Austin REED,
Plaintiff

v.

Franklin D. RAINES, Office of Management and Budget,
Defendant

No. 96-CV-1171

United States District Court,
W.D. Davis.

May 7, 1997.

OPINION AND ORDER

BRADY, District Judge.

On October 27, 1996, Plaintiff, Austin Reed, filed his complaint against Defendant, Franklin D. Raines, Director of the Office of Management and Budget, alleging that the President's veto of a section of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 204-208 (1996), pursuant to his authority under the Line Item Veto Act, Pub. L. No. 204-130, 210 Stat. 1200 (1996) codified at 222 U.S.C. § 691 et seq. ("the Act") violated the United States Constitution. The section of the appropriations bill which was vetoed by the President awarded $8,500,000 to be used by the University of Davis to build an environmental technology facility. As Director of the Board of Trustees of the University of Davis, Plaintiff brought this action claiming that he was injured by the denial of the funds.

The Line Item Veto Act empowers the President unilaterally to "cancel" certain appropriations after signing them into law. The Act represents an effort by Congress to enlist presidential assistance in controlling rampant federal spending by conferring upon the President what it termed a species of "enhanced rescission" power. The Act expands the authority he formerly possessed under the Impoundment Control Act of 1974. Plaintiff contends that the mechanism chosen by Congress to its desired end contravenes the text and purpose of Article I, Section 7, Clause 2, known as the "Presentment Clause" of the Constitution. Rather than making expenditures of federal funds appropriated by Congress matters of presidential discretion, the Act

effectively permits the President to repeal duly enacted provisions of federal law. This he cannot do. Accordingly, this Court declares the Act unconstitutional.

Historical Background

The Act is best understood against the historical backdrop of the efforts of the President and Congress over the years to control government spending and in more recent times to reduce an ever-increasing federal budget deficit. Since the outset of the 19th Century, American Presidents have labored to influence congressional spending habits and many have lobbied in particular for the authority to veto selected provisions of bills presented for their signature. Congress has considered both amending the Constitution and enacting several alternative legislative measures to give the President the increased authority he has sought. Although Presidents have uniformly acknowledged that the Constitution affords no inherent authority for a line-item veto, they have managed to exert their will by "impounding"--or simply not spending--appropriated funds. In some instances, Presidents have refused to spend money on measures that conflicted with their foreign policy objectives or that would advance an unconstitutional purpose. Most of the time, however, Presidents simply preferred not to spend the money for the purposes for which Congress had allocated it. *See. e.g.,* David A. Martin, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 Yale L.J. 1636, 1644-45 (1973). Some impoundments have been challenged successfully in federal court; others have either been judicially sanctioned or not contested at all. *See City of New Haven v. United States*, 634 F. Supp. 1449, 1454 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987).

Although presidential impoundments throughout the 19th century occurred in a state of uncertainty as to their legality, Congress has in this century conferred a measure of legitimacy upon them and given some direction as to their use. In the Anti-Deficiency Acts of 1905 and 1906, Congress also allowed the President to waive spending appropriations in the event of emergencies or unusual circumstances. When Congress amended the Anti-Deficiency Act in 1950, it created a mechanism for the Executive Branch to recommend the rescission of any reserves not required to carry out the purposes underlying an appropriation.

Congress has not, however, always been sanguine about Presidents' refusals to spend appropriated funds. During the Nixon administration, for example, the President's extensive

resort to impoundment prompted many lawsuits. *See City of New Haven*, 634 F. Supp. at 1454 ("[B]y 1974, impoundments had been vitiated in more than 50 cases and upheld in only four."). President Nixon's reluctance to spend appropriated funds also provoked passage of the Impoundment Control Act of 1974 (the "ICA"), Pub. L. No. 93-344, 88 Stat. 332 (1974), a statute critical to an understanding of the present Act.

