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Law, Geo. U. L. Center)

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Testimony of Viet D. Dinh

Professor, Georgetown University Law Center

Hearing: Line-Item Veto: Constitutional Issues

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U.S. House Budget Committee

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Mr. Chairman, Ranking Member, and Members of the Committee, Thank you for the opportunity to testify before you this morning on the Legislative Line Item Veto Act of 2006. My name is Viet D. Dinh. I am Professor of Law at the Georgetown University Law Center and Principal of Bancroft Associates PLLC. My comments here are prepared with Nathan A. Sales, currently John M. Olin Fellow at the Georgetown University Law Center. Neither of us represents any entity in this hearing, and neither receives any grant or contract from the Federal government.

The proposed legislation, of course, furthers the unassailable policy principles of fiscal discipline and balanced budgets. We applaud Congressman Ryan and the co-sponsors for their leadership and thank the Committee for its work on this important legislation. Our testimony, however, will be limited to the constitutional issues raised by the proposed legislation and, more broadly, the constitutional principles that should guide Congress as it considers a line item veto.

We believe that H.R. 4890 satisfies the Constitution's Bicameralism and Presentment Clauses, and thus does not suffer from the defects that doomed previous line item veto legislation invalidated by the Supreme Court. The Act also is consistent with the basic principle that Congress has broad discretion to establish procedures to govern its internal operations, including by adopting fast-track rules for the quick consideration of legislation proposed by the President. Finally, there are a number of different approaches through which Congress constitutionally could authorize the President temporarily to freeze spending items while Congress decides whether to rescind them permanently.

A. Bicameralism and Presentment: Overcoming *Clinton v. City of New York*

The Legislative Line Item Veto Act of 2006 is perfectly consistent with the principles laid down in *Clinton v. City of New York*,¹ where a 6-3 Supreme Court invalidated predecessor legislation that Congress enacted and President Clinton signed in 1996. The

1996 version of the line item veto authorized the President to "cancel in whole" certain spending outlays and tax breaks that were approved by Congress and signed into law. A cancellation did not require additional legislation to go into effect; it was effective as soon as Congress received the requisite special message from the President. Congress could override a presidential cancellation, but only by enacting a "disapproval bill" by a veto-proof supermajority: "A majority vote in both Houses is sufficient to enact a disapproval bill," but the President "does, of course, retain his constitutional authority to veto such a bill." In effect, then, the 1996 Act conferred on the President the power to strike, retroactively, items from legislation that had been passed by both Houses of Congress and signed into law. The law as enforced would be qualitatively different than what was congressionally enacted and presidentially approved.

It was precisely this feature of the 1996 Act - the power of the President to amend properly enacted laws - that proved its downfall in *City of New York*. Because a presidential cancellation "prevents the item 'from having legal force or effect,'" the 1996 Act effectively "gives the President the unilateral power to change the text of duly enacted statutes." And such a grant of authority offends the Constitution's Bicameralism and Presentment Clauses, which require unanimity as to the content of a proposed law among all three players in the lawmaking process: the House, the Senate, and the President. That is why George Washington remarked that the Presentment Clause obliged him to either "approve all the parts of a Bill, or reject it in toto." The 1996 Act was constitutionally impermissible, according to the Court, because it purported to 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."

The Legislative Line Item Veto Act of 2006 operates very differently from the 1996 incarnation, and its differences place the Act on different, and firm, constitutional ground. First, and most important, a suggested presidential rescission is just that: a suggestion. The President would submit to Congress for its consideration a proposal to cancel a set of spending outlays or tax breaks. Those items would be stricken if and only if majorities in both Houses of Congress vote in favor of the proposal and the President signs the

resulting bill. Article I, section 7, of the Constitution requires no more than that. If a single House disagrees and fails to approve the new bill submitted by the President, the original spending decisions would remain in force. The Bicameralism and Presentment Clauses thus are fully respected.

