ARTICLE I, SECTION 7, CLAUSE 2—PRESENTMENT CLAUSE—A FEDERAL STATUTE THAT AUTHORIZES THE PRESIDENT OF THE UNITED STATES TO RENDER DULY ENACTED ITEMS OF NEW DIRECT SPENDING AND LIMITED TAX BENEFITS WITHOUT LEGAL FORCE OR EFFECT VIOLATES THE PRESENTMENT CLAUSE—*Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

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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.[1]

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[icle] 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.[2]

I. INTRODUCTION

The Article I, Section 7, Clause 2 Presentment Clause of the United States Constitution provides that "[e]very 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 . . . ."[3] On April 9, 1996, President Bill Clinton signed the Line

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[1] Clinton v. City of New York, 118 S. Ct. 2091, 2106-07 (1998).

[2] *Id.* at 2118 (Scalia, J., concurring in part and dissenting in part).

[3] U.S. CONST. art. I, § 7, cl. 2. This section of the United States Constitution provides, in whole:

Item Veto Act of 1996[4] (the "Act"), which authorized the President, subject to congressional override, to eliminate certain spending items and tax benefits after signing the bills that contained them into law.[5] Since the Civil War, at least eleven Presidents have supported executive line-item veto authority.[6] In addition, forty-three of the fifty state governors possess some type of line-item veto power.[7]

The 104th Congress' passage and the President's signing of the Act represents the culmination of years of public and scholarly discussion about the political and practical wisdom as well as the constitutionality of vesting the President with a line-item veto.[8] Supporters of the presidential line-item veto have

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> 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 the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return in which Case it shall not be a Law.

Id.

[4] *See* 2 U.S.C. §§ 691-692 (1994 ed., Supp. II), Pub. L. No. 104-130, 110 Stat. 1200 (1996).

[5] *See* City of New York v. Clinton, 985 F. Supp. 168, 170 n.3 (D.D.C. 1998). The Act became effective on January 1, 1997, and would expire on January 1, 2005. *See id.*; *see also* 2 U.S.C. §§ 691-692. For a description of how the Act operates, see *infra* Part II.

[6] *See* Michael J. Gerhardt, *The Bottom Line on the Line-Item Veto Act of 1996*, 6 CORNELL J.L. & PUB. POL'Y 233, 235 (1997) (citing S. REP. NO. 104-9, at 3 (1995)). These presidents include: Ulysses Grant, Rutherford Hayes, Chester Arthur, Franklin Roosevelt, Harry Truman, Dwight Eisenhower, Richard Nixon, Gerald Ford, Ronald Reagan, George Bush, and Bill Clinton. *See id.* at 235 n.9. By contrast, two presidents, William Howard Taft and Jimmy Carter, opposed such executive authority. *See id.* at 235.

[7] *See id.*

[8] *See generally* Judith A. Best, *The Item Veto: Would the Founders Approve?*, 14 PRESIDENTIAL STUD. Q. 183 (1984); L. Gordon Crovitz, *The Line-Item Veto: The Best Response When Congress Passes One Spending "Bill" a Year*, 18 PEPP. L. REV. 43 (1990); J.

deemed it a restoration of fiscal discipline and a necessary weapon in combating the enormous federal budget deficit.[9] The modern preference for omnibus legislation,[10] proponents have argued, has weakened the President's veto power under the Constitution, thereby requiring a reestablishment of the balance of power between Congress and the President.[11] Citing legislative "horse-trading"[12] as the cause of many diverse items being included in appropriations bills, supporters have urged that requiring majority support to reinstate items that the President cancels truly confirms that a majority of legislators actually supports an item.[13]

The line-item veto also has its detractors. First and foremost, critics argue that the Framers deliberately placed the spending power in the Congress to serve as a vital check on the Executive branch.[14] From a practical perspective,

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Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990); J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39 (1992); Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385 (1992); Anthony R. Petrilla, Note, *The Role of the Line-Item Veto in the Federal Balance of Power*, 31 HARV. J. ON LEGIS. 469 (1994).

[9] *See* Gerhardt, *supra* note 6, at 235 (citing 135 CONG. REC. S614 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon); 142 CONG. REC. §§ 2929, 2962 (1996) (statement of Sen. Lott); 142 CONG. REC. § 2960 (1996) (statement of Sen. Gramm)).

[10] "Omnibus appropriations bills are an amalgamation of assorted legislation grouped together and presented in a single bill or resolution." 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, 584 n.6 (1991).

[11] *See* Gerhardt, *supra* note 6, at 235-36 (citing 135 CONG. REC. S615 (daily ed. Jan. 25, 1989) (statement of Sen. Dixon)). Bill sponsor Senator John McCain remarked that "[g]iven Congress' predilection for . . . (veto-proof) omnibus spending bills, and continuing resolutions, it would seem only prudent and constitutional to provide the President with functional veto power." Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605, 1605-06, 1610 (1997) (citing 141 CONG. REC. §§ 53, 104 (1995)).

[12] One author has described "horsetrading" as "barter politics: buying votes by doling out favors." HEDRICK SMITH, THE POWER GAME 470 (1989).

[13] *See* Gerhardt, *supra* note 6, at 236 (citing 135 CONG. REC. S15,340 (daily ed. Nov. 9, 1989) (statement of Sen. Coats)).

[14] *See* Senator Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 298-306 (1998). Documenting the history of various governments' placement of the power of the purse, Senator Byrd advanced that the Framers of the Consti-

opponents of the veto believe that Congress, being the largest, most representative and open of the branches of government, as well as being characterized by a sense of coordination and compromise, is the best-suited of the three branches to make spending decisions.[15] Critics contend that providing the President with line-item veto authority leaves congressionally-initiated projects vulnerable to elimination while immunizing projects suggested by the President.[16] Furthermore, bolstering the President's power in the budget process would alter the nature of executive-legislative relations.[17] For example, to avoid a congressional override of his cancellations, the President may choose to use the line-item veto selectively so as not to cause representatives to mobilize for an override.[18] In addition, the President's mere threat to use the line-item veto may be effective enough to dissuade legislators from straying too far from the President's budget proposals or freely speaking their minds for fear that their projects will be targeted by an exercise of the line-item veto.[19] The veto's opponents also cite the mechanism's potentially harmful effects on the Judiciary.[20] Specifically, some fear that the line-item veto would enable the Executive, the chief litigant in the federal courts, to cancel the Judiciary's funding as

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tution decided to vest the Congress with the spending power against this historical backdrop. *See id.* at 304-06.

[15] *See id.* at 312-17. Senator Byrd continued by stating that

> [a]pportioning the fisc requires hearing from interested recipients, assessing the validity of the conflicting demands, and coordinating all the programs in a compromise package. Only Congress can adequately balance these interests, for its size allows it to bring to policy-making a diversity of opinion, reflecting that of the members' constituents, that the President cannot have.

Id. at 316 (quoting Paul R.Q. Wolfson, *Is a Presidential Item Veto Constitutional?*, 96 YALE L.J. 838, 851-52 (1987)).

[16] *See id.* at 325.

[17] *See id.* at 327-31.

[18] *See id.* at 330.

[19] *See id.* at 330-31.

[20] *See* Robert Destro, *Whom Do You Trust? Judicial Independence, The Power of the Purse & The Line Item Veto*, 44-JAN FED. LAW. 26, 27-28 (Jan. 1997) (citation omitted); *see also* Louis Fisher, *Judicial Independence and the Line Item Veto*, 36 NO. 1 JUDGES' J. 18 (1997); Gerhardt, *supra* note 6, at 243.

a means of extracting retribution for adverse decisions.[21] Moreover, the President's exercise of the line-item veto would force the courts to become involved in budgetary conflicts.[22]

Despite differing views as to the constitutionality and effectiveness of the Act,[23] it would only be a matter of time before a challenge in the courts. Recently, in *Clinton v. City of New York*,[24] the Supreme Court of the United States invalidated the Act and held that the line-item veto violated the Presentment Clause.[25] According to the Court, such a deviation from the constitutional framework could be accomplished only through the Article V amendment process.[26]

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[21] *See* Destro, *supra* note 20, at 27-28.

[22] *See* Gerhardt, *supra* note 6, at 243. Gerhardt observed that the President's exercise of the line-item veto will naturally result in substantial judicial review of executive and congressional compliance with the veto's procedures. *See id.* This result controverts the Constitution because

> [t]he framers deliberately excluded the unelected federal judiciary from exercising any kind of decisive role in budgetary negotiations or deliberations . . . . The framers wanted all of the key decisionmakers within budget negotiations to be politically accountable; any budgetary impasse between the President and Congress that the federal courts help to resolve in favor of one or the other will simply diminish even further the public's confidence that the political process is the place to turn for answers to such deadlocks.

Id.

[23] *See generally* Lawrence Lessig, *Lessons From a Line Item Veto Law*, 47 CASE W. RES. L. REV. 1659 (1997) (arguing Act is unconstitutional); H. Jefferson Powell & Jed Rubenfeld, *Laying It On the Line: A Dialogue on Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171 (1998) (arguing Act is constitutional); Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1 (1998) (arguing Act is constitutional); Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771 (1997) (arguing Act is unconstitutional); 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, 121 (1997) (arguing Act is unconstitutional); Michael G. Locklar, Comment, *Is the 1996 Line-Item Veto Constitutional?*, 34 HOUS. L. REV. 1161 (1997) (arguing Act is constitutional).

[24] 118 S. Ct. 2091 (1998).

[25] *See id.* at 2095.

[26] *See id.* at 2108. Article V reads, in whole:

This Casenote will discuss the standing and Presentment Clause analyses that the Supreme Court undertook in striking down the Line Item Veto Act of 1996. Specifically, the *Clinton* Court compromised its jurisdiction requirements by making it easier for litigants with questionable credentials to gain standing. In addition, by forbidding the President from using the cancellation power, the Court has called into question the longstanding congressional practice of delegating discretionary power to the President.

II. STATEMENT OF THE CASE

The Line Item Veto Act of 1996, an amendment to Title X of the Congressional Budget and Impoundment Control Act of 1974,[27] authorized the President to "cancel in whole—1) any dollar amount of discretionary budget authority; 2) any item of new direct spending; or 3) any limited tax benefit within five days, excluding Sundays, of being signed into law."[28] The funds appro-

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> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. CONST. art. V.

[27] *See* 2 U.S.C. §§ 681-688 (1988).

[28] 2 U.S.C. §§ 691-692, §§ 691(a), 691(a)(B) (1997). The Act defined a "'dollar amount of discretionary budget authority' . . . as 'the entire amount of budget authority' that is specified in the text of an appropriations law or found in the tables, charts, or explanatory text of statements of committee reports accompanying a bill." City of New York v. Clinton, 985 F. Supp. 168, 170-71 (D.D.C. 1998) (quoting 2 U.S.C. § 691e(7)). The Act defined an "'item of new direct spending' [as] a specific provision that will result in 'an increase in budget authority or outlays' for entitlements, food stamps, or other specified programs." *Id.* (quoting 2 U.S.C. §§ 691e(8), 691e(5)). The Act further defined a "'limited tax benefit' [as] a revenue-losing provision that gives tax relief to 100 or fewer beneficiaries in any fiscal year, or a tax provision that 'provides temporary or permanent transitional relief for ten or fewer beneficiaries in any fiscal year.'" *Id.* (quoting 2 U.S.C. § 691e(9)). To "cancel" an "amount of discretionary budget authority" means "to rescind." 2 U.S.C. § 691e(4)(A). To "cancel" an "item of new direct spending" or a "limited tax benefit" means "to prevent . . . from having legal force or effect." *Id.* §§ 691e(4)(B)(i)-(iii), 691e(4)(C).

priated for the canceled item could only be used for reduction of the federal budget deficit.[29] The Act mandated that the President consider such factors as the legislative history, the purposes of the item under consideration for cancellation, and referenced information.[30] Before canceling an item, the President had to determine that the cancellation would: "i) reduce the Federal budget deficit; ii) not impair any essential Government functions; and iii) not harm the national interest."[31] Once the decision was made to cancel an item, the President was required to send a special message to Congress which identified the item being canceled, the reasons for its cancellation, and an estimate of the cancellation's budgetary effect.[32]

Pursuant to the Act, a cancellation was effective upon Congress' receipt of the "special message."[33] Congress could reinstate a canceled item by passing a disapproval bill, not subject to the veto authorized by the Act but subject to the procedures of Article I, Section 7, Clause 2.[34] Once both houses enacted a dis-

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[29] *See id.* § 691c(a)-(b).

