviewing the historical background of Article I of the Constitution, the Court held that the constitutional silence should be construed as an express prohibition.⁶⁸ Using history as its support, the Court concluded that “the power to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure’”⁶⁹; namely, that mandated by Article I. The Court, in addition, found that “[r]epeal of statutes, no less than enactment, must conform with Art[icle] I.”⁷⁰

In accordance with the Court’s holding, a cancellation of a spending provision through the use of a line item veto—akin to the repeal of a law—must meet two requirements of Article I: bicameralism and presentment.⁷¹ Bicameralism demands that the House of Representatives and Senate must pass every bill before it becomes a law.⁷² The Presentment Clause demands that after Congress passes a bill, the bill must be presented to the President to (1) be signed into law, (2) be returned to Congress with his objections, or (3) have no action taken, whereupon the bill becomes law if Congress has not adjourned before the bill’s ten-day return limit has expired.⁷³ In holding the Line Item Veto Act unconstitutional, the Court agreed with former President George Washington that the Presentment Clause requires a President to “either ‘approve all the parts of a Bill, or reject it in toto.’”⁷⁴

⁶⁵ *Id.* at 421. President Clinton used his line item veto authority to cancel section 4722(c) of the Balanced Budget Act of 1997 and section 968 of the Taxpayer Relief Act of 1997. *See id.* at 422–25.

⁶⁶ *See id.* at 421.

⁶⁷ *Id.* at 439. The Court noted that a President may, however, “initiate and influence legislative proposals.” *Id.* at 438.

⁶⁸ *Id.* at 439.

⁶⁹ *Id.* at 439–40 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

⁷⁰ *Id.* at 438 (quoting *Chadha*, 462 U.S. at 954).

⁷¹ *See id.*

⁷² U.S. CONST. art. I, § 7, cl. 2.

⁷³ Byrd, *supra* note 4, at 320; *see* U.S. CONST. art. I, § 7, cl. 2.

⁷⁴ *Clinton*, 524 U.S. at 440 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940)).

Therefore, under the Presentment Clause, the President may veto an entire bill but not particular provisions of his choosing.⁷⁵

The Act permitted the President to unilaterally cancel provisions of law without Congress passing a new law and presenting it to the President for signature. Therefore, the Court held that the cancellation procedures in the Act violated bicameralism and the Presentment Clause, stating that the laws produced were “not the product of the ‘finely wrought’ procedure that the Framers designed.”⁷⁶ Although the purpose of the Act was to allow the President to prevent Congress from spending wastefully, it effectively gave the President unconstitutional, unfettered, and unilateral power to change duly enacted statutes.⁷⁷

The Court expanded its separation of powers analysis by noting that the Line Item Veto Act permitted the President to usurp Congress’s power to create laws.⁷⁸ According to the Court, it was of no importance that Congress abdicated its power; the power shift still violated separation of powers principles.⁷⁹ As Justice Kennedy noted in his concurrence: “it is of no answer . . . to say that Congress surrendered its authority by its own hand [because] [t]he 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.”⁸⁰

Although it is important to curb wasteful spending to reduce the deficit, the Court found that true line item veto authority unconstitutionally permits the President to unilaterally amend duly enacted law, usurping Congress’s legislative authority. The President cannot rescind funding to achieve necessary deficit reduction without direct congressional action supporting the repeal of specific provisions of law. A new tool, therefore, is needed to eliminate increases in the

⁷⁵ See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve 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.”).

⁷⁶ *Clinton*, 524 U.S. at 440.

⁷⁷ See Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration’s Costly Failure to Seek Acknowledgment of “National Security Rescission,”* 47 AM. U. L. REV. 1273, 1302 (1998).

⁷⁸ See *Clinton*, 524 U.S. at 445–46.

⁷⁹ See *id.* (finding that the “Line Item Veto Act authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7” and “that Congress intended such a result is of no moment”).

⁸⁰ *Id.* at 451–52 (Kennedy, J., concurring).

deficit caused by wasteful discretionary spending, items of direct spending, and targeted tax benefits.

II. Expedited Rescission Authority: The New Line Item “Veto” Authority

In 2007, in response to President Bush’s request for constitutional authority to eliminate wasteful spending to reduce the deficit, bills were introduced in both the House and Senate to provide the President with expedited rescission authority, rather than line item veto authority: the Legislative Line Item Veto Act of 2007 in the House, and the Second Look at Wasteful Spending Act of 2007 (“SLAW”) in the Senate.⁸¹ Such authority would (a) allow the President to propose rescissions of spending provisions already enacted into law and (b) provide a fast-track procedure requiring Congress to vote on the President’s proposed rescissions.⁸² President Bush had previously proposed his own version of the expedited rescissions procedure, the Legislative Line Item Veto Act of 2006, on March 6, 2006.⁸³

Although each of these three proposals—the President’s proposal, the House proposal, and the Senate proposal—corrected the con-

⁸¹ See *supra* note 10 and accompanying text. Senator Judd Gregg (R-NH), Ranking Member of the Senate Committee on the Budget, introduced SLAW as an amendment to the Senate ethics reform bill. See 153 CONG. REC. S319, S336–37 (daily ed. Jan. 10, 2007) (statement of Sen. Gregg). The amendment, however, was withdrawn. Senator Gregg reintroduced SLAW as an amendment to the proposed Fair Minimum Wage Act. See 153 CONG. REC. S791–94 (daily ed. Jan. 22, 2007) (statement of Sen. Gregg). This amendment never received a vote because it failed to receive the sixty votes necessary to achieve cloture. See Michael Sandler & Alan K. Ota, *Senate: Wage Hike Must Bend for Business*, CONG. Q. TODAY (Jan. 24, 2007), available at <http://public.cq.com/docs/cqt/news110-000002436569.html>.