The second critical difference follows from the first. Any cancellation proposed by the President would not go into effect immediately (as was true under the 1996 Act), but only after congressional deliberation and action. While the President would be able to suggest spending cuts to Congress and request that they be disposed of expeditiously, he would have no power by himself and immediately to "prevent[] the item 'from having legal force or effect.'" None of the Executive Branch "unilateral[ism]" that was condemned in *City of New York*¹⁰ is to be found here.

H.R. 4890 is a constitutional improvement over the 1996 Act in another sense, as well. Unlike its predecessor, it permits disputed spending items - those on whose desirability Congress and the President disagree - to go into effect without a supermajority vote. Suppose the Supreme Court invalidated the "legislative veto," which permitted one House of Congress to nullify an Executive Branch action - thus are flip sides of the same coin. Both cases proscribe unilateralism in the lawmaking process. *City of New York* stands for the proposition that the President may not unilaterally amend legislation enacted by Congress. And *Chadha* stands for the proposition that Congress may not unilaterally revoke a power previously delegated by law to the President. Both cases work together to ensure collaboration in the enactment of laws.

President thinks that a given spending item is wasteful and should be eliminated, but congressional majorities believe the outlay is important and therefore support it. Under the 1996 Act, the President would cancel the item. Congress would then need to pass a disapproval bill to reinstate it, and the President would veto the bill. The only way for Congress to ensure that its spending priorities go into effect would be to override the veto, requiring a two-thirds supermajority in each House. Under H.R. 4890, the President would identify the item and transmit to Congress a bill proposing to rescind it. If

Congress wanted to preserve the outlay, all that would be necessary would be for a single House to reject the bill - by a simple majority vote. H.R. 4890 thus protects the procedure to make law prescribed by Article I, section 7, and vindicates the constitutional value of majority rule.¹¹

In these respects H.R. 4890 is quite similar to the rescission authority enacted by Congress in the 1974 Impoundment Control Act (which remains in force today).¹² Like H.R. 4890, the Impoundment Control Act does not authorize unilateral presidential cancellation of spending items. Instead, the President may propose to Congress new legislation to strike the items, and rescission only goes into effect if Congress approves the bill and it is signed into law.¹³ Unlike H.R. 4890, the Impoundment Control Act does not oblige Congress to consider the President's proposed rescissions. Congress is entirely free to, and over the lifetime of the Act often has, let them die on the vine through inaction. H.R. 4890 thus is little more than an enhanced version of its 1974 predecessor - one in which Congress would commit itself to giving the President's proposals an up-or-down vote through specified procedures. It is to those procedures that our analysis now turns.

B. Congress's Power to Establish Its Internal Rules and Procedures

The Legislative Line Item Veto Act of 2006 is consistent with the basic principle, expressly recognized in the Constitution, that Congress has broad discretion to "determine the rules of its proceedings,"¹⁴ and that this power generally is "absolute and beyond the challenge of any other body or tribunal."¹⁵ H.R. 4890 - which would oblige Congress to vote on a rescission bill proposed by the President within a particular timeframe - should not be thought of as a transfer of authority away from the legislature and to the Executive Branch. Instead, the Act is little more than a straightforward application of the constitutional principle that Congress has wide latitude to govern its internal operations as it sees fit. In fact, Congress many times in the past has provided for the fast-track consideration of legislative proposals in the same way that H.R. 4890 would.

The basic rule of congressional discretion is articulated in *Nixon v. United States*. In *Nixon*, the House impeached a federal district court judge who was convicted of making false statements before a federal grand jury and was sentenced to imprisonment. (The judge refused to resign, and thus continued to collect his salary while in jail.) Pursuant to Senate Rule XI, the Senate's presiding officer appointed a committee of Senators to receive evidence in the impeachment trial, and the committee reported that evidence to the full Senate. After the Senate voted to convict and Nixon was removed from office, the former judge filed suit, claiming that Rule XI offends the Constitution's directive that the Senate shall "try" all impeachments.¹⁷