The ICA recognized two types of impoundment: "deferral" and "rescission." Deferral affects the timing of expenditures and is accomplished by "withholding or delaying the obligation or expenditure of budget authority provided for projects or activities" or any other type of Executive action or inaction accomplishing the same result. 2 U.S.C. § 682(1) (1994). Deferral is permitted in order to effect savings through changes or efficiency or as specifically provided by law. 2 U.S.C. § 684(b) (1994). Under the ICA, the President effects a deferral in the same way he cancels an item under the Line Item Veto Act, by transmitting to Congress a special message containing statutorily required information. 2 U.S.C. § 684(a) (1994). Also like cancellations under the Act, deferrals become effective when Congress receives the special message; unlike cancellations, however, they expire with the end of the fiscal year. *Id.*

A rescission under the ICA is the cancellation of budget authority. 2 U.S.C. § 682(3) (1994). In contrast to a cancellation under the Line Item Veto Act, the ICA requires the President to propose a rescission by transmitting a special message to Congress which Congress may enact or not, as it chooses, within 45 days. 2 U.S.C. § 683(b) (1994). The perceived deficiency of the rescission process under the ICA was the necessity of congressional acquiescence. Whenever Congress neglected or declined to pass a bill enacting into law a proposed rescission, the rescission expired. The cancellation procedure embodied in the Line Item Veto Act thus came to be known as "enhanced rescission." The enhancement consists of eliminating the need for congressional action.

Shorn of its political implications, this case turns on the narrow and subtle question of whether the President's power under the Act is simply a present-day enlargement of his historically sanctioned impoundment power, as Defendant urges, or rather a radical transfer of the legislative power to repeal statutory law, as Plaintiff believes. As explained below, the Court agrees with Plaintiff that, even if Congress may sometimes delegate authority to impound funds, it

may not confer the power permanently to rescind an appropriation that has become the law of the United States. That power is possessed by Congress alone, and, according to the Framers' careful design, may not be delegated at all.

The Line Item Veto under the Presentment Clause

The Constitution separates the power to make law from the power and duty to execute the law. Article I vests "[a]ll legislative Powers" in the Congress. U.S. Const. art. I, § 1. It gives the President only a qualified check on the law making process: the power to veto a whole bill that has been presented to him, which is in turn subject to override by two-thirds of both Houses of Congress. *Id.* at § 7, cl. 2. The President's constitutional role is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This separation of legislative and executive power is one of the foundations of our government and the Supreme Court has taken important steps to preserve it. *See. e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Buckley v. Valeo*, 424 U.S. 1 (1976); *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

The Presentment Clause, one of the mechanisms through which the principle of separation of powers is preserved, requires that any bill making or changing federal law must first be passed by both Houses of Congress and then presented to the President in toto. The President must act upon the law in this form, either to make it a law or to return it to Congress for reconsideration. U.S. Const. art. I, § 7, cl. 2. The parties here understand the Presentment Clause differently. Plaintiff argues the President's primary duty under the Presentment Clause is one of approval or disapproval. If he approves of the bill in toto, his signature is but a ministerial formality. If he does not approve of it in toto, his duty obliges him to return it with his "objections" to the House in which it originated or at least to leave it be. If he signs it while disapproving of it--or parts of it--as the Act purports to authorize him to do, then he does so, according to Plaintiff, in violation of the Presentment Clause.

Defendant, on the other hand, argues that it is the bright-line act of signing alone that converts a bill into law. Approval is a highly subjective and temporal concept. A President may "approve" of a bill for many reasons not all of which import enthusiasm for its legislative consequences. A President may sign a bill of which he actually disapproves (as undoubtedly many

Presidents have done) for political, diplomatic, or other purposes unrelated to his judgment of its merit.