⁸² See Legislative Line Item Veto Act of 2007, H.R. 689, 110th Cong. § 2(a) (2007) (proposed §§ 1011(a), 1012 of the Impoundment Control Act); Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. § 102(a) (2007) (proposed § 1021(a), (c) of the Impoundment Control Act); *supra* note 7 and accompanying text. A question arises, however, as to whether Congress is truly constitutionally required to vote on the President’s proposed rescissions. See Aaron-Andrew P. Bruhl, *The New Line Item Veto Proposal: This Time It’s Constitutional (Mostly)*, 116 YALE L.J. POCKET PART 84, 85 (2006).

⁸³ See MORTON ROSENBERG, LINE-ITEM VETO: A CONSTITUTIONAL ANALYSIS OF RECENT PROPOSALS 1 (Cong. Research Serv. 2006). The House and Senate originally introduced expedited rescission authority legislation in 2006 based on the President’s proposal. See *id.*; *supra* note 10. The Senate Budget Committee introduced its own newly revised version of the legislation as Title I of the Stop Over Spending Act of 2006, a comprehensive budget reform bill. See ROSENBERG, *supra*, at 15. Although the House passed an amended version of their proposal on June 22, 2006, *id.*, the Senate failed to pass either version. Because none of the bills were passed by both houses of Congress, all three died at the end of the 109th Congress. Congress never voted on the President’s proposal, which also died at the end of the 109th Congress. This Note analyzes the President’s proposal in case a similar proposal is reintroduced.

stitutional deficiencies of the Line Item Veto Act, the proposals contain other problematic provisions.⁸⁴

A. *Constitutionality of Expedited Rescission Proposals*

Expedited rescission authority seems similar to line item veto authority because it involves presidential cancellations of spending provisions already enacted into law. It is a misnomer to call an expedited rescission a line item veto, however, because expedited rescissions lack the line item veto's fatal flaw: unilateral cancellations.

Unlike the line item veto, the expedited rescission procedure requires cancellations to meet the requirements of the elements of Article I, Section 7: bicameralism and presentment.⁸⁵ Under an expedited rescission procedure, the special message that the President sends to Congress is simply a proposal for repealing provisions of enacted law, *not* an immediate cancellation.⁸⁶ Congress is then required to consider the package and vote on the proposed rescissions through an expedited process.⁸⁷

If the vote on the proposed rescissions fails in either the House or the Senate, then the President's proposal fails, and the President is prohibited from resubmitting those rescissions.⁸⁸ If both houses of Congress pass the proposed rescissions, then, like all bills, the bill must be presented to the President for signature.⁸⁹ The proposed rescissions, therefore, can only take effect once they become signed into law, which satisfies the Presentment Clause.

⁸⁴ See ROSENBERG, *supra* note 83, at 7–8.

⁸⁵ See *supra* notes 71–73 and accompanying text.

⁸⁶ See ROSENBERG, *supra* note 83, at 7. The President is permitted to “initiate and influence legislative proposals.” *Clinton v. City of New York*, 524 U.S. 417, 438 (1998).

⁸⁷ See *supra* text accompanying note 82. Under the Senate bill, a vote on final passage of the President's proposal must occur by the thirteenth day of session after the President transmits his proposal through a special message to Congress. See S. 15, § 102(a) (proposed § 1021(c)(1)(A)–(C) of the Impoundment Control Act) (the bill must be introduced by the third day of session and a final vote must be taken on the tenth day of session after introduction). Under the House bill, a vote must occur on the tenth day of session after the President transmits his proposal through a special message to Congress. See H.R. 689, § 2(a) (proposed § 1012(a) of the Impoundment Control Act) (the bill must be introduced by the third day of session and a final vote must be taken on the seventh day of session after introduction).

⁸⁸ See H.R. 689, § 2(a) (proposed § 1011(b)(1)(C) of the Impoundment Control Act); S. 15, § 102(a) (proposed § 1021(b)(1)(A)(iii)(II) of the Impoundment Control Act). The Senate bill provides an exception that would allow one resubmission if Congress adjourns *sine die*—that is, an adjournment at the end of a year or the two-year session of a Congress—before it completes action on a bill with the President's proposal. H.R. 689, § 2(a) (proposed § 1021(b)(1)(A)(iii)(III) of the Impoundment Control Act).

⁸⁹ See U.S. CONST. art. I, § 7, cl. 2.

Simply put, under an expedited rescission procedure the President is not permitted to veto any provision of law; instead, he is allowed to propose legislation that repeals provisions of law, and Congress is required to vote up-or-down on the new legislation. If Congress votes in favor of the new legislation and the President signs the bill, then a new law is passed repealing the wasteful provisions.

Because the proposed cancellations must be made in the form of a bill passed by Congress and signed into law by the President, an expedited rescission procedure passes the constitutional scrutiny of *Clinton v. City of New York*. As Senator Judd Gregg said on the Senate floor regarding the constitutionality of the 2007 Senate proposal:

This language . . . retains to the Senate and to the House absolute authority over spending. It simply asks them, through the Executive, to take a second look at an item that might otherwise—and, in fact, for all practical purposes—never get a clear vote. It was something that was buried in some larger bill.⁹⁰

The expedited rescission procedure does not permit the President to bypass the Constitution. Under this procedure, a rescission of a duly enacted law must follow the procedures outlined in Article I, Section 7 of the Constitution.

B. Potential Constitutional Problems with Withholding and Suspension Provisions

1. The Impoundment Control Act: Current Withholding Authority

The President currently has rescission authority that is somewhat similar, although much weaker than, the proposed expedited rescission authority.⁹¹ In response to a conflict between the Nixon administration and Congress over presidential authority to impound appropriated funds, Congress reasserted its authority over spending by creating a check on presidential impoundments with the enactment

⁹⁰ 153 CONG. REC. S793 (daily ed. Jan. 22, 2007) (statement of Sen. Gregg) (referring to the Senate language when the bill was first introduced as an amendment to H.R. 2). In 1995, Senators Tom Daschle and Robert Byrd offered a substitute amendment to the Line Item Veto Act of 1996. *See id.* The Daschle amendment was an expedited rescission procedure, similar to the SLAW amendment introduced in the Senate. *See id.* The Senate amendment, however, is weaker than the Daschle amendment in terms of the power it gives the President. *See id.* In 1995, Senator Byrd stated, “The Daschle amendment does not result in any shift of power from the legislative branch to the executive. It is clear cut. It gives the President the opportunity to get a vote.” 141 CONG. REC. S4422 (daily ed. Mar. 23, 1995) (statement of Sen. Byrd).