In a 6-3 ruling, the Supreme Court held that the dispute over the Senate's decision to assign its power of conducting evidentiary hearings to a committee was a nonjusticiable political question. The authority to determine the manner in which impeachment trials will be conducted "is reposed in the Senate and nowhere else." Courts therefore will decline to override or otherwise interfere with that body's choice to conduct its business in a particular way. Even the separate concurrence of Justices White and Blackmun seconded the proposition that decisions by Congress about its own procedures ordinarily will not be disturbed. Though the concurrence denied that the Senate has "an unreviewable discretion" to establish its internal rules and regulations, they nevertheless maintained that "the Senate has very wide discretion in specifying [its] procedures."

The same principle applies here. In the same way the Senate enjoys unfettered discretion to adopt whatever mechanism it wishes for gathering evidence in impeachment trials, so Congress as a whole is free to establish a rule that commits it to disposing of presidential proposals to rescind spending items on an accelerated basis. The Constitution expressly confers on the President the authority to submit legislative proposals to Congress: "He shall . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient . . ." ²⁰ Congress frequently has adopted procedures to consider such proposals expeditiously, and courts just as frequently have held that they have no authority to second guess those internal legislative rules.

In particular, on at least five occasions, Congress has enacted legislation in which it commits itself to considering on a fast-track basis international trade agreements proposed by the President. The first fast-track trade bill was adopted in 1974. Renewals followed in 1984 (which enabled the Reagan Administration to negotiate trade agreements with Israel and Canada), and in 1988, 1991, and 1993 (under which the George H.W. Bush and Clinton Administrations completed the talks on NAFTA and the Uruguay Round of the GATT negotiations). These fast-track trade procedures are strikingly similar to the ones proposed for spending rescissions in the Legislative Line Item Veto Act of 2006. Like H.R. 4890, the trade rules specified that congressional leadership will introduce the President's proposed bill soon after it is received.²² Like H.R. 4890, the trade rules did not contemplate that the bill will be amended.²³ And like H.R. 4890, the trade rules required a final floor vote within a specified period of time.

Federal courts have shown little enthusiasm for questioning Congress's internal procedures for speedy consideration of proposed trade agreements. The same degree of deference should apply to rescissions rules, as well. Indeed, a decision by Congress to consider a President's proposed spending cuts on an expedited basis presents a much easier constitutional question than fast-track trade authority. The latter procedures, which allowed trade agreements between the United States and foreign nations to be adopted by simple majority vote in both houses of Congress, could be seen as conflicting with the Constitution's command that treaties must be approved by a two-thirds vote in the Senate. In the rescission context, by contrast, there is no constitutional norm that arguably might specify internal rules that conflict with, and thus override, Congress's new streamlined procedures.

If Congress decides to proceed with H.R. 4890, it should consider making plain in the statutory text (as Section 2(b) of the current draft bill proposes to do) that the Legislative Line Item Veto Act of 2006 is an instance of its settled authority to craft procedures to govern its internal operations. (Congress did something similar in the fast-track trade legislation.) Not only would such express language aid the courts in subsequent judicial

review, it also would prevent a misinterpretation of the Act to imply a more extensive delegation of authority than Congress actually intends.

C. Temporary Freezes of Spending Items

Because H.R. 4890 does not (and under *Clinton v. City of New York* constitutionally could not) authorize the President unilaterally and immediately to cancel spending items, and because proposed rescissions are not effective unless and until Congress enacts conforming legislation, some mechanism is needed temporarily to freeze the identified items pending final congressional action. In the absence of a temporary suspension, a cloud of uncertainty would hang over the recipients of the contested funds. Recipients might decline to spend the funds once received for fear that Congress ultimately might revoke them. Alternatively, recipients might begin to spend the funds despite that uncertainty, and this could give rise to reliance interests that could militate against subsequent congressional cancellation. The safer course is to call a time-out until Congress has worked its way through the prescribed legislative process.