The Court agrees with Defendant that the act of signing a bill is the critical requirement of the Presentment Clause. The President's judgment of approval coincides with his decision to sign a bill; it has no independent operative significance. Whether a bill is or is not a law of the United States cannot depend on the President's state of mind when he affixes his signature. He may object to various appropriations--that is, he may disapprove of them--but nevertheless sign a bill and thereby remain in full compliance with the Presentment Clause. Likewise, no subsequent action by the President is capable of retroactively undermining the approval he registered with his signature. By that time the Article I approval process has run its course and the bill indisputably has become a law of the United States. *See United States v. Will*, 449 U.S. 200, 224-25 & n.29 (1980); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899).

Yet, although the Court agrees that statutes subject to cancellation will have been "approved" in accordance with the Presentment Clause, the Act is vulnerable to the additional charge that, following approval, a cancellation by the President is a legislative repeal that itself must comply with Presentment Clause procedures. The Court must resolve this issue in light of the Supreme Court's admonition that "[t]he legislative steps outlined in Art. I are not empty formalities; they were designed to assure that both Houses of Congress and the President participate in the exercise of lawmaking authority." *INS v. Chadha*, 462 U.S. 919, 958 n.22 (1983). Fundamentally, the Presentment Clause enforces "bicameralism" and circumscribes the President's ability to act unilaterally. *See Field v. Clark*, 143 U.S. 649, 692-93 (1892). It embodies "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. The President's contribution to the process is his approval of (or objection to) legislation as Congress presents it to him. His is merely a qualified check on the will of the legislature. The President must consider the whole of the bill presented which in today's world of omnibus appropriations and myriad riders, is an undeniably difficult task. Nevertheless, upon considering a bill, he must reach a final judgment: either "approve it," or "not." U.S. Const. art. I, § 7, cl. 2. Once he has by his signature transformed the whole bill into a law of the

United States, the President's sole duty is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. *See also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("[T]he President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.").

Where the President signs a bill but then purports to cancel parts of it, he exceeds his constitutional authority and prevents both Houses of Congress from participating in the exercise of lawmaking authority. The President's cancellation of an item unilaterally effects a repeal of statutory law such that the bill he signed is not the law that will govern the Nation. That is precisely what the Presentment Clause was designed to prevent.

The Line Item Veto under the Delegation Doctrine

Defendant, arguing that the Act merely ratifies traditional impoundment authority of the President in a novel form, dismisses the notion that it represents an abdication of Congress's Article I lawmaking power. Defendant alludes to a long history of presidential impoundments, many of which have been tested by courts, and as to which the issue has been confined primarily to whether Congress intended to delegate discretion to the President not to spend money it had appropriated, that is, whether its appropriations were permissive or mandatory. *See. e.g., Train v. City of New York*, 420 U.S. 35 (1975); *City of New Haven v. United States*, 634 F. Supp. 1449, 1454 n.6 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). The effect of the ICA was to make all appropriations presumptively mandatory. The Line Item Veto Act merely reverses that presumption for a period of five days. During that limited period, the President has the option to "cancel" any appropriation--he may not change it in any manner. If he cancels it with an appropriate message to Congress, it is extinguished as if it had never been part of the bill unless Congress revives it with a new bill passed like any other by both Houses of Congress and presented anew to the President. In the meantime no money can be spent for it, just as would have been the case had it been "deferred" or "rescinded" in accordance with the ICA. The Line Item Veto Act is, therefore, according to Defendant, merely an advance delegation by Congress to the President of a brief period of discretion to spend or not, as his judgment dictates, subject to the broad injunctions that his decision not to spend must operate to reduce the deficit and may not impair any essential Government functions or harm the national interest.

It has long been held that Congress may--indeed, of necessity, must--delegate vast authority to the Executive Branch of government to make and to change rules for the governance of national affairs. When the Supreme Court has inquired into whether Congress has abdicated its legislative function in cases of allegedly overbroad delegations, its sole concern is whether Congress itself articulated "intelligible principles" by which delegated authority is to be exercised. *See Mistretta v. United States*, 488 U.S. 361 (1989); *J.W. Hampton. Jr. & Co. v. United States*, 276 U.S. 394 (1928). Since 1935, the Supreme Court has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996). Defendant is therefore correct that, if the Act's conferral of cancellation power can be equated with a delegation of impoundment authority, their burden under the delegation standard is not "a tough one." *Nat'l Fed'n of Fed. Employees v. United States*, 905 F.2d 400, 404 (D.C. Cir. 1990).