[30] *See id.* § 691(b). In identifying items for cancellation, the Act directs the President to:

> 1) consider the legislative history, construction, and purposes of the law which contains such dollar amounts, items, or benefits; 2) consider any specific sources of information referenced in such law or, in the absence of specific sources of information, the best available information; and 3) use the definitions contained in section 691e of this title in applying this subchapter to the specific provisions of such law.

Id.

[31] *Id.* § 691a(A)(i)-(iii).

[32] *See id.* § 691a(B). The special message must be sent to Congress within five days, excluding Sundays, of the signing of the bill that contained the canceled provision. *See id.* § 691a(c)(1). The special message must contain:

> the reasons for the cancellation; the President's estimate of the "fiscal, economic, and budgetary effect" of the cancellation; an estimate of "the . . . effect of the cancellation upon the objects, purposes and programs for which the canceled authority was provided;" and the geographic distribution of the canceled spending.

Clinton, 985 F. Supp. at 171 (quoting 2 U.S.C. § 691a(b)).

[33] *See* 2 U.S.C. § 691b(a).

[34] *See id.* A disapproval bill must comport with the Article I, Section 7 requirements of bicameral passage and presentment to the President. *See Clinton*, 985 F. Supp. at 171.

approval bill, the President's cancellation would be voided and the canceled items would be restored.[35] If the President vetoed a disapproval bill, Congress must, as in the context of other exercises of the President's Article I, Section 7, Clause 2 veto power, muster a two-thirds majority in both houses to reinstate the items.[36] The President, however, could either sign the disapproval bill or not return it within the ten-day timeframe provided by Article I, Section 7, Clause 2, either of which would result in the reinstatement of the previously canceled items.[37]

On August 11, 1997, President Clinton canceled an "item of new direct spending" and a limited tax benefit, which prompted two separate constitutional challenges.[38] The first canceled item, Section 4722(c) of the Balanced Budget Act of 1997,[39] relieved the State of New York of approximately $2.6

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[35] *See* 2 U.S.C. § 691b(a).

[36] *See id.* The Act did provide for expedited consideration of disapproval bills. *See Clinton*, 985 F. Supp. at 171 (citing 2 U.S.C. §§ 691e(6), 692(c)).

[37] *See Clinton*, 985 F. Supp. at 171. The President may also use the pocket veto to prevent a bill from becoming law. *See* PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 153 (1989). The pocket veto describes the President's failure to return a bill within ten days of its passage, excluding Sundays, because Congress has adjourned. *See id.* When the President uses a pocket veto, "Congress must pass an entirely new piece of legislation in its next session, which the President again may disapprove." *Id.*

[38] Clinton v. City of New York, 118 S. Ct. 2091, 2095-97 (1998).

[39] *See* Pub. L. No. 105-33, 111 Stat. 515 (*quoted in Clinton*, 118 S. Ct. at 2095 n.2). Section 4722(c) provides, in whole:

> (c) WAIVER OF CERTAIN PROVIDER TAX PROVISIONS.—Notwithstanding any other provision of law, taxes, fees, or assessments, as defined in section 1903(w)(3)(A) of the Social Security Act (42 U.S.C. 1396b(w)(3)(A)), that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver of the provisions of subparagraph (B) or (C) of section 1903(w)(3) of such Act has been applied for, or that would, but for this subsection require that such a waiver be applied for, in accordance with subparagraph (E) of such section, and, (if so applied for) upon which action by the Secretary of Health and Human Services (including any judicial review of any such proceeding) has not been completed as of July 23, 1997, are deemed to be permissible health care related taxes and in compliance with the requirements of subparagraphs (B) and (C) of section 1903(w)(3) of such Act.

Id.

billion of tax liability.[40] Complying with the procedural requirements of the Act, the President sent a special message to Congress.[41] Congress did not pass a disapproval bill, and thus, the canceled item was not reinstated.[42] The City of New York, two hospital associations, one hospital, and two unions that represented health care employees (the "New York appellees") filed suit against the President and other federal officials.[43] These plaintiffs sought a declaratory judgment that the Act was unconstitutional and that the cancellation of Section 4722(c) was invalid.[44]

The President also canceled Section 968 of the Taxpayer Relief Act of 1997,[45] which allowed sellers of specified processing facilities and food refin-

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[40] *See Clinton*, 118 S. Ct at 2095. Under Title XIX of the Social Security Act, the federal government transfers money to the states to aid in financing medical care for the indigent. *See id.* Under the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, these federal subsidies are decreased by the amount of certain taxes that the states impose on health care providers. *See id.* In 1994, the Department of Health and Human Services (HHS) informed the State of New York that some of its taxes were covered by the 1991 amendments, thereby obligating the state to return nearly $1 billion to the federal government. *See id.* The state applied for a waiver, but HHS had not determined at the time of the passage of Section 4722(c) whether or not to grant it. *See id.* The uncertain status of the state's waiver request prompted the state to lobby Congress for relief. *See id.*

[41] *See id.* at 2095-96. In addition to finding that the cancellation would reduce the federal deficit, the President declared that to permit New York "to continue relying upon impermissible provider taxes to finance its Medicaid program . . . would have increased Medicaid costs, would have treated New York differently from all other States, and would have established a costly precedent for other States to request comparable treatment." *Id.* (quoting the statement of reasons for Cancellation No. 97-3).

[42] *See id.* at 2102.

[43] *See id.* at 2097. If HHS denied the waiver requests filed by the State of New York, health care providers would have been required to make retroactive tax payments to the State of New York under N.Y. Pub. Health Law § 2807-c(18)(e). *See id.* at 2097 n.10. Section 4722(c) effectively eliminated these health care providers' potential liabilities to the State of New York and the President's cancellation of this item served to resurrect these potential liabilities. *See id.* at 2097.

[44] *See id.* at 2097 n.9. The plaintiffs did not seek injunctive relief against the President. *See id.*

[45] *See* 111 Stat. 896 (*quoted in Clinton*, 118 S. Ct. at 2096 n.4). Section 968 of the Taxpayer Relief Act of 1997 was an amendment to § 1042 of the Internal Revenue Code. *See Clinton*, 118 S. Ct. at 2096. Before § 968 was adopted, the seller of a qualified processing facility or refinery to a farmers' cooperative could not defer recognition of gain from the sale for capital gains tax purposes. *See id.* Section 968 reads, in whole:

eries to defer capital gains taxes from the sale of their facility or refinery to a farmers' cooperative.[46] In the special message pertaining to this cancellation, the President agreed with Congress' aim of helping farmers' cooperatives acquire processing facilities yet did not concur with the means proposed to achieve it.[47] As with the New York cancellation, Congress did not pass a disapproval bill.[48] Like the New York appellees, the Snake River Potato Growers, Inc., and Mike Cranney (the "Snake River appellees") filed suit seeking a declaratory judgment that the Act was unconstitutional and that the cancellation was invalid.[49]

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(2) QUALIFIED REFINER OR PROCESSOR—

For purposes of this subsection, the term "qualified refiner or processor" means a domestic corporation—

(A) substantially all of the activities of which consist of the active conduct of the trade or business of refining or processing agricultural or horticultural products, and

(B) which, during the 1-year period ending on the date of the sale, purchases more than one half of such products to be refined or processed from—

(i) farmers who make up the eligible farmers' cooperative which is purchasing stock in the corporation in a transaction to which this subsection is to apply, or (ii) such cooperative.

111 Stat. 896, *quoted in Clinton*, 118 S. Ct. at 2096 n.4.

[46] *See Clinton*, 118 S. Ct. at 2096.

[47] *See id.* at 2096-97. Specifically, the President believed that the provision "failed to target its benefits to small-and medium-size cooperatives." *Id.* at 2096-97 (quoting the statement of reasons from Cancellation No. 97-2).

[48] *See id.* at 2102.

[49] *See id.* at 2097 n.9. Like the New York appellees, the Snake River appellees did not seek an injunction against the President. *See id.* The Snake River Potato Growers, Inc. is a farmers' cooperative, formed in May 1997, when Congress was considering the adoption of § 968. *See id.* at 2097. During the time leading up to the passage of the section, Mike Cranney, a member, Director and Vice Chairman of the cooperative, was involved in discussions on its behalf for the purchase of an Idaho potato processing facility. *See id.*; *see also* City of New York v. Clinton, 985 F. Supp. 168, 173 (D.D.C. 1998). If § 968 became law, that potential seller would have been able to defer its payment of capital gains taxes.

The District Court for the District of Columbia consolidated both cases and found that at least one plaintiff in each case satisfied Article III standing requirements.[50] The court determined that the cancellations had produced laws that were different than those passed by both houses of Congress.[51] The President's cancellations, according to the district court, amounted to "unilateral action by [a] single participant in the law-making process," forbidden by the Bicameralism and Presentment Clauses of Article I.[52] Furthermore, the court

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See Clinton, 118 S. Ct. at 2097. Once the President canceled the section, however, discussions regarding a sale were discontinued. *See id.* At the time of the Court's review, the Snake River cooperative stated that it was considering other purchases of processing facilities if the cancellation of § 968 was reversed. *See id.*

[50] *See Clinton*, 985 F. Supp. at 173. As the Court in *Allen v. Wright* explained:

> Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." . . . Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.

Allen v. Wright, 468 U.S. 737, 751 (1984) (citation omitted). In order to demonstrate standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.*

[51] *See Clinton*, 118 S. Ct. at 2097.

[52] *Id.* at 2098 n.12 (quoting *Clinton*, 985 F. Supp. at 178-79). The Bicameralism and Presentment Clauses refer to Article I, Section 7, Clauses 2 and 3 of the United States Constitution. Article I, Section 7, Clause 2 reads, in whole:

> 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 the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its

held that the Act was unconstitutional because it disrupted the balance of powers among the branches of government.[53]

The United States Supreme Court expedited its review to determine the constitutionality of the Act.[54] The Court subsequently affirmed the decision of the district court.[55] In so holding, the majority found that both sets of appellees had standing and declared the Act's authorization to the President to cancel portions of duly enacted statutes violative of the Article I, Section 7, Clause 2 Presentment Clause.[56]

III. PRIOR RELEVANT CASES

The Court had considered the constitutionality of the Line Item Veto Act of 1996 once before. In *Raines v. Byrd*,[57] six Members of Congress who voted against the Act challenged its constitutionality immediately after its passage.[58]

Return in which Case it shall not be a Law.

U.S. CONST. art. I, § 7, cl. 2. Article I, Section 7, Clause 3 reads, in whole:

> Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and the House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and the House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

U.S. CONST. art. I, § 7, cl. 3.

[53] *See Clinton*, 118 S. Ct. at 2098.

[54] *See id.* at 2095 (citing Clinton v. City of New York, 118 S. Ct. 1123 (1998) (granting expedited review)). Pursuant to 2 U.S.C. § 692(b), any order issued by the district court concerning the constitutionality of the Act must be reviewed by direct appeal to the Supreme Court. *See* 2 U.S.C. § 692(b) (1994 ed., Supp. II). Subsection (c) provided that both the district court and the Supreme Court were obligated "to advance on the docket and to expedite to the greatest possible extent the disposition of any" challenge to the Act's constitutionality. *Id.* § 692(c).

[55] *See Clinton*, 118 S. Ct. at 2108.

[56] *See id.* at 2095.

[57] 117 S. Ct. 2312 (1997).

[58] *See id.* at 2315. This group included four Senators and two Representatives: Senators Byrd, Levin, Moynihan, and Hatfield, and Representatives Skaggs and Waxman. *See*

Vacating the district court's conclusion that the Act was unconstitutional, the majority of the Supreme Court found that the congressmen lacked standing to bring the suit, which precluded the Court from reaching the merits of the case.[59] Specifically, the Court discerned that the congressmen had failed to allege a personal injury, that their claim of institutional injury was "wholly abstract and widely dispersed," and "that their attempt to litigate this dispute at this time and in this form [was] contrary to historical experience."[60]

As the *Raines* Court emphasized, any party seeking relief from the Court must demonstrate standing. The Supreme Court's modern standing doctrine is set forth in *Allen v. Wright*.[61] To meet Article III standing requirements, "[a]

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id. at 2315 n.1. Unlike the suits filed in *Clinton*, the plaintiffs in *Raines* named only the Secretary of the Treasury and the Director of the Office of Management and Budget as defendants. *See id.* at 2315.