⁹¹ *See supra* notes 7–9 and accompanying text.

of the Impoundment Control Act in 1974.⁹² Title X of the Impoundment Control Act created a rescission process that the President is required to follow to rescind appropriated funds.⁹³

Under the Impoundment Control Act, the President is permitted to submit proposals to rescind only discretionary spending authority—and not items of direct spending or targeted tax benefits—already duly enacted into law.⁹⁴ Similar to the current proposals for rescission authority, to rescind any spending provision, Congress must pass the rescission proposal and send the bill to the President to be signed into law.⁹⁵ The Impoundment Control Act gives Congress forty-five calendar days of continuous session to consider and approve the President's proposals, but it does not require Congress to vote on the proposals.⁹⁶ The current rescission authority proposals, however, require Congress to vote on the President's proposed rescissions in an expedited procedure.⁹⁷

Additionally, under the Impoundment Control Act, the President may withhold the funds that he is proposing to rescind during the forty-five day period that Congress is permitted to consider his rescission proposal.⁹⁸ The President is required to make the funds available for obligation—or simply to be spent—as soon as the forty-five day period has expired or once Congress has voted against the President's proposal.⁹⁹ Similarly, the new rescission authority proposals each contain withholding periods, ranging from 45 to 180 days, but they only

⁹² See *CBO's Comments*, *supra* note 17, at 2; Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 89 (1997). Although past Presidents have asserted an authority to impound—or to withhold spending—appropriated funds, Nixon pushed this assertion of broad impoundment power to new heights during his administration, angering Congress by challenging its authority. See Sargentich, *supra*, at 89–90; Diane P. Wood, Judge, United States Court of Appeals for the Seventh Circuit, Madison Lecture: Our 18th Century Constitution in the 21st Century World (Oct. 18, 2004), in 80 N.Y.U. L. REV. 1079, 1085 (2005). President Nixon refused to spend appropriated funds because he did not agree with the policy behind the statute—not because he thought the funding was wasteful. Sargentich, *supra*, at 90.

⁹³ See 2 U.S.C. § 683 (2000).

⁹⁴ *CBO's Comments*, *supra* note 17, at 3; see 2 U.S.C. § 683(a) (2000). Items of discretionary spending, direct spending, and targeted tax benefits may all be rescinded under the current expedited rescission proposals. See H.R. 689, § 2(a) (proposed § 1011(a) of the Impoundment Control Act); Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. § 102(a) (2007) (proposed § 1021(a) of the Impoundment Control Act); Legislative Line Item Veto Act of 2006, S. 2381, 109th Cong. § 2(a) (2007) (proposed § 1021(a), (h) of the Impoundment Control Act).

⁹⁵ See Sargentich, *supra* note 92, at 90.

⁹⁶ See 2 U.S.C. §§ 682, 688 (2000).

⁹⁷ See *CBO's Comments*, *supra* note 17, at 4.

⁹⁸ See 2 U.S.C. § 683 (2000). The Supreme Court has never ruled on the constitutionality of the forty-five day withholding period.

⁹⁹ *Id.* § 683(b); *CBO's Comments*, *supra* note 17, at 1–2.

require funds to be made available once the withholding periods have expired, even if Congress has already voted on the rescission proposal.¹⁰⁰

The rescission power currently available under the Impoundment Control Act does not sufficiently enable a President to reduce the deficit. For example, during the period between 1976 and 2005, Presidents proposed rescissions under the Impoundment Control Act totaling \$72.8 billion.¹⁰¹ Congress, however, only enacted \$24.6 billion in rescissions,¹⁰² about one-third of the Presidents' proposed rescissions. This is a small percentage of savings, approximately 0.5 percent of the \$15 trillion total discretionary budget authority that Congress appropriated.¹⁰³

There are several reasons why the Impoundment Control Act has produced a minimal impact on deficit reduction. First, the Impoundment Control Act only permits the President to propose rescissions of discretionary spending authority.¹⁰⁴ Discretionary spending, however, only comprises thirty-eight percent of federal spending.¹⁰⁵ A great deal of spending comes from direct spending, which cannot be touched under this procedure.¹⁰⁶ Second, Congress is not required to vote on rescission proposals introduced under the Impoundment Control Act.¹⁰⁷ Thus, there is no guarantee that Congress will vote on the President's proposal. Third, under the Impoundment Control Act, rescissions have been used to offset other spending, rather than to reduce the deficit.¹⁰⁸ For example, Congress has offset emergency appropriations through rescissions in other areas of discretionary spending.¹⁰⁹

Conversely, the new expedited rescission proposals permit the President to propose rescissions to direct spending, such as entitlements, and targeted tax benefits in addition to discretionary spend-

¹⁰⁰ See *infra* Parts II.B.2–4.

¹⁰¹ *CBO's Comments*, *supra* note 17, at 2.

¹⁰² *Id.*

¹⁰³ See *id.*

¹⁰⁴ See *supra* note 94 and accompanying text.

¹⁰⁵ See *supra* note 27 and accompanying text.

¹⁰⁶ See *The Rescissions Process After the Line Item Veto: Tools for Controlling Spending: Hearing Before the Subcomm. on Legislative and Budget Process of the H. Comm. on Rules*, 106th Cong. 4 (1999) [hereinafter *Tools for Controlling Spending*] (statement of Gary Kephlinger, Associate General Counsel, General Accounting Office).

¹⁰⁷ *CBO's Comments*, *supra* note 17, at 3.

¹⁰⁸ *Id.*; see *Tools for Controlling Spending*, *supra* note 106, at 4.