But Defendant is mistaken in asserting that Article I concerns disappear once the President has signed a bill into law and, consequently, that the delegation doctrine is the only hurdle for them to surmount. Their analysis assumes that Congress conferred a delegable power. It did not; it ceded basic legislative authority. The Constitution vests "all legislative Powers" of the United States in Congress, U.S. Const. art. I, § 1, including the power of repeal. *Chadha*, 462 U.S. 919, 954 (1983). As *Chadha* made clear, there are formal aspects of the legislative process that Congress may not alter. Just as Congress could not delegate to one of its chambers the power to veto select provisions of law, it may not assign that authority to the President. Before the question of a delegation's excessiveness ever arises, a court must be convinced that Congress did not attempt to alienate one of its basic functions.

None of the cases in which the Supreme Court has decided that a delegation of broad authority was saved by Congress's articulation of intelligible principles included an equivalent of the cancellation power given to the President by the Line Item Veto Act. Cancellation under the Act is simply not the same thing as impoundment or any other suspension of a statutory provision. Instead, cancellation is equivalent to repeal--and "repeal of statutes, no less than enactment, must conform with Art. I." *Id.* Cancellation forever renders a provision of federal law without legal force or effect, thus the President who canceled an item and his successors must turn to Congress

to reauthorize the foregone spending. Whereas delegated authority to impound is exercised from time to time in light of changed circumstances or shifting executive (or legislative) priorities, cancellation occurs immediately and irreversibly in the wake of the "approval" of the bill containing the very same measures being rescinded.

Thus the cancellation power conferred by the Act is indeed revolutionary. Never before has Congress attempted to give away what this Act purports to give--the power to shape the content of a statute of the United States. As expansive as Congress's delegations of power may have been in the past, none has gone so far as to transfer the function of repealing a provision of statutory law. The power to "make" the laws of the nation is the exclusive, non-delegable power of Congress which the Line Item Veto Act purports to alienate in part.

The Court therefore agrees with Plaintiff. In those cases which this Court finds most instructive for its purposes, the Supreme Court has repeatedly counseled that when the Constitution speaks to the matter, the Constitution alone controls the way in which governmental powers shall be exercised. *See also Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986); *cf. U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). The formalities of the constitutional framework must be respected; the several estates subject to it must function within the spheres the Constitution allots to them.

In passing the Act, Congress and the President, striving to create a more efficient process, addressed the significant problem of runaway spending. However, "the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 959. As the Court elaborated: "With 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.* For the foregoing reasons, it is ORDERED that the Line Item Veto Act is adjudged and declared unconstitutional.

APPENDIX A: FINDINGS OF FACT

1. On September 25, 1996, Congress voted for passage of H.R. 36100, an act making omnibus consolidated appropriations for the fiscal year ending September 30, 1997.

2. John Black, United States Senator for the State of Davis and Chairman of the Senate

Appropriations Committee was responsible for the following award to the National Oceanic and Atmospheric Administration:

> For repair and modification of, and additions to, existing facilities and construction of new facilities, and for facility planning and design and land acquisition not otherwise provided for the National Oceanic and Atmospheric Administration, $58,250,000, to remain available until expended, of which $8,500,000 shall be available only for a grant to the University of Davis for construction and related expenses for an environmental technology facility.

3. On September 30, 1996, the President signed the appropriations bill into law.

4. Immediately upon signing the bill, the President sent a special message to Congress in conformance with the requirements of 222 U.S.C. § 691a, indicating his veto of the above appropriation.