[59] *See id.*

[60] *Id.* at 2322. The majority stated that the appellees had failed to allege a personal injury because they had not demonstrated "specially unfavorable treatment as opposed to other Members of their respective bodies." *Id.* at 2318. In addition, the appellees also failed to show that they had been "deprived of something to which they *personally* [were] entitled." *Id.* The majority rejected the appellees' claim of institutional injury because such a claim is only available in the rare situation where legislators' votes have not been given their due validity. *See id.* at 2319 (citation omitted). The appellees had failed to demonstrate that their votes had not, in any way, been given their full effect or had been nullified. *See id.* at 2320. Moreover, the Court examined various conflicts between the legislative and executive branches and found the absence of any suits filed alleging "injury to official authority of power" to be conclusive support for denying appellees standing. *Id.* at 2321.

[61] 468 U.S. 737 (1984). Additionally, Article III of the Constitution requires that all federal courts adjudicate only those matters that rise to the level of "actual 'cases' and 'controversies.'" *Id.* at 750. The Court stated that "[t]he case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government." *Id.* The standing doctrine, according to the Court, "is perhaps the most important of these doctrines." *Id.* Describing the Case or Controversy Requirement, Chief Justice Hughes stated:

> A "controversy" in this sense must be one that is appropriate for judicial determination . . . . A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot . . . . The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts . . . . Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or

plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."[62] In *Allen*, the parents of black school children brought a class action suit against the Internal Revenue Service for its alleged failure to deny tax-exempt status to private schools that engaged in racial discrimination.[63] The Court found that the plaintiffs did not meet the standing requirements of Article III because the plaintiffs did not demonstrate the requisite injury or traceability.[64]

Similarly, in *Simon v. Eastern Kentucky Welfare Rights Organization*,[65] the Court denied standing to individuals challenging an Internal Revenue Service Revenue Ruling that had the effect of benefiting nonprofit hospitals that restricted their offerings to the poor to solely emergency-room services.[66] The Court determined that the plaintiffs had failed to demonstrate both that the hospitals had restricted their services due to the Revenue Ruling and that a favorable ruling by the Court would make the desired services available to the plaintiffs.[67]

In *Bryant v. Yellen*,[68] the Supreme Court indicated that standing would be found in instances where the purported injury consisted of a party threatened with the loss of a contingent advantage or benefit that, if found to exist, may

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the payment of damages.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-42 (1937).

[62] *Allen*, 468 U.S. at 751.

[63] *See id.* at 739.

[64] *See id.* at 753. To meet the injury requirement, the plaintiffs claimed that the government's financial aid to discriminatory schools was a direct injury in-and-of-itself and secondly, that the tax benefits given to discriminatory private schools hindered the black schoolchildren's ability to receive an education in a racially integrated school. *See id.* at 752-53. The Court rejected the plaintiffs' first claim "because it [did] not constitute judicially cognizable injury," and dismissed the second because the "alleged injury [was] not fairly traceable to the assertedly unlawful conduct" of the defendant. *Id.* at 753.

[65] 426 U.S. 26 (1976).

[66] *See id.* at 42-45.

[67] *See id.* at 42-43. The Court observed that "[s]peculative inferences are necessary to connect [respondents'] injury to the challenged actions of petitioners." *Id.* at 45.

[68] 447 U.S. 352 (1980).

not even be used by the complaining party.[69] The *Bryant* Court considered whether statutory acreage limitations for irrigation, which had not been enforced for thirty-five years, were applicable.[70] If the acreage limitations were found applicable, excess lands would likely become available for purchase by local residents at below market prices.[71] Despite the possibility that the residents may not have been able to afford the land if it did become available, the Court approved the lower court's finding that the residents had demonstrated "a sufficient stake in the outcome of the controversy . . . ."[72]

Harm sustained in the negotiation process may also constitute injury in fact. In *Northeastern Florida Chapter, General Contractors of America v. Jacksonville*,[73] the Court found that prospective bidders had standing to challenge a city ordinance that gave minority-owned businesses preferential treatment in awarding city contracts.[74] Despite the bidders' inability to demonstrate that they would have been awarded the contracts in the absence of the ordinance, the Court discerned that the injury was the harm in the negotiation process, "not the ultimate inability to obtain the benefit."[75]

Besides standing, the *Clinton* Court confronted the Constitution's lawmaking procedures. In *Immigration and Naturalization Service v. Chadha*,[76] the Supreme Court held that the Article I procedures for enacting laws required strict adherence.[77] The *Chadha* Court considered a constitutional challenge to Section 244(c)(2) of the Immigration and Nationality Act, which authorized either house of Congress, by passage of a resolution, to veto an Executive branch decision to permit a deportable alien to remain in the United States.[78]

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[69] *See id.* at 366.

[70] *See id.* at 355-56.

[71] *See id.* at 367 n.17.

[72] *Id.* at 368.

[73] 508 U.S. 656 (1993).

[74] *See id.* at 669.

[75] *Id.* at 666.

[76] 462 U.S. 919 (1983).

[77] *See id.* at 951.

[78] *See id.* at 925. The Immigration and Nationality Act delegated the power to suspend the deportation of an individual to the Attorney General of the United States, an Executive

Such a resolution, upon passage by either body, would be effective without the other house's passage and without presentment to the President.[79] Chadha, an alien whose deportation was suspended and subsequently vetoed by a house resolution, challenged the constitutionality of the one-house veto created by the Immigration and Nationality Act.[80]

The *Chadha* Court found that the House's veto of the deportation suspension was a legislative act, thereby requiring passage by both houses of Congress and presentment to the President as outlined in Article I.[81] The Court examined the purposes that underlied these requirements,[82] and concluded that "the prescription for legislative action in [Article I, Sections 1 and 7], represents the Framers' decision that the legislative power of the Federal Government be exercised in a single, finely wrought and exhaustively considered, procedure."[83] Upon considering the one-house veto's character, purpose and

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branch official. *See id.* at 924-25 (discussing 8 U.S.C. § 1254(c)(1)). Under § 244(c)(2) of the Immigration and Nationality Act, if either house of Congress passed a resolution stating its disfavor with the suspension of deportation, either during the present congressional session or "prior to the close of the session of the Congress next following the session at which a case is reported," the Attorney General would be required to deport the alien. *Id.* at 925 (quoting 8 U.S.C. § 1254(c)(2)).

[79] *See id.* at 928.

[80] *See id.* Pursuant to the Act, Chadha applied for a suspension of deportation and an immigration judge found that he had satisfied the prescribed requirements set forth by the Act to have his deportation suspended. *See id.* at 925. As required by the Act, the immigration judge reported the suspension to Congress. *See id.* The House of Representatives, without debate or recorded vote, proposed and passed a resolution vetoing Chadha's deportation suspension. *See id.* at 927-28.

[81] *See id.* at 955.

[82] *See id.* at 947-52. In assessing the purposes behind the Presentment Clauses and the Bicameralism Requirement, the Court stressed that the Framers intended for lawmaking to be a joint exercise. *See id.* at 948. The President's involvement in the legislative process through the veto power and signing legislative enactments into law ensured that a "'national' perspective" was represented. *See id.* at 949. The bicameral requirement ensured, among other things, that legislation had been "carefully and fully considered by the Nation's elected officials." *Id.* at 950. The most important purpose, however, for vesting each branch with different powers in the legislative process was to ensure that no one branch dominated the others. *See id.* at 952. The *Chadha* Court explained that "[t]he bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps." *Id.* at 957.

[83] *Id.* at 952.

effect, and the fact that the only other way Congress could implement the result attained by section 244(c) was by legislation requiring deportation, the Court identified the House's veto as a legislative action.[84] Moreover, the *Chadha* Court opined that the one-house veto could not be likened to an amendment or a repeal of the Immigration and Nationality Act because "[a]mendment and repeal of statutes, no less than enactment, must conform with [Article] I."[85] Therefore, since this legislative act did not fall within "any of the express constitutional exceptions authorizing one house to act alone, and [it was] equally clear that it was an exercise of legislative power," the Court concluded that section 244(c) was unconstitutional for failure to comport with the law-making procedures of Article I.[86]

As *Chadha* demonstrated, the issue of whether an action is legislative, executive, or judicial in nature is often an important consideration when determining the constitutionality of an action. In *Field v. Clark*,[87] the Court upheld section 3 of the Tariff Act of 1890, which authorized the President to suspend import duty exemptions on enumerated foreign goods when he determined that other countries had levied "reciprocally unequal and unreasonable" import duties on American agricultural products.[88] In holding that section 3 did not delegate legislative power to the President, the Supreme Court reasoned that the suspension power was of an executive nature because the President's role was simply to enforce the wishes of Congress upon ascertaining a fact.[89] With nothing but the duration of the suspension left to the discretion of the President, which was inherently a part of the enforcement of Congress' policy, the Court concluded that the President had not been delegated the power to make laws.[90]

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[84] *See id.* at 953-55. By regulating immigration and thereby exercising its power "to establish an uniform Rule of Naturalization," the Congress "took action that had the purpose and effect of altering the legal rights, duties, and relations of persons . . . ." *Id.* at 952 (quoting U.S. CONST. art. I, § 8, cl. 4).

[85] *Id.* at 954.

[86] *Id.* at 957-58. Chief Justice Burger concluded with the observation that "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

[87] 143 U.S. 649 (1892).

[88] *Id.* at 680.

[89] *See id.*

[90] *See id.* Specifically, the *Field* Court reasoned that

In addition to the suspension power, the Court, in *Train v. City of New York*,[91] held that Congress may delegate to the President discretionary power to withhold appropriated funds, including funds that Congress appropriated for a specific purpose.[92] Further, the Court examined a statute that authorized spending for controlling and decreasing water pollution.[93] The statute provided for spending on the program not to exceed certain amounts and stated that appropriated funds shall be allotted by the Administrator of the Environmental Protection Agency.[94] President Nixon instructed the Administrator to allot less than the maximum appropriation.[95] The Court held that the President's direction to withhold the appropriated funds was improper because the statute did not delegate discretion to the Executive to do so and instead required total allotment of the appropriated funds.[96]

Despite the proscription on Congress delegating legislative powers, the Court has taken a permissive approach by allowing various and sundry con-

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> [n]othing involving the expediency or the just operation of such legislation was left to the determination of the President . . . . [W]hen 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 [specified goods], 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 in the premises 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 [specified goods], from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed.

Id. at 693.

[91] 420 U.S. 35 (1975).

[92] *See id.* at 44-47.

[93] *See id.* at 37.

[94] *See id.* at 37-39 (quoting 33 U.S.C. §§ 1285, 1287 (1970 ed., Supp. III)).

[95] *See id.* at 40.

[96] *See id.* at 44-47.

gressional delegations to stand.[97] The Court has required, however, that congressional delegations contain "an intelligible principle to which the person or body authorized [to act] is directed to conform . . . ."[98]

IV. *CLINTON V. CITY OF NEW YORK*: THE PRESIDENT'S CANCELLATION OF ITEMS OF NEW DIRECT SPENDING AND LIMITED TAX BENEFITS VIOLATES THE PRESENTMENT CLAUSE OF ARTICLE I, SECTION 7, CLAUSE 2

A. THE MAJORITY OPINION

Writing for the Court, Justice Stevens[99] began by dismissing the government's jurisdictional challenges.[100] First, the majority rejected the government's argument that none of the appellees, except for Mike Cranney, were authorized to bring actions because they were not "individuals" as required by the Act's expedited review provision.[101] Citing the government's failure to

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[97] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404-05 (1928) (upholding congressional delegation of authority to adjust tariffs to President); Crowell v. Benson, 285 U.S. 22, 53-54 (1928) (permitting congressional delegation to non-Article III commission to adjudicate factual disputes under a federal statute); American Trucking Ass'ns, Inc. v. United States, 344 U.S. 298, 310-13 (1953) (upholding congressional delegation of rulemaking power to federal agency); Wiener v. United States, 357 U.S. 349, 354-56 (1958) (allowing congressional delegation of adjudicatory power to federal agency); Morrison v. Olson, 487 U.S. 654, 696-97 (1988) (allowing congressional delegation of prosecutor-appointment power to federal judges); Mistretta v. United States, 488 U.S. 361, 412 (1989) (upholding congressional delegation to Sentencing Commission to promulgate Sentencing Guidelines); Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 221-23 (1989) (upholding delegation of authority to implement system of user fees to Secretary of Transportation).

[98] *Hampton*, 276 U.S. at 409.