¹⁰⁹ *Tools for Controlling Spending*, *supra* note 106, at 4.

ing.¹¹⁰ Additionally, the proposals require Congress to vote on the President's proposed rescissions,¹¹¹ giving the President a better chance of success. Lastly, the new proposals require that rescissions must be dedicated to deficit reduction and are not to be used as an offset for other spending increases.¹¹²

2. *President Bush's 2006 Proposal*

Of the three proposals, President Bush's 2006 proposal is the least likely to withstand constitutional scrutiny.¹¹³

a. *The Withholding Period*

Under President Bush's proposal, the President is permitted to withhold discretionary budget authority or suspend items of direct spending and targeted tax benefits proposed for rescission for a period not to exceed 180 calendar days from the day that the President sends the proposals to Congress.¹¹⁴ The President is permitted to make the funds available earlier if he concludes that the withholding or suspension of funds would not further the purposes of the bill; however, he is not required to make the funds available if Congress votes against his proposal.¹¹⁵ Instead, the President can continue to withhold the funds until the 180-day period expires, even if Congress rejects his proposal at some point during the 180 days.¹¹⁶

¹¹⁰ See *supra* note 94.

¹¹¹ See *supra* note 82 and accompanying text.

¹¹² See *supra* note 11 and accompanying text.

¹¹³ This assumes the President resubmits his proposal in the 110th Congress.

¹¹⁴ See Legislative Line Item Veto Act of 2006, S. 2381, 109th Cong. § 2(a) (2007) (proposed § 1021(e)(1), (f)(1), (g)(7) of the Impoundment Control Act).

¹¹⁵ See *id.* (proposed § 1021(e), (f)).

¹¹⁶ See *id.* According to OMB, the 180-day withholding period was selected to permit the President to withhold spending while Congress considered the proposal during a long recess. See Jonathan Nicholson, *Six-Month Budget Impoundment Time with 'Veto' Seen Raising Issues in Congress*, BNA DAILY REPORT FOR EXECUTIVES, Mar. 24, 2006. For example, in 2006, Congress recessed from late September through mid-November for the 2006 election. See LIBRARY OF CONGRESS, DAYS IN SESSION CALENDARS, <http://thomas.loc.gov/home/ds/h1092.html> (last visited Sept. 4, 2007). According to OMB, 180 days would cover an even longer election year recess, for example, from October to February, a five-month period. See Nicholson, *supra*. OMB's rationale is not very convincing. First, because the fiscal year lasts from October 1 to September 30, 31 U.S.C. § 1102 (2000), a recess starting in October and lasting through February would mean that all annual appropriations from the previous year with funds not yet spent would already be terminated. Thus, the President would not have any annual appropriations to withhold. The President could, however, withhold any funds that can be obligated at the end of the fiscal year. Second, under the President's proposal, he is permitted to send a rescission proposal to Congress at any time. See S. 2381, § 2(a) (proposed § 1021(a), (b)(1)(A) of the Impoundment Control Act). Thus, instead of withholding funds for a six-month period to ac-

Even though a vote on final passage of the rescission bill must take place within thirteen days of session from when the President transmits his message to Congress, the President is still permitted another 167 calendar days to withhold the funds.¹¹⁷ In other words, if Congress votes against the proposed rescissions, the President is still permitted to withhold the funds for an additional 167 days.

Additionally, because this proposal neither repeals the Impoundment Control Act nor prohibits the President from using the expedited procedure in conjunction with the Impoundment Control Act, the President would be able to withhold the funds for an additional forty-five calendar days after the expiration of the 180-day period.¹¹⁸ This could potentially allow the President to withhold funds for 225 days.

Even considering the withholding period alone, and not in conjunction with the Impoundment Control Act, the 180-day period likely would be held unconstitutional based on the Court's reasoning in *Clinton* because it allows the President to effectively cancel funds unilaterally.¹¹⁹ Appropriations bills provide the most funding for a fiscal year and most commonly last for one fiscal year only.¹²⁰ Because the fiscal year lasts from October 1 to September 30,¹²¹ all funds that have been appropriated for a fiscal year must be spent by September 30 of the year Congress enacted the appropriations bill. As a result, if the President sent a rescission package containing annual appropriation provisions after April of a given year and withheld the funding for the entire 180 days, the President would effectively cancel those provisions because the funds would necessarily not be spent before the end of the fiscal year for which they were appropriated.¹²²

count for a long recess, the President could time the transmittal of a rescission package so that it does not occur prior to a long recess, effectively holding congressional funding hostage. For example, during an election year, the President could simply refrain from sending a rescission package to Congress in September.

¹¹⁷ See KOGAN, *supra* note 34, at 3; *supra* note 114 and accompanying text.

¹¹⁸ See *Hearing on H.R. 4890*, *supra* note 34, at 24 (statement of James R. Horney, Senior Fellow, Center on Budget and Policy Priorities); ROSENBERG, *supra* note 83, at 7–8.

¹¹⁹ See *supra* Part I.C.

¹²⁰ Annual appropriations “are made for a specified fiscal year and are available for obligation only during the fiscal year for which” the appropriation was made. U.S. GEN. ACCOUNTING OFFICE, OFFICE OF THE GEN. COUNSEL, GAO-04-261SP, 1 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-4 (3d ed. 2004). Unless expressly provided, appropriations are presumed to be annual appropriations. *Id.*

¹²¹ 31 U.S.C. § 1102 (2000).

¹²² See *The Constitution and the Line Item Veto: Hearing on H.R. 4890 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 16 (2006) (statement of Cristina Martin Firvida, Senior Counsel, National Women’s Law Center).