5. Austin Reed is Director of the Board of Trustees of the University of Davis.

APPENDIX B: THE LINE ITEM VETO ACT

222 U.S.C. § 691 provides:

(a) In general

> The President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole--
>
> > (1) any dollar amount of discretionary budget authority; or
> > (2) any item of new direct spending
>
> if the President--
>
> > (A) determines that such cancellation will-
> >
> > > (i) reduce the Federal budget deficit;
> > > (ii) not impair any essential Government functions; and
> > > (iii) not harm the national interest; and
> >
> > (B) notifies the Congress of such cancellation by transmitting a special message, in accordance with section 691a of this title, within five calendar days (excluding Sundays) after the enactment of the law providing the dollar amount of discretionary budget authority, or item of new direct spending that was canceled.

(b) Identification of cancellations

In identifying dollar amounts of discretionary budget authority and items of new direct spending for cancellations, the President shall-

(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.

222 U.S.C. § 691e provides the following definitions:

As used in this subchapter:

(1) Appropriation law

The term "appropriation law" means an Act referred to in section 105 of Title 1, including any general or special appropriation Act, or any Act making supplemental, deficiency, or continuing appropriations, that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States.

(2) Cancel

The term "cancel" or "cancellation" means-
(A) with respect to any dollar amount of discretionary budget authority, to rescind; and
(B) with respect to any item of new direct spending--
(i) that is budget authority provided by law (other than an appropriation law), to prevent such budget authority from having legal force or effect; or
(ii) that is entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect.

(3) Direct spending

The term "direct spending" means--
(A) budget authority provided by law (other than an appropriation law); and
(B) entitlement authority.

222 U.S.C. § 692 prescribes the process for legal challenge to the Line Item Veto Act:

(a) Any individual adversely affected by the Line Item Veto Act may bring an action in any United States District Court for declaratory judgment and injunctive relief on the ground that any provision of this Act violates the Constitution.

(b) Notwithstanding any other provision of law, any order of a United States District Court which is issued pursuant to an action brought under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States.

(c) It shall be the duty of the United States District Court and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

Alice HORTON,
Plaintiff

v

Franklin D. RAINES, Office of Management and Budget,
Defendant

No. 96-CV-2274

United States District Court,
E.D. Davis.

June 22, 1997.

OPINION AND ORDER

DIMERA, District Judge.

This case challenges The Line Item Veto Act, Pub. L. No. 204-130, 210 Stat. 1200 (1996) codified at 222 U.S.C. § 691 et seq. (hereinafter "the Act"), which provides the President with conditional authority to cancel certain spending and revenue items which have been passed by both houses of Congress and signed into law by the President.

Pursuant to § 691(a)(2) of the Act, the President exercised the power granted by Congress to cancel an item of "new direct spending" on September 30, 1996. The President's action followed the signing into law of an appropriations bill passed by Congress, Pub. L. No 204-208, 210 Stat. 3009 (1996). The President, who took such action within the time period specified by the Act, canceled an item of new direct spending that awarded $1.5 million to the Davis Mountain Wildlife Refuge. Plaintiff Alice Horton, director of the Davis Mountain Wildlife Refuge, brought this action on December 1, 1996, claiming that the President's cancellation is invalid because the Line Item Veto Act violates both the Presentment Clause and the non-delegation doctrine.

The Line Item Veto Act has previously been challenged in the District Court for the Western District of Davis. The Western District held that the Act permits the President to repeal duly enacted provisions of federal law and is therefore unconstitutional. *Reed v. Raines*, No. 97-7777, slip op. at 2 (W.D. Dav. May 7, 1997). The decision of the Western District is not binding on this Court. Since this Court disagrees with that decision, this Court now reaches the contrary

conclusion.