[99] Justice Stevens delivered the opinion of the Court, in which Chief Justice Rehnquist and Justices Kennedy, Souter, Thomas, and Ginsburg joined. *See* Clinton v. City of New York, 118 S. Ct. 2091, 2094 (1998). Justice Kennedy filed a concurring opinion. *See id.* at 2108 (Kennedy, J., concurring). Justice Scalia filed an opinion concurring in part and dissenting in part, in which Justice O'Connor joined and in which Justice Breyer joined as to Part III. *See id.* at 2110 (Scalia, J., concurring in part and dissenting in part). Justice Breyer filed a dissenting opinion in which Justices O'Connor and Scalia joined as to Part III. *See id.* at 2118 (Breyer, J., dissenting).

[100] *See id.* at 2098.

[101] *See id.* The government based this argument on § 692(a)(1), which provided that "[a]ny Member of Congress or any individual adversely affected [by the Act] may bring an

raise this jurisdictional argument in the district court, Justice Stevens indicated that this omission, while not resulting in a waiver of the argument, evidenced a congressional intent to construe the word "individual" as broadly as the word "person."[102] In the Court's view, the Act's inclusion of an expedited review provision demonstrated the congressional interest in "a prompt and authoritative judicial determination of the constitutionality of the Act."[103] Moreover, the Court found no congressional intent to support special consideration for suits brought by individuals while completely denying jurisdiction to similar actions filed by corporations.[104]

The majority next dismissed the government's argument that the appellees' claims were nonjusticiable.[105] Justice Stevens distinguished *Raines v. Byrd* by observing that in *Clinton*, the President's cancellations precluded any lack of ripeness claim.[106] Moreover, unlike the appellees in *Raines*, the Court determined that the New York and Snake River appellees had demonstrated the requisite "'personal stake' in having an actual injury redressed . . . ."[107]

Justice Stevens concluded that the reinstatement of the state's multibillion dollar contingent liability, effected by the President's cancellation of section 4722(c) of the Balanced Budget Act of 1997, amounted to "the cancellation of the legislative equivalent of a favorable final judgment," and therefore qualified as an immediate and concrete injury.[108] The Court also disagreed with the

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action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any provision of this part . . . violates the Constitution." 2 U.S.C. § 692(a)(1) (1994 ed., Supp. II) (citation omitted).

[102] *See Clinton*, 118 S. Ct. at 2098. The Court explained that in ordinary usage, "individual" and "person" take on the same meaning. *See id.* at 2098 n.13. "Person," however, often takes on a broader construction in the law. *See id.* (citing 1 U.S.C. § 1) (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, and individuals").

[103] *Id.* at 2098.

[104] *See id.*

[105] *See id.* at 2098-2102.

[106] *See id.* at 2099. In *Raines*, the challenge to the constitutionality of the Act was brought the day after the Act became law and before the President exercised his cancellation authority. *See* Raines v. Byrd, 117 S. Ct. 2312, 2316 (1997).

[107] *Clinton*, 118 S. Ct. at 2099 (citing *Raines*, 117 S. Ct. at 2322).

[108] *Id.* at 2099 n.16. The majority rejected the government's claim that the alleged injury to the State of New York was too speculative because HHS had not decided whether to

government's assertion that the wrong parties had advanced the claim.[109] Relying on New York statutes, the Court observed that the City of New York and the health care providers would be liable for substantial payments to the state, which, in turn, would be used to reimburse the federal government.[110] The Court concluded that the state, the city, and the health care providers shared the same potential liability, and therefore, any of them could have brought the claim.[111]

In assessing the justiciability of the Snake River appellees' suit, the Court relied on three factors to find that the cancellation of section 968 of the Taxpayer Relief Act had inflicted a sufficiently immediate and specific injury on the Snake River appellees.[112] First, Justice Stevens recognized that Congress had sought to help farmers' cooperatives by vesting them with a "statutory 'bargaining chip.'"[113] Second, the Justice found that the President targeted this bargaining chip as one of two limited tax benefit cancellations in the entire Taxpayer Relief Act of 1997.[114] Third, the Court explained that the Snake

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grant the waiver requests. *See id.* at 2099. Justice Stevens likened the President's cancellation "to the judgment of an appellate court setting aside a verdict for the defendant and remanding for a new trial of a multibillion dollar damages claim." *Id.* Regardless of the outcome in the second trial, the defendant has nonetheless been deprived of a benefit, a favorable final judgment. *See id.* In describing the importance of the contingent liability, Justice Stevens cited the state's lobbying of Congress for a favorable resolution of the issue, Congress' determination that the situation warranted action, and the President's decision to cancel only this provision from the expansive statutory text. *See id.* Furthermore, the Justice observed that the reinstatement of such a large contingent liability "immediately and directly affects the borrowing power, financial strength, and fiscal planning of the obligor." *Id.*

[109] *See id.* The government argued that the claim belonged to the State of New York. *See id.*

[110] *See id.* at 2099-2100. The Court cited N.Y. Pub. Health Law §§ 2807-c(18)(e), 2807-d(12), 2807-j(11) and 2807-s(8) and found that retroactive payments were required from the providers in the event that the exclusions were found not to apply. *See id.* at 2097 n.10.

[111] *See id.* at 2100. Once the Court found that the City of New York and the health care providers satisfied standing requirements, the majority deemed it unnecessary to determine whether the appellee unions had standing. *See id.* at 2100 n.19.

[112] *See id.* at 2100.

[113] *Id.*

[114] *See id.*

River cooperative was formed for the very purpose of taking advantage of the seller's tax deferral that Congress had chosen to grant, that the cooperative had demonstrated a sufficient likelihood of taking advantage of this deferral in the future, and that the cooperative had been involved in negotiations that implicated the use of the deferral at the time of the cancellation.[115] Therefore, the Court concluded that under its precedents, the Snake River appellees had demonstrated "a sufficient likelihood of economic injury" to support a finding of standing.[116]

Justice Stevens compared the injury suffered by the Snake River appellees with the injury sustained by the irrigation district residents in *Bryant v. Yellen*.[117] The Court noted that although the appellees could not demonstrate with certainty that the limited tax benefit would be enjoyed, it was sufficient that it was merely possible that they would enjoy the benefit.[118] Despite the government's insistence that the Snake River appellees had to demonstrate that a processing facility would have been acquired on favorable terms, the Court was satisfied with the lesser showing of a "denial of a benefit in the bargaining process . . . irrespective of the end result."[119] The Court then confirmed that both sets of appellees had met the standing doctrine's traceability and redressability requirements.[120]

As with the New York appellees, the majority disagreed that the Snake River appellees were the wrong parties advancing the claim.[121] Justice Stevens reasoned that the Snake River appellees were the intended beneficiaries of the

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[115] *See id.* In addition, the Court found persuasive the Snake River appellees' assertion that it was actively searching for other processing facilities to acquire if the President's cancellation was nullified and that there were promising purchasing opportunities within Idaho. *See id.*

[116] *Id.*

[117] *See id.*

[118] *See id.* at 2100-01 (citing Bryant v. Yellen, 447 U.S. 352, 367-68 (1980)).

[119] *Id.* at 2101 n.22 (discussing Northeastern Florida Chapter, Associated Gen. Contractors v. Jacksonville, 508 U.S. 656, 664-66 (1993)).

[120] *See id.* at 2101 n.22. The Court stated that "each injury is traceable to the President's cancellation[s] . . . and would be redressed by a declaratory judgment that the cancellations are invalid." *Id.*

[121] *See id.* The government argued that because the sellers of processing facilities would have received the tax benefits under § 968, the sellers were the appropriate parties to bring such a challenge. *See id.*

limited tax benefit and that multiple parties often have standing to challenge a certain action or inaction.[122] Therefore, Justice Stevens concluded that both cases satisfied Article III's Case or Controversy Requirement.[123]

Reaching the merits of the case, Justice Stevens concluded that the President's cancellations, both legally and practically, had "amended two Acts of Congress by repealing a portion of each."[124] According to the Court, such action was not consistent with the law-making procedures contained in Article I.[125] The Court examined the President's law-making powers and responsibilities provided by the Constitution and found the absence of any explicit provision authorizing the President to enact, amend, or repeal statutes to be decisive.[126] Justice Stevens distinguished the President's power of return contained in Article I, Section 7 from the cancellation power vested in the President by the Act: the constitutionally-based return occurs before the bill becomes a law and affects the entire bill while the statutorily-created cancellation took effect after the bill had become a law and only affected part(s) of the bill.[127]

Having examined the constitutional provisions that addressed the President's role in the law-making process, the Court construed the Constitution's silence on the Executive's ability to repeal or amend statutes as both deliberate and dispositive of this case.[128] Justice Stevens acknowledged that enacting laws must comply with the "single, finely wrought and exhaustively considered, procedure" that was agreed upon only after historic debate and compromises.[129]

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[122] *See id.* The Court compared the injury in the instant case to "the repeal of a law granting a subsidy to sellers of processing plants if, and only if, they sell to farmers' cooperatives." *Id.* at 2101 n.23. Such a repeal would effectively harm every farmers' cooperative that sought to buy a processing plant. *See id.*

[123] *See id.*

[124] *Id.* at 2103.

[125] *See id.* (citing Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 954 (1983)).

[126] *See id.* When the Court examined the President's lawmaking powers and responsibilities, it specifically cited Article II, Section 3, which authorizes the President to report on the State of the Union and make legislative recommendations to Congress, and the Presentment Requirement and veto power of Article I, Section 7. *See id.*

[127] *See id.*

[128] *See id.*

[129] *Id.* at 2103-04 (quoting *Chadha*, 462 U.S. at 951).

According to the Court, the President's cancellations had produced "truncated versions" of bills passed by both houses of Congress, a result that conflicted with the historical materials that the Court had relied upon in the past and past presidents' understanding of the veto power.[130]

Justice Stevens next dismissed the government's reliance on the Act's lockbox provisions to argue that a cancellation was not a repeal because the canceled items continued to have "real, legal budgetary effect."[131] Rejecting this argument, the Court concluded that although the savings from the canceled items continued to exist within the context of the budget and deficit reduction, the items were nonexistent insofar as they affected the New York and Snake River appellees.[132]

Justice Stevens discarded the government's contention that the President's cancellations were exercises of congressionally delegated discretionary authority such as were upheld in *Field v. Clark*.[133] In assessing the government's analogy of the President's cancellation power to the suspension power upheld in *Field*, the Court relied on three differences to justify invalidating the cancellation power.[134] First, Justice Stevens explained that the use of the suspension power in *Field* necessitated a finding of a condition that was nonexistent

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[130] *See id.* The majority opinion made passing reference to "familiar historical materials" discussed in *Chadha*, which include: The Federalist Papers, The Records of the Federal Convention of 1787, and Commentaries on the Constitution of the United States by Joseph Story. *See Chadha*, 462 U.S. at 947-60. Justice Stevens also cited Presidents George Washington and William Howard Taft for their shared view that the President's veto could only be of the entire bill. *See Clinton*, 118 S. Ct. at 2104 n.30.

[131] *Id.* at 2104. As the Court described, "The lockbox procedure ensures that savings resulting from cancellations are used to reduce the deficit, rather than to offset deficit increases arising from other laws." *Id.* (citing 2 U.S.C. §§ 691c(a)-(b)).

[132] *See id.* The Court observed that "[s]uch significant changes do not lose their character simply because the canceled provisions may have some continuing financial effect. 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." *Id.* at 2104-05 (citation omitted). Moreover, assuming that the government's lockbox provision argument was accepted on the basis that the canceled items retained some effect on the budget, Justice Stevens observed that nothing prevented Congress from amending or repealing this feature so as to abolish the continuing budgetary effect of canceled items. *See id.* at 2104 n.34.