In *Clinton*, the Court stated that the effect of cancellation of a specific spending provision is to prevent the provision “from having legal force or effect.”¹²³ Under President Bush’s expedited rescission proposal, a President may essentially deny provisions their legal force and effect if he withholds the funds through the end of the fiscal year, when they terminate. By effectively unilaterally canceling a provision of duly enacted law, the President usurps Congress’s legislative powers and exceeds his own constitutional authority.¹²⁴

b. Unlimited Rescissions

Even if the withholding period does not affect a fiscal year, 180 days is too long because the President’s expedited rescission proposal permits unlimited resubmissions.¹²⁵ Thus, he could continue to withhold funds for an indefinite period by repeatedly resubmitting a rescission proposal. If a President continually resubmitted his proposal for the duration of the appropriation, he would effectively unilaterally cancel the provision by never spending the funding appropriated by Congress. Doing so clearly contravenes bicameralism and the Presentment Clause, the processes by which Congress passes a bill and the President either signs or vetoes the legislation “in toto” rather than unilaterally canceling only some provisions of the bill.¹²⁶

3. The 2007 House Proposal

The 2007 House proposal is also unlikely to withstand constitutional scrutiny, though it is less violative than President Bush’s proposal. Under the 2007 House proposal, the President would be permitted to withhold discretionary funds and suspend items of direct spending and targeted tax benefits for forty-five calendar days from the date the President transmits the proposed rescission package to Congress.¹²⁷ Although the President would be permitted to terminate the withholding and suspension of funds at an earlier time if he “determines that continuation of the suspension would not further the

¹²³ *Clinton v. City of New York*, 524 U.S. 417, 437 (1998) (internal quotation marks omitted); see Thomas C. Weisert, Note, *Timing Isn’t Everything: The Supreme Court Decides That a Presidential Cancellation Does Indeed “Walk, Swim, and Quack” Like a Line-Item Veto*, 29 SETON HALL L. REV. 1618, 1644 (1999).

¹²⁴ See *Byrd v. Raines*, 956 F. Supp. 25, 35 (D.D.C. 1997).

¹²⁵ See Legislative Line Item Veto Act of 2006, S. 2381, 109th Cong. § 2(a) (2007) (proposed § 1021(a) of the Impoundment Control Act).

¹²⁶ See *supra* notes 72–74 and accompanying text.

¹²⁷ See Legislative Line Item Veto Act of 2007, H.R. 689, 110th Cong. § 2(a) (2007) (proposed § 1013(a)(1), (b)(1), (d)(1) of the Impoundment Control Act).

purposes” of the Legislative Line Item Veto Act,¹²⁸ he is not required to do so. Additionally, the bill provides for an extension of the forty-five day period for an additional forty-five calendar days if the President so chooses, even if Congress denies his proposed rescission package.¹²⁹

Unlike President Bush’s proposal, the House proposal prohibits a President from resubmitting his rescission package if it is rejected by Congress.¹³⁰ Similar to President Bush’s proposal, however, a President is able to withhold funds even if Congress rejects his proposal.¹³¹ The House proposal does not repeal the Impoundment Control Act, however, and thus there is no prohibition against submitting the same rescissions under the Impoundment Control Act. Thus, the President may use the Impoundment Control Act in conjunction with the House proposal and withhold funds for an additional forty-five days.¹³² In other words, although final passage of the President’s rescission proposal would be required within thirteen days of transmittal of the package, the House bill would permit the President to withhold funds for ninety days plus the extra forty-five days provided in the Impoundment Control Act for a total of 135 days.

The potential duration of presidential withholding, even without the extra forty-five days provided by the Impoundment Control Act, has the same constitutional deficiency as the President’s proposal.¹³³ Although the House proposal would only permit the President to withhold funds for a three-month period, a cancellation of funds for that length of time likely would constitute a unilateral cancellation of funds. For example, if the President has not spent annually appropriated funds by July 1, and has proposed those funds for rescission, under the House proposal he may decide to withhold funds for the entire ninety days permitted until the end of the fiscal year on September 30, effectively nullifying the appropriation.¹³⁴ Similar to President Bush’s proposal, this is a unilateral cancellation of enacted

¹²⁸ See *id.* (proposed § 1013(a)(2), (b)(2), (d)(2) of the Impoundment Control Act).

¹²⁹ See *id.* (proposed § 1013(e) of the Impoundment Control Act).

¹³⁰ See *id.* (proposed § 1011(b)(1)(C) of the Impoundment Control Act).

¹³¹ See *id.* (proposed § 1013 of the Impoundment Control Act). The House proposal only provides early availability of funds if the President concludes withholding or suspension of funds would not further the purposes of the Act, instead of requiring funds to be made available once Congress rejects his rescission package. See *id.* (proposed § 1013(a)(2), (b)(2), (c)(2), (d)(2) of the Impoundment Control Act).

¹³² See ROSENBERG, *supra* note 83, at 15.

¹³³ See *supra* Part II.B.2.

¹³⁴ This applies only to annual appropriations or any appropriation ending in that fiscal year.

provisions of law and unconstitutional because the President has effectively denied those items their legal force and effect without meeting the requirements of bicameralism and the Presentment Clause.¹³⁵

4. *The 2007 Senate Proposal*

The 2007 Senate proposal is the most likely of the three proposals to withstand constitutional scrutiny. Under the proposal, the President may withhold discretionary funds or suspend items of direct spending or tax benefits for forty-five calendar days from the day he transmits his rescission proposal to Congress.¹³⁶ The President would be able to terminate the withholding or suspension of funds at an earlier time if he determined that continued withholding or suspension would not further the purposes of the Act.¹³⁷ But, unlike the President's and House's proposals, early termination is not required under the Senate proposal.¹³⁸ Unlike the House version, there is no option for a forty-five day extension in the Senate proposal.¹³⁹ Additionally, the President cannot resubmit a proposed rescission after Congress voted once to reject the rescission proposal.¹⁴⁰ Furthermore, unlike President Bush's proposal, the Senate proposal only permits the President to send four rescission packages annually¹⁴¹ so that consideration of rescission packages do not consume an unnecessary amount of Congress's floor time.¹⁴²

Under the Senate proposal, a President may withhold or suspend funds for forty-five days: the same number as provided under the Im-

¹³⁵ See *supra* notes 123–24 and accompanying text.