This is not a new insight. It was precisely for this reason that Congress in the 1974 Impoundment Control Act authorized the President to freeze the spending items he has targeted for rescission while Congress weighs his proposal. Specifically, after the President submits his suggested rescissions to Congress, the outlays he has identified are frozen for 45 days. Congress could include a comparable mechanism in new line item veto legislation, and it could take any number of forms.

One approach would be to provide, as the current draft of H.R. 4890 does, that the President's suspension of spending items will remain in effect for a set number of calendar days (say, 45), and then lapse automatically. The advantage of this approach is that it steers well clear of any possible constitutional pitfalls under *INS v. Chadha*, to which we will return below. A shortcoming of the calendar-days model is that, because the clock continues to run during congressional recesses, it is conceivable that a temporary freeze could expire before Congress has had time to take final action on a

proposed rescission bill.

An alternative approach is to provide, similar to the Impoundment Control Act, that a temporary suspension would lapse after a set number of legislative days. We understand that some have suggested that such a procedure could run afoul of the Supreme Court's ruling in *INS v. Chadha*. These are legitimate concerns, but we believe them to be overblown. In *Chadha*, the Court held that the "legislative veto" - which allowed a single House of Congress to invalidate an action taken by the Executive Branch pursuant to congressionally delegated authority - violated the Constitution's Bicameralism and Presentment Clauses. There is "only one way" for Congress to make the "determinations of policy" necessary to override lawful Executive Branch action, and that is "bicameral passage followed by presentment to the President."³⁰

To be sure, under the legislative-days approach, Congress could manipulate, by going in and out of session, the length of time the President may suspend the contested funds. The President's powers - specifically, his power to continue to freeze the spending items - in some sense thus would depend on congressional action that has not satisfied the Constitution's bicameralism and presentment requirements. But that does not necessarily mean that the use of legislative days necessarily would offend the Constitution. *Chadha* makes clear that only certain types of congressional acts are subject to the Bicameralism and Presentment Clauses - namely, legislative acts. "Not every action taken by either House is subject to the bicameralism and presentment requirements of Art. I." Instead, only actions that "in law and fact" are "an exercise of legislative power" must satisfy those requirements. It follows that other sorts of congressional acts, such as those that are designed to regulate Congress's internal operations, need not.

It seems to us that a decision by a House of Congress to remain in session or go into recess is - at least in ordinary cases - a quintessential example of a nonlegislative, internally-oriented action. It certainly lacks the hallmarks of what we usually think of as legislative action. Deciding whether to be in session typically does not result in the distribution of benefits to citizens or others, nor does it impose new burdens on such

persons. Regulated entities ordinarily do not change their primary conduct simply by virtue of Congress deciding whether or not to recess. In a word, a decision to be in session is not itself a legislative act; it is merely a prelude that enables Congress subsequently to engage in legislative acts.

It certainly is possible to imagine scenarios in which Congress's decision to recess would be "essentially legislative in purpose and effect" - for instance, where the subjective intent of Members of Congress is to manipulate the length of time the President has to freeze the funds he proposes to rescind. That would present a close case under *Chadha*. But there is no reason to think that the mere possibility that Congress could act in such a manner renders a 45-legislative-day freeze constitutionally infirm in all cases.

In closing, we again thank the Committee for the chance to share our views on this important issue. Fiscal restraint and balanced budgets are common ground among all, but even these shared values must yield to our fundamental commitment to the Constitution. Fortunately, the Legislative Line Item Veto Act does not force a choice between them. H.R. 4890 provides for rescission through bicameralism and presentment, and thus is fully consistent with the Supreme Court's admonitions in *Clinton v. City of New York*. The legislation further represents an effort by Congress to exercise its basic power to lay down rules and procedures for its internal operations. Finally, Congress might consider authorizing the President to suspend targeted spending items for periods of 45 legislative days. Given the *Chadha* Court's condemnation of the legislative veto, such an approach may be riskier than the use of calendar days, but only marginally so. 31 *Id.* at 952. 32 *Id.* at 953.