[133] *See id.* at 2105. The government likened the President's cancellation authority, which was derived from the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 read in light of the Line Item Veto Act of 1996, to the suspension power of § 3 of the Tariff Act of 1890 upheld by the *Field* Court. *See id.*

[134] *See id.*

when the power was created and delegated by Congress to the President.[135] The Court observed that by requiring the cancellation power to be employed, if at all, within five days of the passage of the targeted provisions, it was obvious that cancellations would be "based on the same conditions that Congress evaluated when it passed those statutes."[136] Second, the majority recognized that upon the President's discovery of certain facts, it was mandatory that the *Field* suspension power be employed.[137] According to Justice Stevens, although the cancellation power mandated that the President be satisfied of three factors, a finding of these factors "did not qualify [the President's] discretion to cancel or not to cancel."[138] Third, the majority stated that an exercise of the *Field* suspension power executed congressional policy whereas an exercise of the cancellation power amounted to a rejection of congressional policy in favor of the President's.[139]

Confronted with examples of other tariff and import statutes that vested the President with discretionary powers,[140] the Court distinguished these grants of power from the Act on the grounds that the President had traditionally been recognized to enjoy greater discretion and autonomy in foreign matters as opposed to domestic affairs.[141] The majority emphasized, however, that the most

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[135] *See id.*

[136] *Id.*

[137] *See id.*

[138] *Id.*

[139] *See id.* at 2106. To demonstrate this point, the Court referred to the President's cancellation of the limited tax benefit. *See id.* at 2106 n.35. The President stated that the decision to cancel the benefit was motivated by a perceived failure to limit its effect to small and medium farmers' cooperatives. *See id.* The Court observed that because every cancellation must be accomplished within five days of congressional passage of the item, the President's reasons for canceling the item were likely based on the same conditions and facts that motivated Congress to pass the item. *See id.*

[140] For example, the *Field* Court cited approvingly of the Act of January 7, 1824 and the Act of May 24, 1828, which directed the President to temporarily withhold or terminate statutory duties upon finding that other nations were not imposing discriminatory duties on American goods. *See* Field v. Clark, 143 U.S. 649, 686-87 (1892). Justice Stevens specified that the *Field* Court did not consider whether these statutes were consistent with the Presentment Clause. *See Clinton*, 118 S. Ct. at 2106 n.36.

[141] *See id.* at 2106 (citing United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936)). Justice Stevens indicated that the *Field* Court itself recognized that Congress often finds it necessary to vest a great deal of discretion with the President when it comes to dealing with foreign countries on trade and commercial matters. *See id.* at n.38 (citing

important difference between the tariff statutes cited in *Field* and the Line Item Veto Act of 1996 was that in the former actions, Congress made the legislative policy judgment by determining that suspension was to occur upon a discovery of certain facts but reserved to the President the power to execute that judgment, for example, to decide when these facts had occurred.[142] In contrast, the Court perceived the Act as authorizing the President, based on his policy judgments, to repeal laws in contravention of the procedures specified in Article I, Section 7.[143]

Similarly, the Court found no merit in the government's analogy of the power to cancel spending items and tax benefits to the President's traditionally recognized authority to decline to spend appropriated funds.[144] Unlike statutes that enabled the President to determine how and how much of appropriated funds would be spent, the Court observed that the Act unprecedentedly authorized the President to unilaterally modify the text of enactments.[145]

Justice Stevens concluded the majority opinion by emphasizing three points. First, the Court declared that its invalidation of the Act should not be construed as expressing a view as to the wisdom of the Act.[146] Next, the majority clari-

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Field, 143 U.S. at 691).

[142] *See id.* at 2106. The Court stated, "Congress may feel itself conveniently unable to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive." *Id.* at 2106 n.39 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407 (1928)).

[143] *See id.* at 2106. Despite Congress' desire to vest the President with this power and the obvious congressional awareness that certain statutory provisions may be eliminated by cancellation, the Court maintained that changing the procedures under Article I, Section 7 may only be accomplished by the amendment process. *See id.* at 2106-07. To counter the Court's position that only Congress may repeal laws, the government cited the Rules Enabling Act, 28 U.S.C. § 2072(b), which allows the Supreme Court of the United States to make procedural rules for the lower federal courts. *See id.* at 2107 n.40. Under the Rules Enabling Act, if the Supreme Court fashions a procedural rule that is inconsistent with any preexisting procedural law, that law is deemed repealed. *See id.* (citing Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941); Henderson v. United States, 517 U.S. 654, 664 (1996)). The Court rejected the government's argument and likened the Rules Enabling Act to the tariff statutes cited in *Field*. *See id.* The Court stated that "[a]s in the tariff statutes, Congress itself made the decision to repeal prior rules upon the occurrence of a particular event—here, the promulgation of procedural rules by this Court." *Id.* at 2107 n.40.

[144] *See id.* at 2107.

[145] *See id.*

[146] *See id.* Despite the congressional bipartisanship and presidential support of the Act,

fied that although the Act was challenged on alternative grounds, namely its effect on the balance of powers, finding that Article I, Section 7 had been evaded was sufficient, by itself, to invalidate the Act.[147] Finally, Justice Stevens declared that the Court's decision to invalidate the Act was based on the narrow ground that the Act's procedures were unauthorized by the Constitution.[148] According to the majority, if the President's role in the lawmaking process was to be altered, it must be accomplished through the Article V amendment process.[149]

B. JUSTICE KENNEDY'S CONCURRENCE

Agreeing with the reasoning of the majority, Justice Kennedy wrote separately to respond to Justice Breyer's dissent and focused exclusively on the separation of powers issue.[150] Justice Kennedy rejected the dissent's position that the Court should be restrained when the other two branches have chosen to redistribute their powers between themselves because individual liberties were implicated whenever the political branches attempted to encroach the separation of powers.[151] According to the concurrence, "[t]he Constitution's structure re-

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the careful consideration and debate that led to its passage, and the primary importance of the problem it sought to address, the Court stressed that invalidation was necessary in light of the Court's obligation and duty. *See id.*

[147] *See id.* at 2107-08. In addition to declining to consider whether the Act disrupted the Separation of Powers in the tripartite scheme, the Court also passed on deciding the severability of the provisions that provided for cancellation of discretionary budget authority. *See id.* at 2108 n.43. The Court noted, however, that the Act did not contain a severability clause. *See id.*

[148] *See id.* at 2108. The majority added that

> [i]f the [Act] were valid, it would authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature. Something that might be known as "Public Law 105-33 as modified by the President" may or may not be desirable, but it is surely not a document that may "become a law" pursuant to the procedures designed by the Framers of Article I, § 7, of the Constitution.

Id.

[149] *See id.*

[150] *See id.* at 2108-10 (Kennedy, J., concurring).

[151] *See id.* at 2108-09 (Kennedy, J., concurring).

quires a stability which transcends the convenience of the moment."[152]

Justice Kennedy discussed the Framers' appreciation for the separation of powers and cautioned against the modern tendency to view the Bill of Rights as the sole protection of liberty.[153] The Justice explained that the Framers' adherence to principles of federalism and their construction of a tripartite system were motivated by a desire "to secure liberty in the most fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts."[154] Liberty, according to the concurrence, entailed limiting a political branch's influence on basic political decisions.[155]

Although the Act was not intended to strengthen the President's power to help or reward one group, set of taxpayers, or state, and hurt or penalize another group, set of taxpayers, or state, Justice Kennedy observed that these were the Act's undeniable effects.[156] The Justice speculated that such an enhancement of the Executive's powers surpassed what the Framers would have

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[152] *Id.* at 2108 (Kennedy, J., concurring).

[153] *See id.* at 2109 (Kennedy, J., concurring).

[154] *Id.* Justice Kennedy explained that in order to secure liberty, the Framers installed "limits on the ability of any one branch to influence basic political decisions." *Id.* Specifically, the Separation of Powers doctrine guards against the exercise or consolidation of multi-branch powers by a single branch. *See id.* To illustrate this point, Justice Kennedy referred to a passage from the Federalist Papers:

> "When the legislative and executive powers are united in the same person or body, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Id. (quoting THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (emphasis omitted)).

[155] *See id.* As an example, Justice Kennedy offered the case of the Executive, without adequate control by Congress, determining the measure of a tax and the purposes for which the revenue from that tax would be spent. *See id.* According to the concurrence, "[m]oney 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." *Id.*

[156] *See id.* In addition, Justice Kennedy viewed the Act as enabling the President to win more concessions from Congress. *See id.*

approved.[157] The concurrence rejected the assertion that the Act was valid because Congress had voluntarily given its authority to the Executive and could reclaim it by merely enacting a statute.[158] Describing the Constitution as "a compact enduring for more than our time," the Justice instructed that no Congress may forfeit its own powers or those of future Congresses.[159]

Justice Kennedy conceptualized separation of powers as functioning on a two dimensional axis to demonstrate the interplay between the three branches and the interplay between each individual branch and the citizens for whom the branches exercise their powers.[160] Recognizing the citizen's "vital interest in the regularity of the exercise of governmental power," Justice Kennedy concluded that the Act contravened the doctrine of separation of powers by endangering the political liberty of individual citizens.[161]

Justice Kennedy invoked federalism and "control of the political branches by an informed and responsible electorate" as devices built into the Constitution that may be used to control excessive spending.[162] In closing, the Justice remarked that although these mechanisms may be inadequate to combat inordinate spending, the Framers had provided them and their lack of efficacy could not justify utilization of unconstitutional measures.[163]

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[157] *See id.*

[158] *See id.*

[159] *Id.* Justice Kennedy further stated that "[a]bdication of responsibility is not part of the constitutional design." *Id.*

[160] *See id.* at 2110 (Kennedy, J., concurring). Separation of powers "operates on a horizontal axis to secure a proper balance of legislative, executive, and judicial authority. Separation of powers operates on a vertical axis as well, between each branch and the citizens in whose interest powers must be exercised." *Id.*

[161] *Id.* According to the Justice, "If this point was not clear before *Chadha*, it should have been so afterwards." *Id.*

[162] *Id.*

[163] *See id.* Moreover, Justice Kennedy observed:

> The Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge. The fact that [federalism and control of the political branches by a responsible and informed electorate], plus the proper functioning of the separation of powers itself, are not employed, or that they prove insufficient, cannot validate an otherwise unconstitutional device.

Id.

C. JUSTICE SCALIA CONCURS IN PART AND DISSENTS IN PART

Justice Scalia filed an opinion concurring in part and dissenting in part.[164] Accusing the majority of "unrestrained zeal to reach the merits of this case," Justice Scalia stated that the Snake River appellees had not met Article III standing requirements, and therefore, the Court should not have addressed the constitutionality of the cancellation of the limited tax benefit.[165] Justice Scalia determined that the New York appellees had demonstrated standing to challenge the cancellation of the "item of new direct spending" but disagreed with the Court and found the Act to be constitutional.[166]

In Part I of his opinion, Justice Scalia focused on how the statutory limits of the Court's jurisdiction had been implicated.[167] The Justice accepted the government's argument that all of the appellees, except Mike Cranney, were disqualified from having their claims adjudicated by the Act's expedited-review provision because they were not "'individuals' under any accepted usage of that term."[168] Citing the United States Code's generic definition of "person"[169] and the Act's distinguishing of "individuals" from "persons,"[170] the Justice argued that the Court was obligated to accept the plain language of the statute, especially in light of Congress' common practice of treating individuals more favorably than corporations and other entities.[171] Next, Justice Scalia chastised the majority for having been so quick to declare Congress' definition an oversight or a mistake.[172] Although adopting a limited interpretation of individuals

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[164] *See id.* at 2110 (Scalia, J., concurring in part and dissenting in part). Justice O'Connor joined in the opinion and Justice Breyer joined only as to Part III. *See id.*

[165] *Id.*

[166] *See id.*

[167] *See id.* at 2110-11 (Scalia, J., concurring in part and dissenting in part).

[168] *Id.* at 2110 (Scalia, J., concurring in part and dissenting in part).

[169] *See id.* (emphasis omitted) (quoting 1 U.S.C. § 1 (1988)) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

[170] *See id.* at 2111 (Scalia, J., concurring in part and dissenting in part) (quoting 2 U.S.C. § 691e(9)(B)(iii) (1994 ed., Supp. II)).

[171] *See id.*

[172] *See id.*

so as to exclude entities other than natural persons may not have been congressionally intended, the Justice contended that this view was not so absurd as to warrant the Court rejecting it outright as a mistake in lieu of a broader reading.[173]

Justice Scalia proceeded to find an alternative grant of statutory jurisdiction for the New York and Snake River appellees' claims.[174] Invoking Rule 11 of the Supreme Court Rules, the Justice deemed the cases to be worthy of *certiorari* review before judgment because "of the public importance of the issues involved."[175]

In Part II of the opinion, Justice Scalia addressed the Snake River appellees'

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[173] *See id.* Justice Scalia stated:

> There is nothing whatever extraordinary—and surely nothing so bizarre as to permit this Court to declare a "scrivener's error"—in believing that individuals will suffer more seriously from delay in the receipt of "vetoed" benefits or tax savings than corporations will, and therefore according individuals (but not corporations) expedited review. It may be unlikely that this is what Congress actually had in mind; but it is what Congress said, it is not so absurd as to be an obvious mistake, and it is therefore law.