¹³⁶ See Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. § 102(a) (2007) (proposed § 1021(e)(1), (f)(1)(A) of the Impoundment Control Act). A different procedure applies to suspensions of direct spending and targeted tax benefits than withholdings of discretionary spending. See *id.* (proposed § 1021(f)(1)(C) of the Impoundment Control Act); ROSENBERG, *supra* note 83, at 20. If the suspension starts before the effective date of the provisions, then the President may suspend the funds for forty-five days. See S. 15, § 102(a) (proposed § 1021(f)(1)(C) of the Impoundment Control Act); ROSENBERG, *supra* note 83, at 20–21. If the suspension is sent after the effective date, however, then the suspension decreases by a day for each day after the effective date of the provision. See S. 15, § 102(a) (proposed § 1021(f)(1)(C) of the Impoundment Control Act); ROSENBERG, *supra* note 83, at 21. Therefore, suspensions of these provisions may be shorter than forty-five days.

¹³⁷ S. 15, § 102(a) (proposed § 1021(e)(2), (f)(2) of the Impoundment Control Act).

¹³⁸ See *id.*

¹³⁹ See *supra* note 129 and accompanying text.

¹⁴⁰ S. 15, § 102(a) (proposed § 1021(b)(1)(A)(iii)(I) of the Impoundment Control Act).

¹⁴¹ *Id.* (proposed § 1021(b)(1)(A)(i) of the Impoundment Control Act).

¹⁴² See 153 CONG. REC. S792 (daily ed. Jan. 22, 2007) (statement of Sen. Gregg).

poundment Control Act.¹⁴³ Because forty-five days is the number allowed for withholding under the Impoundment Control Act, it seems likely that this time period would be short enough to avoid violating the Presentment Clause. Several other potential issues, however, may be raised.

First, although a forty-five day withholding period is provided by the Impoundment Control Act, the time period is not necessarily constitutional, as there has yet to be a legal challenge to this provision.¹⁴⁴ For the President to effectively cancel funding set to expire at the end of the fiscal year, he would have to send a rescission package and start withholding funds by August 15, forty-five days prior to the termination of a fiscal year. Although this withholding would effectively nullify the spending provision,¹⁴⁵ the Court may find that such a short period does not have a significant impact on funding. Because the Court has not yet addressed this question, however, it remains uncertain whether the Senate's forty-five day withholding period would pass constitutional muster.

Second, because the Senate proposal does not repeal Title X of the Impoundment Control Act, the forty-five day withholding period can be used in conjunction with the Impoundment Control Act's forty-five day period.¹⁴⁶ This ninety-day period could potentially be problematic for the same reasons as the House proposal,¹⁴⁷ and the Court may find that a three-month withholding period is long enough to deny the provisions their legal force and effect, rendering them unconstitutional.¹⁴⁸

Third, unlike the Impoundment Control Act—which requires the President to make funds available as soon as Congress votes against the President's rescission proposal¹⁴⁹—the Senate proposal permits the President to continue to withhold or suspend funds until the forty-five day period is exhausted, even if Congress has voted against the rescission proposal.¹⁵⁰ Although it is unclear whether this triggers a

¹⁴³ See *supra* notes 98, 136 and accompanying text. The Impoundment Control Act, however, is limited to discretionary funds. See *supra* note 94 and accompanying text.

¹⁴⁴ After exhaustive research, no legal challenge to the Impoundment Control Act was found.

¹⁴⁵ See *supra* notes 123–24 and accompanying text.

¹⁴⁶ See ROSENBERG, *supra* note 83, at 21.

¹⁴⁷ See *supra* Part II.B.3.

¹⁴⁸ See ROSENBERG, *supra* note 83, at 21; *supra* notes 132–33 and accompanying text.

¹⁴⁹ See 2 U.S.C. § 683(b) (2000).

¹⁵⁰ See Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. § 102(a) (2007) (proposed § 1021(e), (f) of the Impoundment Control Act).

constitutional question, when considered in conjunction with the other potential problems with the Senate proposal, the Court could consider this as additional evidence of the President's usurpation of Congress's legislative authority. Because the Senate's proposal would permit the President to withhold funds for an extended period after Congress has voted against his rescission proposal, this might be considered as an unconstitutionally improper withholding of funds that Congress had determined were important enough to distribute.¹⁵¹

III. A Constitutional Expedited Rescission Law

A. Proposals

In terms of constitutionality, the Senate proposal is the most likely to be upheld by the Supreme Court, although it still has potential issues.¹⁵² By eliminating the problems with this expedited rescission proposal, the constitutionality of the legislation will be ensured.

One important and necessary change would be to amend the Impoundment Control Act so that it could not be used in conjunction with the Senate proposal; therefore, a President could only invoke the withholding provision of one procedure or the other, but not both.

¹⁵¹ An additional issue with the expedited rescission proposals is the constitutionality of allowing a President to withhold entitlements. Under the House and Senate versions, the President is permitted to suspend funds for items of direct spending, which include entitlements. *See supra* notes 127, 136 and accompanying text. Critics may argue that the President does not have the authority to suspend funding for a benefit that Congress has bestowed onto a class of people. This argument, however, is likely to fail.

Congress is permitted to rescind part or all of a benefit from an entitlement that it has created by enacting a new law. *See* U.S. CONST. art. I, § 7, cl. 2. The Supreme Court, however, held in *Goldberg v. Kelly*, 397 U.S. 254 (1970), that Congress may not deprive someone that it believes no longer is eligible for the entitlement of his or her benefits without meeting proper due process requirements: notice and a hearing. *See id.* at 261, 267–68. This holding narrowly applies to the deprivation of benefits for a particular recipient, *see id.* at 255, not an entire group of recipients. The expedited rescission proposals, on the other hand, do not permit the President to suspend funds for a particular recipient; rather, they allow the President to suspend funds generally for an entire group that is eligible to receive benefits. *See* Legislative Line Item Veto Act of 2007, H.R. 689, 110th Cong. (2007); Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. tit. I (2007); Legislative Line Item Veto Act of 2006, S. 2381, 109th Cong. (2006).

Congress is permitted to terminate such funds, so the question that remains is whether the President may constitutionally do so. Although the Court has not answered this question, it seems likely that it would find that the President is permitted to suspend entitlements when that authority is delegated by Congress. Any new entitlement law that is created, therefore, should be understood in conjunction with the expedited rescission proposal that becomes law. Thus, the entire group of people eligible for the new entitlement would have notice that their benefits may be suspended if the President chooses to suspend funds while sending Congress a rescission package.