Id.

[174] *See id.* Since Mike Cranney, a member, director, and Vice Chairman of the Snake River cooperative, was found to have jurisdiction under the Act's expedited-review provision, this finding of alternative statutory jurisdiction did not include him. *See id.*

[175] *Id.* The appellees had sought declaratory relief under both the expedited-review provision of the Act and the Declaratory Judgment Act, 28 U.S.C. § 2201, thereby summoning the jurisdiction of the United States District Court under 28 U.S.C. § 1331. *See id.* Upon receiving an adverse determination in the district court, the government concurrently appealed directly to the Supreme Court and filed a notice of appeal in the Court of Appeals for the District of Columbia. *See id.* Justice Scalia accepted the government's explanation for appealing to both courts, namely that it sought to ensure that the district court's judgment would be reviewed. *See id.* (citing Reply Brief for Appellants at 2 n.1). Justice Scalia, therefore, considered the direct appeal to the Supreme Court to be a petition for writ of *certiorari* before judgment, as provided for in Rule 11 of the Supreme Court Rules, and the Justice granted it. *See id.* (citing 28 U.S.C. § 2101(e) (1988)). Rule 11 provides that "[a] petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." *Id.* (quoting SUP. CT. R. 11). The Justice also regarded "the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals . . ." as a persuasive reason for granting the appellees review. *Id.*

failure to meet Article III standing requirements.[176] The Justice refused to find that either the "deprivation of a 'bargaining chip'" or the "sufficient likelihood of economic injury" created by that deprivation conferred standing.[177] First, Justice Scalia rejected the majority's reliance on *Northeastern Florida Chapter, Associated General Contractors of America v. Jacksonville*, characterizing it as an equal protection case where the denial of equal treatment, not the harm to bargaining position, constituted the requisite injury-in-fact.[178] Justice Scalia found no precedent outside of the equal protection context that held detriment to bargaining position, as opposed to actually showing the loss of a bargain, sufficient to constitute standing.[179] Rather, the Justice likened this case to *Simon v. Eastern Kentucky Welfare Rights Organization*, which held that indigent individuals who were denied medical treatment lacked standing to challenge an Internal Revenue Service decision that decreased the amount of charitable medical services required of hospitals to achieve tax-exempt status.[180] The Justice concluded that standing could not be established by the appellees' reduced chances of enjoying a financial benefit resulting from the denial of a tax benefit to a third party.[181]

Assuming that harm to bargaining position was sufficient to constitute the requisite injury for standing, the Justice determined that the facts alleged by the Snake River appellees were inadequate to demonstrate personalized injury.[182] Specifically, Justice Scalia stated that the nature and content of the Snake River appellees' discussions with the seller of a processing facility could not be said to have reached "the *point* of bargaining."[183]

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[176] *See id.* at 2111-15 (Scalia, J., concurring in part and dissenting in part).

[177] *Id.* at 2111-12 (Scalia, J., concurring in part and dissenting in part).

[178] *See id.* at 2112 (Scalia, J., concurring in part and dissenting in part).

[179] *See id.*

[180] *See id.*

[181] *See id.*

[182] *See id.*

[183] *Id.* at 2112-13 (Scalia, J., concurring in part and dissenting in part) (emphasis in original). According to Justice Scalia,

> All we know from the record is that Snake River had two discussions with (a seller of a processing facility) concerning the sale of its processing facility on the tax deferred basis the [Taxpayer Relief] Act [of 1997] would allow; that [the seller] was

Alternatively, Justice Scalia found that the Snake River appellees had failed to demonstrate that a "sufficient likelihood of economic injury" had been sustained as a result of the President's cancellation.[184] The Justice criticized the majority for concluding otherwise, stating that the Snake River appellees had asserted only that the cancellation had made it more difficult to purchase a processing facility.[185] According to Justice Scalia, this, standing alone, could not qualify as an injury-in-fact.[186] Moreover, considering the cooperative's apparent inability to afford the purchase of a facility with or without the tax benefit, and Snake River's unilateral decision to terminate discussions, Justice Scalia decided that the cooperative's purchase of a facility was never really likely to occur at all.[187] The Justice further supported denial of standing to the Snake River appellees by likening them to individuals who had challenged the government's tax treatment of a third party and were subsequently found by the Court to lack standing.[188] According to Justice Scalia, it was conjectural to conclude that the limited tax benefit would have brought about any sale, "let alone one that reflected the tax benefit in the sale price."[189]

> interested; and that Snake River ended the discussions after the President's action. We do not know that Snake River was prepared to offer a price—tax deferral or no—that would cross [the seller]'s laugh threshold. We do not even know for certain that the tax deferral was a significant attraction to [the seller]; we know only that Cranney thought it was. As we have said many times, conjectural or hypothetical injuries do not suffice for Article III standing.

Id. at 2113 (Scalia, J., concurring in part and dissenting in part) (citations omitted).

[184] *Id.*

[185] *See id.*

[186] *See id.*

[187] *See id.*

[188] *See id.* (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976); Allen v. Wright, 468 U.S. 737 (1984)). In *Simon*, the Court stated that it was "purely speculative whether the denials of service . . . fairly can be traced to [the IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications." *Simon*, 426 U.S. at 42-43. In *Simon*, the Court also found it speculative whether the desired result would be achieved by the exercise of the requested redressability. *See id.* at 43. Justice Scalia next recounted that part of the Court's holding in *Allen* was that it was "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Clinton*, 118 S. Ct. at 2114 (Scalia, J., concurring in part and dissenting in part) (quoting *Allen*, 468 U.S. at 758).

[189] *Clinton*, 118 S. Ct. at 2114 (Scalia, J., concurring in part and dissenting in part).

Justice Scalia proceeded to distinguish *Bryant v. Yellen*, which the majority relied upon to find standing.[190] The Justice found significant the absence of evidence that the cooperative could either have afforded or secured the financing necessary to purchase the processing facility, or that even with the tax benefit in place a processing facility would have been available for sale.[191] Moreover, Justice Scalia criticized the majority's reliance on the reasoning of *Bryant* "because it represents a crabbed view of the standing doctrine that has been superseded."[192] Justice Scalia conceded that under *Bryant*'s standard, the Snake River appellees may have had standing, yet their allegations did not demonstrate injury-in-fact, traceability, or remediation.[193] Therefore, failing to find jurisdiction, the Justice passed on determining the constitutionality of the President's cancellation of the limited tax benefit.[194]

In Part III, the Justice found that the New York appellees had demonstrated standing to challenge the cancellation of the "item of new direct spending."[195] Unlike the majority, however, Justice Scalia concluded that the cancellation did not violate the Presentment Clause and was constitutional.[196] Acknowledging that the Presentment Clause did not allow the President to cancel a law that Congress did not permit the President to cancel, the Justice offered examples of authorized presidential cancellation of laws.[197] According to Justice Scalia, the

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[190] *See id.*

[191] *See id.* In contrast, the Court in *Bryant* found it likely that would-be purchasers would have been able to secure financing should the excess lands became available for purchase. *See id.* (discussing Bryant v. Yellen, 447 U.S. 352, 366-67, n.17 (1980)). The *Bryant* Court also found it likely that if the would-be purchasers were successful in getting the statutory restrictions applied, many of the landowners would likely sell. *See id.*

[192] *Id.* According to Justice Scalia, *Bryant* was decided in an era that took a limited view of standing, namely "to assure that concrete adverseness which sharpens the presentation of issues." *Id.* at 2114-15 (Scalia, J., concurring in part and dissenting in part) (citations omitted). The *Bryant* Court found standing not on the basis of injury in fact, causation, and redressability, but on the simple finding that the would-be purchasers held "a sufficient stake in the outcome of the controversy." *Bryant*, 447 U.S. at 368.

[193] *See Clinton*, 118 S. Ct. at 2115 (Scalia, J., concurring in part and dissenting in part).

[194] *See id.*

[195] *Id.*

[196] *See id.* at 2115-18 (Scalia, J., concurring in part and dissenting in part).

[197] *See id.* at 2115-16 (Scalia, J., concurring in part and dissenting in part) (citing Act of Mar. 1, 1809, § 11, 2 Stat. 528 (authorizing President to cancel trade restrictions); Act of

Presentment Clause "no more categorically prohibits the Executive reduction of congressional dispositions in the course of implementing statutes that authorize such reduction, than it categorically prohibits the Executive augmentation of congressional dispositions in the course of implementing statutes that authorize such augmentation—generally known as substantive rulemaking."[198] The Justice conceded that the limits on the reduction statutes might be greater than those on the augmentation enactments, however, such limits were not imposed by the Presentment Clause but by "the doctrine of unconstitutional delegation of legislative authority."[199]

In Justice Scalia's view, the Act did not even implicate the Presentment Clause.[200] The Justice approved of the majority's distinguishing past authorizations of Executive cancellation because they were premised on a contingent finding of fact by the President and involved Presidential activity in foreign affairs.[201] Therefore, the Justice opined, to determine the constitutionality of the Act depended on "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."[202] Noting that a similar cancellation power had been delegated to the Executive branch in the Balanced Budget and Emergency Deficit Control Act of 1985, Justice Scalia explained that the Court's invalidation of that enactment was not premised on its impermissibly vesting the Executive with legislative power, but rather because it assigned responsibility for execution of the law to a legislative official.[203] Observing that

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Oct. 1, 1890, § 3, 26 Stat. 612 (Tariff Act of 1890 upheld in *Field*)).

[198] *Id.* at 2116 (Scalia, J., concurring in part and dissenting in part) (emphasis omitted).

[199] *Id.* Justice Scalia described "the doctrine of unconstitutional delegation of legislative authority" as "[w]hen authorized Executive reduction or augmentation is allowed to go too far, [the Executive action] usurps the nondelegable function of Congress and violates the separation of powers." *Id.*

[200] *See id.*

[201] *See id.*

[202] *Id.*

[203] *See id.* (discussing Bowsher v. Synar, 478 U.S. 714 (1986)). In *Bowsher*, the Court held that a provision of the Balanced Budget and Emergency Deficit Control Act of 1985 was unconstitutional because it vested the Comptroller General, deemed a legislative official because Congress retained the power to remove him, with the power to determine what budget cuts would be made. *See id.* The *Bowsher* Court found that such a power was properly characterized as an executive function. *See id.*

the Act granted the President greater discretion than the Balanced Budget and Emergency Deficit Control Act of 1985 granted the Comptroller General, Justice Scalia found the grant of discretion to be valid in light of the broader discretion given to the President in the execution of spending laws.[204]

Justice Scalia analogized the Act's authorization of the cancellation power to Congress' common practice of appropriating funds for a particular item to be spent at the President's discretion.[205] The Justice offered examples of this congressional appropriations practice and asserted that its constitutionality had never been doubted.[206] According to Justice Scalia, although the President may not impound or withhold appropriated funds without a congressional grant of discretion to do so, the Court's decision in *Train v. City of New York* certainly approved of Congress conferring upon the President the discretion to withhold appropriated funds.[207]

In closing, the Justice analogized the cancellation power to the often utilized power to decline to spend.[208] Acknowledging that a technical difference existed between the two exercises, Justice Scalia articulated that this difference was unrelated "to the technicalities of the Presentment Clause, which have been fully complied with."[209] Moreover, the doctrine of unconstitutional delegation of legislative authority, in Justice Scalia's view, "is preeminently *not* a doctrine of

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[204] *See id.*

[205] *See id.* According to Justice Scalia, "[T]here 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." *Id.*

[206] *See id.* at 2116-17 (Scalia, J., concurring in part and dissenting in part) (citing Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190 (examples of Congress making lump-sum appropriations for entire government); Act of Feb. 28, 1803, ch. 11, § 3, 2 Stat. 206 (appropriating $50,000 to the President to build as many as fifteen gun boats "to be armed, manned and fitted out, and employed for such purposes as in his opinion the public service may require"); Act of Feb. 25, 1862, ch. 32, 12 Stat. 344-45 (appropriating money to be used for various items "as the exigencies of the service may require"); Act of Feb. 15, 1934, ch. 13, 48 Stat. 351 (appropriating money "for such projects and/or purposes and under such rules and regulations as the President in his discretion may prescribe"); Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (appropriating money to be used "in the discretion and under the direction of the President")).

[207] *See id.* at 2117 (Scalia, J., concurring in part and dissenting in part) (discussing Train v. City of New York, 420 U.S. 35, 37-47 (1975)).

[208] *See id.* at 2118 (Scalia, J., concurring in part and dissenting in part).

[209] *Id.*

technicalities."[210] According to the Justice, since the President's cancellation of new direct spending items was substantially identical to the President's exercise of the power to decline to spend, and not anything resembling a true line-item veto, the Justice concluded that the title of the Act "ha[d] succeeded in faking out the Supreme Court."[211]

D. JUSTICE BREYER DISSENTS

Agreeing with the majority that both sets of appellees had standing, Justice Breyer dissented because the Act's cancellation procedures violated neither the Presentment Clause nor the Separation of Powers doctrine.[212] The Justice set forth three general considerations to address the constitutionality of the Act: first, the Justice opined that Congress had opted to equip the President with a power to select what items in an appropriations bill will have effect, an objective that does not run afoul of the Constitution;[213] second, Justice Breyer addressed the Constitution's structural provisions, which vest all "legislative" power in Congress and all "executive" power in the President, and how the Court has interpreted them liberally by upholding various congressional delegations to the other branches;[214] and third, Justice Breyer stated that the Court

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[210] *Id.* (emphasis in original).

[211] *Id.* Justice Scalia further resolved that "[t]he President's action [that the Act] 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." *Id.*

[212] *See id.* at 2118 (Breyer, J., dissenting). Justices O'Connor and Scalia joined as to Part III of the opinion. *See id.*

[213] *See id.* According to the dissent, Congress could have given the President the power to selectively enforce provisions of an appropriations bill at the inception of the nation. *See id.* The dissent observed that the country's population, number of federal employees, and annual budget expenditures had increased dramatically since the nation's founding. *See id.* Justice Breyer speculated that if the inaugural Congress sought to give the President the same power that the Act had authorized, "[Congress] could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto." *Id.* at 2118-19 (Breyer, J., dissenting). Considering that the country's current population is approximately 250 million, the annual federal budget is between one and two trillion dollars, and modern budget appropriations bills are gigantic, the dissent concluded that it was practically impossible to divide an appropriations bill into thousands of separate bills, each subject to the President's veto. *See id.* at 2119 (Breyer, J., dissenting). The dissent framed the issue as "whether the Constitution permits Congress to choose a particular novel means to achieve this same, constitutionally legitimate, end." *Id.* (emphasis omitted).

[214] *See id.* (citing Mistretta v. United States, 488 U.S. 361 (1989); Youngstown Sheet

did not need to "referee a dispute among the other two branches."[215] Acknowledging that, at first glance, the Act appeared to contravene the literal commands of the Constitution, the Justice maintained that a close examination of the Act demanded the opposite conclusion.[216] In addition, Justice Breyer stated that if the Separation of Powers doctrine was applied as the Court had always interpreted it, to promote workable government, then the Act must be deemed constitutional.[217]

In Part III of the dissent, Justice Breyer explained why the Act's cancellation procedures could not be equivocated to the literal repeal or literal amendment of a law.[218] Justice Breyer opined that by effecting a cancellation of an item that Congress had made amenable to cancellation, the President had literally followed or executed the law.[219] The Justice, however, cautioned against

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& Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Jackson, J., concurring); Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Div., Dep't of Labor, 312 U.S. 126 (1941); Crowell v. Benson, 285 U.S. 22 (1932); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928)). These cases, Justice Breyer explained, demonstrated the Court's practice of "find[ing] constitutional room for necessary institutional innovation." *Id.*

[215] *Id.* In response to the majority's observation that only "the most compelling constitutional reasons" can justify invalidating a provision enacted by both Congress and the President that addresses "a deeply vexing national problem," Justice Breyer referred to Justice Jackson's oft-quoted passage from *Youngstown Sheet & Tube Co.*: "'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.'" *Id.* at 2120 (Breyer, J., dissenting) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

[216] *See id.*

[217] *See id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

[218] *See id.*

[219] *See id.* For example, Justice Breyer offered an alternative phrasing of the Act that provided for the elimination of the liability of the health care providers:

> 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 from having legal force or effect if he [makes the three determinations required by the Act.]

Id. According to the dissent,

deciding the case based solely on "a purely literal analysis as the majority [did]."[220] Justice Breyer found no force in the argument that although the cancellation power did not literally violate the Constitution, the Act was unconstitutional because cancellations were analogous or similar to repeal or amendment.[221] According to the dissent, the cancellation power was analogous or similar to the power to choose one legal alternative over another.[222] To illustrate this point, the dissent compared the Act's delegation of the cancellation power to the power of appointment delegated to a beneficiary in a will or trust.[223] Furthermore, citing various federal statutes, Justice Breyer indicated that Congress frequently delegated "a contingent power to deny effect to cer-

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> One could not say that a President who "prevent[s]" 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.

Id. (quoting 2 U.S.C. § 691e(4)(B) (Supp. II 1994)) (emphasis in original).

[220] *Id.* at 2121 (Breyer, J., dissenting). Observing various ways by which Congress could have made the cancellation provisions of the Act applicable to future spending laws, Justice Breyer indicated that Congress had decided to make it applicable by passing the Act and relying on the Act's definitional sections to determine whether future laws were amenable to its cancellation procedures. *See id.* Since the Act's definitional sections made it applicable to the 1997 health care provision, and since the Act "give[s] a special legal meaning to the word 'cancel,'" the Justice asserted that it was improper to rely solely on a literal analysis of the Act. *Id.* (quoting 2 U.S.C. § 691e(4)). Justice Breyer stated, "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." *Id.* (emphasis omitted) (citing Field v. Clark, 143 U.S. 649, 693 (1892)).

[221] *See id.*

[222] *See id.* Justice Breyer offered the power to appoint as an example of the "power to choose one legal path as opposed to another . . . ." *Id.*

[223] *See id.* In the example, Justice Breyer described a will or trust instrument that provides the beneficiary with three alternatives, and maintained that to choose one alternative over the others effectively prevents the legal consequences of the other alternatives from taking effect, or renders the language of the unchosen alternatives from having "legal force or effect." *Id.* However, such a choice does not "amend" or "repeal" the instrument. *Id.* Rather, "in delegating the power of appointment, [the instrument] has not delegated a power to amend or to repeal the instrument; to the contrary, it requires the delegated power to be exercised in accordance with the instrument's terms." *Id.* (citation omitted).

tain statutory language" to the President and others.[224] The Justice summarized that since Congress had created and defined this "power to choose between alternatives" and had made it a component part of the provisions subject to cancellation, the delegation of the cancellation power was constitutionally proper.[225]

The dissent next considered the Act's lockbox provision and accepted the government's argument that the cancellation power did not empower the President to cancel an item but instead allowed the President to determine whether the appropriated funds would be spent on the item specified by Congress or for federal deficit reduction.[226] Concluding that Congress had not conferred upon the President the power to repeal or amend statutes, "or, for that matter, [to effect] a true line item veto," Justice Breyer found the cancellation procedures' noncompliance with "the Constitution's exclusive procedures for enacting (or repealing) legislation" insignificant.[227]

In Part IV of the dissent, Justice Breyer addressed whether the Act violated separation of powers principles.[228] Posing a three-part inquiry, the Justice con-

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[224] *Id.* at 2121-22 (Breyer, J., dissenting) (citing 28 U.S.C. § 2072 (authorizing Supreme Court to promulgate rules in federal courts, which eliminate all conflicting laws); 41 U.S.C. § 405b (stating that if President determined that regulations "would have a significantly adverse effect on the accomplishment of the mission" of government agencies, Office of Federal Procurement Policy would no longer have to promulgate regulations); Pub. L. 104-208, 110 Stat. 3009-695 (authorizing President to repeal an immigration law upon determining that a democratically elected government exists in Cuba); Pub. L. 104-134, § 2901(c), 110 Stat. 1321-160 (authorizing President "to suspend the provisions of . . ." upon determination that suspension is "appropriate based upon the public interest in sound environmental management . . . [or] the protection of national or locally-affected interests, or protection of any cultural, biological or historic resources"); Pub. L. 99-498, § 701, 100 Stat. 1532 (cancellation of law upon sale of stock by Secretary of Education and purchase by Student Loan Marketing Association); Gramm-Rudman-Hollings Act, § 252(a)(4), 99 Stat. 1074 (equipping President with power to cancel sequestered amounts in spending laws in order to bring about budget compliance); Pub. L. 95-384, § 13(a), 92 Stat. 737 (deeming Section 620(x) of the Foreign Assistance Act of 1961 to be canceled "upon the President's determination and certification to the Congress that the resumption of full military cooperation with Turkey is in the national interest of the United States and [other criteria]")).

[225] *Id.* at 2122 (Breyer, J., dissenting).

[226] *See id.* at 2122-23 (Breyer, J., dissenting).

[227] *Id.* at 2123 (Breyer, J., dissenting). The Act did not involve the enactment, repeal, or amendment of a statute and therefore, the Justice argued, it was unnecessary for the President's cancellations to conform with the Constitution's procedures for enactment, repeal, or amendment. *See id.* Justice Breyer observed, however, that the Act had been enacted in compliance with "the Constitution's exclusive procedures for enacting . . . ." *Id.*

[228] *See id.*

cluded that Congress had not given the President non-Executive power, had not vested the President with the power to encroach upon the Legislative branch's constitutional powers, and had not violated the nondelegation doctrine by giving the President too much power.[229] First, the Justice reiterated that the Act granted Executive power.[230] Although the power that the Act vested could also be conceptualized as legislative, the dissent emphasized that certain powers may be exercised by more than one branch and not violate the Constitution.[231] Moreover, comparing the Court's precedents that upheld congressional delegations of various powers to the Executive and Judiciary branches to the cancellation power delegated by the Act, Justice Breyer concluded that the latter was "easier conceptually to reconcile . . . with the relevant constitutional description ('executive')" than the other powers with the relevant constitutional description in the former cases.[232]

Finding that the Act neither encroached upon Congress' power nor aggrandized the power of the Executive branch at the expense of another branch, Justice Breyer determined that the Act did not undermine the tripartite structure of the federal government.[233] In discerning no evidence of encroachment on the Legislative branch, the dissent found significant that Congress could exempt future appropriations bills from the applicability of the Act, pass disapproval bills to reinstate items that the President had canceled, and establish the framework by which the President exercised the cancellation power by its drafting and enacting appropriations laws.[234] In addition, Justice Breyer indicated that

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[229] *See id.* Justice Breyer announced that "[t]here 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?'" *Id.*

[230] *See id.*

[231] *See id.* (citations omitted). Justice Breyer stated, "The Court does not 'carry out the distinction between legislative and executive action with mathematical precision' or 'divide the branches into watertight compartments . . . .'" *Id.* (quoting Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting)).

[232] *Id.* at 2123-24 (Breyer, J., dissenting) (emphasis omitted). Therefore, Justice Breyer concluded that any separation of powers violation "must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant Separation of Powers objective." *Id.* at 2124 (Breyer, J., dissenting).

[233] *See id.*

[234] *See id.* According to Justice Breyer, these factors combined to remove a major concern of Justice Kennedy's concurrence, namely that the Act represented a delegation "'without . . . sufficient check.'" *Id.* (quoting *id.* at 2109 (Kennedy, J., concurring)). The dissent

past Congresses had conferred the same discretionary authority over spending to the President.[235] In finding no aggrandizement of the Presidency, the Justice observed that the cancellation power was limited to budgetary matters, namely to decide whether to spend appropriated items or whether to allow tax exemptions to be implemented.[236] Although the delegation of the cancellation power may have enhanced the President's power, Justice Breyer reasoned that "any such change in Executive branch authority seems minute" in comparison to the changes brought about by other congressional delegations previously upheld by the Court.[237]

Justice Breyer next discussed the "nondelegation" doctrine.[238] The Justice instructed that the doctrine required Congress, when making a delegation of power, to attach "'*intelligible principle*[s]'" that direct or guide the recipient of the delegated power.[239] According to the dissent, the Act procedurally, purposively, and substantively set forth the required "intelligible principle."[240] Acknowledging that these principles were broad, the Justice found them permissible in light of the even broader standards that the Court had upheld in prior cases.[241] Justice Breyer next assessed the Act against the two cases where

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concluded that "[i]ndeed, the President acts only in response to, and on the terms set by, the Congress." *Id.*

[235] *See id.* The dissent responded to the contention that the Act enabled the President to "rewrite" appropriations laws to implement objectives that are contrary to those held by Members of Congress by observing that to protect against such a change in policy, Congress could exempt appropriations from cancellation by merely garnering majority support. *See id.* Justice Breyer stated, "Where the burden of overcoming legislative inertia lies is within the power of Congress to determine by rule." *Id.* at 2124-25 (Breyer, J., dissenting).