¹⁵² *See supra* Part II.B.4.

Doing so would prevent the President from potentially withholding discretionary funds for an additional forty-five days.¹⁵³

Additionally, the withholding language should be modified so that the President cannot unnecessarily withhold funds after Congress has voted against the President's proposed rescissions. This modification can be made in a number of ways: by (1) stripping the withholding authority from the proposal entirely, (2) shortening the number of days for withholding to a period of fifteen days, or (3) beginning the forty-five day withholding period when Congress enacts the provisions that the President is proposing to rescind.

The first modification would be to strip the withholding authority from the proposal entirely. Such a change would render moot any potential separation of powers issue. A valid concern with such a modification, however, is that funds the President wants to rescind may be spent before Congress votes on his rescission proposal. Stripping the withholding period would not be problematic for provisions that are not effective until at least fifteen days after the President transmits his rescission proposal to Congress because the funds would not yet be available for spending. For provisions that are already effective and awaiting funding from the President, the suggested modification would also be unlikely to be problematic because fifteen days is a short enough period for the process to work. Because fifteen days is just enough time for Congress to consider the President's proposal, the President would be unlikely to be forced to obligate the funds prior to Congress's decision. Regardless, stripping the withholding authority from the President risks the possibility that funds would be disbursed before Congress has made a final decision on the President's rescission proposal, which ultimately could lead to unauthorized payments.

Another option would be to shorten the withholding period to fifteen calendar days. Additionally, the President would not be allowed to propose rescission of provisions that expire within fifteen days of sending the rescission package to Congress for consideration. The withholding would terminate at the end of fifteen days, even if this falls during a recess, after which the President would be required to make the funds available for obligation.¹⁵⁴ This shortened period would allow the President to withhold funds only for the period of time that Congress is allotted to consider the President's proposed re-

¹⁵³ See *supra* notes 146–48 and accompanying text.

¹⁵⁴ To avoid making the funds available during a recess, a President could time his proposal so that it does not fall during a week when there is likely to be a recess.

scission package under the expedited process.¹⁵⁵ Under the Senate's proposal, Congress has ten days to consider the President's proposed rescissions, three days for conferencing, and two days on the floor before the final vote.¹⁵⁶ The President, therefore, would only need to withhold funds for fifteen days to account for the time Congress is considering his proposal. Shortening the withholding period to fifteen days would therefore prevent any unnecessary withholding of funds after Congress has decided against the President's proposal.

A third option would be to commence the forty-five day withholding period when Congress enacts the provisions that the President is proposing to rescind.¹⁵⁷ For example, if the President sent a rescission proposal ten days after Congress enacts that law, he would only be able to withhold those funds for thirty-five more days. This would likely reduce the amount of time the President withholds funds because it is unlikely that he would send a proposal to Congress on the day it enacted the bill containing the provisions he would like to rescind. The problem with this solution is that the President would be forced to act more quickly. The President needs some flexibility with the amount of time he has to review bills because the length of bills, especially omnibus bills, can be extensive. Another problem is that under the Senate proposal, the President can only send a rescission proposal to Congress four times per year.¹⁵⁸ Thus, the President would be very limited as to which provisions he could propose to rescind. Therefore, this is a less-than-perfect solution.

The best solution of the three options would be to permit the President to withhold funds during the fifteen days that Congress is considering his rescission package. Once the fifteen days expired or Congress voted to reject the package, the funds would immediately be made available for obligation, eliminating unnecessary withholding after Congress has acted. Although striking the withholding period is the most constitutional option, it risks the obligation of funds prior to congressional action.

¹⁵⁵ See Second Look at Wasteful Spending Act of 2007, S. 15, 110th Cong. § 102(a) (2007) (proposed § 1021(c) of the Impoundment Control Act); KOGAN, *supra* note 34, at 2–3.

¹⁵⁶ See S. 15, § 102(a) (proposed § 1021(c)(1)(A)–(C) of the Impoundment Control Act).

¹⁵⁷ See KOGAN, *supra* note 34, at 2–3.

¹⁵⁸ See *supra* note 141 and accompanying text.

B. Draft Language

1. Number of Days for Withholding

The 2007 Senate proposal should be modified¹⁵⁹ so that the President's authority to withhold or suspend discretionary spending, direct spending, and targeted tax benefits¹⁶⁰ is replaced with:

“(e) TEMPORARY PRESIDENTIAL AUTHORITY TO WITHHOLD.—

“(1) AVAILABILITY.—The President may not withhold any dollar amount of discretionary budget authority, item of direct spending, or targeted tax benefit authority until the President transmits and Congress receives a special message pursuant to subsection (b). Upon receipt by Congress of a special message pursuant to subsection (b), the President may direct that any dollar amount of discretionary budget authority, item of direct spending, or targeted tax benefit proposed to be rescinded in that special message shall be withheld from obligation for a period not to exceed 15 calen-