[236] *See id.* at 2125 (Breyer, J., dissenting).

[237] *Id.* (citations omitted).

[238] *See id.*

[239] *See id.* (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)).

[240] *See id.* According to the Justice, the Act created a procedural intelligible principle by telling the President what sources to consider when selecting items for cancellation. *See id.* The Act contained a purposive principle, namely promoting greater fiscal discipline. *See id.* Justice Breyer also discerned a substantive intelligible principle in the Act's requiring the President to determine that the cancellation would reduce the budget deficit, not hinder essential governmental functions, and not endanger the national interest. *See id.*

[241] *See id.* at 2125-26 (Breyer, J., dissenting) (citing Lichter v. United States, 334 U.S. 742 (1948); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Yakus v. United

the Court had found a violation of the "nondelegation" doctrine and determined that the Act's delegation was not comparable.[242]

The dissent continued to examine the Act in light of other "nondelegation" cases.[243] First, the Justice observed that the Act sought to address a discrete problem, a limited group of expenditures and tax breaks.[244] Second, the Justice opined that determining whether to cancel a spending item or tax benefit was incapable of being accomplished under "a significantly more specific standard" than that set forth by the Act.[245] Justice Breyer next relied on historical support for the congressional grant of discretionary power to the President.[246] Fourth, the dissent recognized that when giving the President the standard by which the delegated power was to be exercised, Congress could depend upon context and history to formulate the required standard.[247]

Justice Breyer conceded that differences existed between the Act's delegation and other broad delegations to executive agencies that the Court had upheld.[248] The Justice referred specifically to both the common practice of agencies formulating rules to avoid arbitrary implementation of a particular statute

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States, 321 U.S. 414 (1944); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944); National Broad. Co. v. United States, 319 U.S. 190 (1943); United States v. Rock Royal Coop., Inc., 307 U.S. 533 (1939)).

[242] *See id.* at 2126 (Breyer, J., dissenting) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Specifically, the dissent focused on the limited scope of the Act's delegation, the budget, and its even more limited conferral of power to the President regarding certain spending and tax items. *See id.*

[243] *See id.* at 2126-28 (Breyer, J., dissenting).

[244] *See id.* at 2126 (Breyer, J., dissenting). Justice Breyer discerned that the spending items affected by the Act represented only about "a third of the current annual budget outlays" and that the limited tax benefits susceptible to cancellation comprised "a tiny fraction of federal revenues and appropriations." *Id.* (citations omitted).

[245] *Id.* at 2127 (Breyer, J., dissenting). Justice Breyer commented that "[t]he statute's language, I believe, is sufficient to provide the President, and the public, with a fairly clear idea as to what Congress had in mind." *Id.*

[246] *See id.* (citations omitted). Justice Breyer declared that the President could refer to history for guidance in the exercise of the Act's delegated authority. *See id.*

[247] *See id.*

[248] *See id.* at 2127-28 (Breyer, J., dissenting).

and the possibility of judicial review of agency implementations.[249] The Justice recognized that although the President had not developed rules to implement the cancellation power and was not subject to judicial review for implementation decisions, these considerations were important but not determinative.[250] Therefore, the dissent concluded that the Act's delegation of cancellation power of spending items to the President did not run afoul of the "nondelegation" doctrine.[251]

Justice Breyer shifted focus to analyze whether the delegation of cancellation power of tax benefits had violated the "nondelegation" doctrine.[252] Stating that most of the considerations offered in the discussion of the spending items were applicable to the case of the limited tax benefits, the Justice found that the lack of incontrovertible historical support for the President's exercise of the cancellation power in the tax context and the basic subject matter of increasing or decreasing taxes posed sufficient concern about the potential for arbitrary use of delegated power by the President.[253] Nevertheless, the Justice stated that these differences were not sufficient to conclude that the delegation of cancellation power of limited tax benefits had violated the "nondelegation" doctrine.[254]

In reaching the same "nondelegation" doctrine result, the dissent reasoned that the "nondelegation" standard to be employed was the same regardless of the subject matter.[255] Moreover, the Justice found support in tax statutes, upheld by the Court yet distinguished by the majority, that delegated to the President the authority to alter taxes under very broad standards.[256] Justice Breyer

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[249] *See id.* at 2128 (Breyer, J., dissenting).

[250] *See id.* The dissent addressed the Court's reluctance to review decisions that are the product of the President's discretion and argued that the voting public was the appropriate judge in such cases. *See id.*

[251] *See id.*

[252] *See id.*

[253] *See id.*

[254] *See id.*

[255] *See id.* at 2128-29 (Breyer, J., dissenting). Justice Breyer relied on *Skinner v. Mid-America Pipeline Company*, wherein the Court rejected the adoption of a more demanding "nondelegation" doctrine for cases in which Congress had delegated, by way of its taxation power, discretionary authority to the Executive. *See id.* at 2129 (Breyer, J., dissenting) (citing Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 221-23 (1989)).

[256] *See id.*

deemed these tax statutes to be too similar to the Act to overlook, and thus, disagreed with the majority's attempt to distinguish these statutes and cases on various grounds.[257] Moreover, the dissent offered five arguments that the delegation of cancellation power of tax benefits was so limited that the risk of arbitrary decision-making by the President was unlikely.[258] Therefore, in Justice Breyer's view, the limited tax benefit provisions did not deviate enough from the Act's spending provisions to justify an opposite result under the "nondelegation" doctrine.[259] In closing, Justice Breyer described the means implemented by the Act as "an experiment that may, or may not, help representative government work better" but maintained that the Constitution "authorizes Congress and the President to try novel methods in this way."[260]

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[257] *See id.* at 2129-30 (Breyer, J., dissenting). Justice Breyer rejected the majority's argument that these examples involved the imposition of a contingent duty to act upon the President. *See id.* Rather, the Justice interpreted the statutes as either imposing no duty at all or imposing a duty that was so vague that they would require reliance upon substantial exercise of Presidential discretion. *See id.* at 2130 (Breyer, J., dissenting). Justice Breyer also dismissed the majority's argument that these statutes involved the execution of congressional policy, as opposed to the Act's inevitable rejection of such policy. *See id.* at 2120-23 (Breyer, J., dissenting). Furthermore, the Justice found unpersuasive the majority's argument that these statutes involved the President's exercise of vast discretion as a result of the Executive's greater degree of discretion in foreign policy. *See id.* at 2130 (Breyer, J., dissenting). The dissent countered by citing various examples of Congress delegating taxation authority in the domestic context. *See id.* (citations omitted).

[258] *See id.* First, Justice Breyer opined that the Act did not vest the President with the power "to change general tax policy." *Id.* Second, the Justice explained that under the Act, the President must make the same policy judgments regardless of whether the targeted item is one of spending or tax benefit. *See id.* Third, the dissent stated that no individual's expectation could be said to have been destroyed by a cancellation of a tax benefit. *See id.* Fourth, Justice Breyer estimated that limited tax benefits make up approximately less than one percent of the total budget outlays and revenues. *See id.* at 2130-31 (Breyer, J., dissenting). Finally, Justice Breyer concluded that it was appropriate to consider this delegation within the budget context rather than as a delegation to make policy under federal tax laws because the Act equivocated the limited tax benefits to be "a special kind of spending, namely spending that puts back into the pockets of a small group of taxpayers, money that 'baseline' tax policy would otherwise take from them." *Id.* at 2131 (Breyer, J., dissenting) (emphasis omitted). The Justice cautioned, however, that "[s]till less does approval of the delegation in this case, given the long history of Presidential discretion in the budgetary context, automatically justify the delegation to the President of the authority to alter the effect of other laws outside that context." *Id.*

[259] *See id.*

[260] *Id.*

E. CONCLUSION

Although *Clinton* will be remembered as "the line-item veto case," its impact on the law of standing will be significant. The Court has spawned an aberration to standing jurisprudence that will require substantial limiting or further development and refining in future cases. By finding that the Snake River appellees had standing to challenge the Act, the Court ignored standing precedents, especially the strikingly similar factual scenarios of *Allen* and *Simon*.[261] In both cases, the Court refused to find standing based on a challenge to "the Government's tax treatment of a third party."[262] While this similarity is sufficient, by itself, to deny standing, the majority instead relied upon equal protection cases and adopted a new standard, "harm to one's bargaining position."[263] Moreover, the facts alleged by the Snake River appellees failed to demonstrate that they had personally suffered harm to their bargaining position, or alternatively, that they had sustained even "a sufficient likelihood of economic injury."[264] Despite the majority's conclusion that a finding of standing for the Snake River appellees was in accord with standing precedent and requirements, the unintended result of the *Clinton* Court's handling of the standing issue may be to allow future litigants with questionable credentials to gain standing.

The *Clinton* Court's disposition of the standing issue was not, however, the only deviation from precedent and practice. In determining the constitutional validity of the Act, the proper inquiry, as suggested by Justices Scalia and Breyer, was not whether the Presentment Clause had been violated but whether the President may properly exercise the type of power delegated by the Act.[265] Upon considering the discretion traditionally delegated to the President in the execution of spending laws, particularly the constitutional propriety of congressional conferrals of discretion on the Executive to withhold appropriated funds, it is difficult to understand why a different result is mandated by this case.[266] Moreover, the analogy between the cancellation power delegated by the Act

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[261] *See id.* at 2112 (Scalia, J., concurring in part and dissenting in part).

[262] *Id.* at 2113 (Scalia, J., concurring in part and dissenting in part).

[263] *Id.* at 2112 (Scalia, J., concurring in part and dissenting in part).

[264] *Id.* at 2113 (Scalia, J., concurring in part and dissenting in part) (quoting *id.* at 2100).

[265] *See id.* at 2116 (Scalia, J., concurring in part and dissenting in part); *id.* at 2123 (Breyer, J., dissenting).

[266] *See id.* at 2116-18 (Scalia, J., concurring in part and dissenting in part).

and both "the contingent power to deny effect to certain statutory language" and "the power to decide *how* to spend the money to which the line item refers—either for the specific purpose mentioned in the item, or for general deficit reduction" confirms that the Act represented nothing new and nothing constitutionally questionable.[267]

The Court's invocation of the Presentment Clause is made possible by its characterization of the cancellation power as a repeal or amendment of a duly enacted law. Comparing the cancellation power, however, with previously upheld delegated discretionary powers exercised by the President indicates that cancellation is execution of the law and not rejection of it.[268] Nevertheless, the Court's application of the Presentment Clause calls into question countless other exercises of executive powers.[269] Will *Clinton* signal a restriction or reigning in of the autonomy and creativity by which executive agencies and officials implement legislative commands into law? Or is this case limited to the unique arrangement and the nature of the power conferred on the President? At the very least, the Court's refusal to reconcile the Act with similar instances of congressional delegation of discretionary power to the President "increases the doubt and disputation each time Congress and the President attempt certain kinds of lawmaking innovation."[270]

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[267] *Id.* at 2121, 2123 (Breyer, J., dissenting).

[268] *See id.* at 2120-23 (Breyer, J., dissenting).

[269] As Professors Powell and Rubenfeld have asserted:

> [Article I,] Section 7 applies to congressional lawmaking. When Congress delegates to officers of the other two branches any of its powers to make or unmake rules of law, those officers may exercise such delegated powers without going through the Section 7 process. After all, that's what executive branch officers do every day, when they exercise their delegated powers to interpret and implement statutory schemes.

Powell & Rubenfeld, *supra* note 23, at 1188.

[270] Charles Tiefer, *Line-Item Ruling Will Put A Damper On Innovation*, 153 N.J. L.J. 39 (July 6, 1998). Professor Tiefer further speculated that

> [t]he [Clinton] decision may make it difficult or impossible to enact solutions to pressing problems, from global warming to Medicare, when those solutions must meliorate their toughest (and politically least palatable) aspects by the balm of presidential waiver provisions . . . . Overall . . . the effect of [*Clinton*] is to put a damper on legislative innovation.

Undoubtedly, the Act represented a unique response to a grave national problem. The President's cancellation power may have been a powerful and decisive weapon in controlling the enormous federal budget deficit. Yet, unless the Constitution is amended to provide the President with greater lawmaking powers, a scenario that is highly unlikely, the Supreme Court has succeeded in permanently canceling the presidential line-item veto.

Id.