¹⁵⁹ Because this Note's proposal is based on the Senate proposal, it may be of interest to consider the Senate proposal's political viability. On March 21, 1995, Senator Tom Daschle introduced an amendment to the Line Item Veto Act. 141 CONG. REC. S4281 (daily ed. Mar. 21, 1995) (statement of Sen. Daschle). The 2007 Senate proposal is nearly identical to the Daschle amendment. See 152 CONG. REC. S792 (daily ed. Jan. 22, 2007) (statement of Sen. Gregg). Both this Note's proposal and the Daschle amendment (1) establish a fast-track congressional procedure for consideration of Presidential rescissions, (2) require congressional affirmation of the rescissions, (3) prohibit the President from resubmitting rescissions, (4) allow rescissions of discretionary funding and targeted tax benefits, (5) only allow motions to strike and prohibit amendments, and (6) require savings from rescissions to go towards deficit reduction. *Id.* Although the 2007 Senate proposal permits the President to propose rescissions of new mandatory spending in addition to discretionary spending and targeted tax benefits, it retains more control over the purse with Congress than the Daschle amendment. See *id.* The Daschle amendment permitted the President to send Congress rescission packages for *each* appropriations and tax bill. See *id.* The 2007 Senate proposal, however, only permits four rescission packages annually, so consideration of rescission packages does not expend too much of Congress's floor time. See *id.* Additionally, the Daschle amendment permitted the President to withhold funds for forty-five days, *id.*, whereas the 2007 Senate proposal only allows a maximum withholding of fifteen days. See S. 15, § 102(a) (proposed § 1021(C) of the Impoundment Control Act). The Senate failed to invoke cloture on the 2007 Senate proposal by a vote of 49–48 when the proposal was first introduced in January as an amendment to H.R. 2. 152 CONG. REC. S1019 (daily ed. Jan. 24, 2007). Of the forty-nine votes in favor of cloture, only two Senators were Democrats. *Id.* The Daschle amendment was tabled 62–38. 141 CONG. REC. S4428 (daily ed. Mar. 23, 1995). Of the thirty-eight votes against, twenty Democratic senators still serve in the Senate. *Id.*; cf. U.S. Senate Website, http://www.senate.gov/general/contact_information/senators_cfm.cfm (last visited Sep. 30, 2007). Because the two versions are almost identical and this Note's version is even weaker in terms of the power it gives to the President, those twenty Senators might vote for this Note's proposal, increasing the number of votes from forty-nine to sixty-nine, which would be enough for the proposal to pass.

¹⁶⁰ S. 15, § 102(a) (proposed § 1021(e)–(f) of the Impoundment Control Act).

dar days from the date of receipt by Congress. The President shall not direct to be rescinded any dollar amount of discretionary spending, item of direct spending, or targeted tax benefit that expires within 15 days of the President's transmittal and receipt by Congress of a special message pursuant to subsection (b).

“(2) EARLY AVAILABILITY.—The President shall make any dollar amount of discretionary budget authority, item of direct spending, or targeted tax benefit withheld from obligation pursuant to paragraph (1) available upon Congress completing action before the end of the 15 day period and failing to approve the proposed rescissions.”

2. *Title of Section 2 of the Senate's proposal*

Section 2 of the Senate's proposal should be changed from “ENHANCED RESCISSION AUTHORITY” to “EXPEDITED RESCISSION AUTHORITY.” Enhanced rescission authority is an incorrect name for this modified proposal. An enhanced rescission allows the President to rescind funds unless Congress passes a resolution of disapproval, which is a true line item veto. The modified proposal permits expedited rescissions, not line item vetoes.¹⁶¹

3. *The Impoundment Control Act and Expedited Rescission Authority*

The Senate proposal should be modified so that the Impoundment Control Act cannot be used in conjunction with the Expedited Rescission Authority. The following quoted text should be appended to the end of section 102(a):

“PART D—RESCISSION AUTHORITY

“SEC. 1027. PRESIDENTIAL AUTHORITY TO
PROPOSE RESCISSIONS.

“The President may not use Part B and Part C of Title X of this Act in conjunction.”

C. *Hypothetical*

Consider a situation where the President sends a rescissions package to Congress on April 1, 2007, that contains rescissions of four provisions enacted into law: a \$13,500,000 appropriation for the International Fund for Ireland, a \$6,435,000 appropriation for wood

¹⁶¹ See *supra* Part II.

utilization research, a \$1,000,000 appropriation for the Waterfree Urinal Conservation Initiative, and a \$500,000 appropriation for a Teapot Museum in Sparta, North Carolina.¹⁶² Each of these provisions are annual appropriations that expire on September 30, 2007, the end of the fiscal year. Once the President has completed sending his rescission proposal to Congress, he withholds the funding for these appropriation provisions. On April 13, Congress rejects the President's rescission proposal. The President is now required to make the funds available for obligation, even though only thirteen days have passed.

Conclusion

The proposals from the President, the House, and the Senate are good first steps toward creating a constitutional expedited rescission authority. None of the three options explicitly violate the Supreme Court's holding in *Clinton v. City of New York*, which made unilateral cancellations by the President unconstitutional.¹⁶³ The Court's holding prevents Congress from authorizing the President to cancel provisions of enacted law without meeting the requirements of the elements of Article I, Section 7 of the Constitution: bicameralism and presentment.¹⁶⁴ Although all three proposed versions—the President's version, the House's version, and the Senate's version—meet the requirements of Article I, Section 7, they risk implicitly violating the Court's holding by permitting the President to withhold funds for an extended amount of time.

For any of the three proposals to be passed by Congress, significant changes must be made. As they stand, the Senate version is the most likely of the three to be found constitutional by the Supreme Court, but even that version must be changed. By changing the withholding period of the Senate's proposal to fifteen days and prohibiting expedited rescission authority to be used in conjunction with the Impoundment Control Act, the modified legislation would very likely withstand constitutional scrutiny and also retain to the Senate the most power of the three options.

Most importantly, the modified Senate version is the best tool for the President to achieve budgetary savings constitutionally. Using the expedited rescission process in the modified Senate proposal, the

¹⁶² All four of these provisions were enacted into law in 2006. CITIZENS AGAINST GOV'T WASTE, 2006 CONGRESSIONAL PIG BOOK SUMMARY 1 (2006), available at <http://www.cagw.org/site/DocServer/2006PigBookSummary.pdf>.

¹⁶³ See *supra* Part I.C.

¹⁶⁴ See *supra* notes 71–73 and accompanying text.

President, with the approval of Congress, can achieve deficit reduction by eliminating wasteful spending caused by discretionary spending, items of direct spending, and targeted tax benefits. The President and Congress can also meet the important goal of improving accountability because the modified proposal constitutionally casts light on earmarks that are slipped into bills last minute behind the closed doors of conference.

The President and Congress should very seriously consider this Note's modified Senate proposal as the proper expedited rescission proposal if they want to provide the President with a constitutional tool to reduce the ever-growing \$248 billion deficit.¹⁶⁵

¹⁶⁵ See *supra* note 16 and accompanying text.