The Presentment Clause

Defendant argues that the *Reed* court erred in concluding that the cancellation power exercised by the President pursuant to the Act violates the Presentment Clause of the United States Constitution. The Presentment Clause mandates that "every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States." U.S. Const. art. I, § 7, cl. 2. Following this presentation, the President is given the option to either sign the bill thereby allowing it to become law or return the entire bill to Congress for reconsideration. *Id.*

The appropriations bill at issue was passed in accordance with the mandates of the Presentment Clause. Both the Senate and the House of Representatives passed the same bill. The bill was subsequently presented to the President. On September 30, 1996, the President signed the bill and it became law at that moment. *See United States v. Will*, 449 U.S. 200, 224-25 (1980); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). Only thereafter did the President exercise the conditional authority granted to cancel certain spending items. Thus, the approval of the appropriations bill was in accordance with the terms of the Presentment Clause.

Nevertheless, the Western District stated that the cancellation power of the President must also be analyzed to determine whether the procedures complied with the Presentment Clause. *Reed*, slip op. at 5. The court concluded that the President's exercise of the conditional authority to cancel an item violated the Presentment Clause. *Id.* at 7. Moreover, the court reasoned that such action amounts to a repeal of statutory law, and therefore must conform with the procedures set forth in the Constitution. *Id.*

It is unchallenged that the Constitution vests all legislative powers in Congress. U.S. Const. art. I, § 1. In addition, every bill which passes both houses of Congress must, before becoming law, be presented to the President. U.S. Const. art. I, § 7, cl. 2. The Supreme Court has stated that these two sections of the Constitution represent a decision by the Framers that the legislative power of the Federal government be exercised in accord with this "single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Congress may not forsake this procedure which is explicitly defined in the Constitution. If Congress is to maintain the integrity of the system of government ordained by the Constitution, it must not delegate legislative power to another branch. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989); *see also Field v. Clark*, 143 U.S. 649, 692 (1892).

Defendant argues that the Act does not delegate legislative power to the President. Rather, Defendant contends, the Act is no more than a statutory grant of discretion to the Executive to administer a duly enacted appropriations law. In other words, Defendant argues that Congress delegated a brief period during which the President is to determine whether or not to spend; the Act does not assign the power to legislate to the President. This Court agrees.

The role of the President is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President's actions are presumptively of an executive or administrative capacity. *Chadha*, 462 U.S. at 951. When the President employs the cancellation authority conferred by the Act, the President is not exercising legislative power but rather is merely carrying out the Executive's core Article II function of faithfully executing the laws. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

Because the Act governs the implementation of appropriations statutes after they have become law rather than the process by which they are enacted, the Act presents no genuine Presentment Clause issue. The Act operates to make the specified spending items discretionary where the President has found the criteria set forth in § 691(a) of the Act to be fulfilled. Thus, Congress has conferred upon the President the authority to determine, in accordance with the statutorily designed standards and procedures, whether items of spending that Congress has authorized will in fact be spent.

The President's cancellation power might appear to be a repeal of a duly enacted law as the *Reed* court held. However, the mere fact that the President's conditional authority to cancel may also appear to be a repeal of a statutory provision does not change the analysis of the action. *Chadha* provides clear guidance on this point.

> Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution

> does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

Chadha, 462 U.S. at 953-54 n.16.

The passage of the Line Item Veto Act does not alter the authority or the ability of Congress to require the President to spend appropriated funds. Congress remains free to decide whether an appropriation will be mandatory or discretionary, and thus whether the appropriation will be subject to the Line Item Veto Act. If Congress determines that a spending measure should not be subject to the Act, Congress may legislate accordingly.

The Act is not "revolutionary" as the Western District proclaimed. *Reed*, slip op. at 8. In fact, this Act is consistent with the historical understanding of Congress's power to confer spending discretion on the Executive Branch. Throughout history Congress has given the President substantial discretion over the expenditure of appropriated funds. In fact, this practice began when the First Congress provided the Executive with "lump-sum" appropriations containing no specifications as to how the funds were to be used. Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95 (1789). The members of the First Congress, many of whom had played a role in framing the Constitution, saw no constitutional impediment to vesting the Executive Branch with discretion as to appropriated funds.

In 1950, through amendments to the Anti-Deficiency Act, Congress provided the Executive with the authority to withhold appropriated funds to establish reserves. General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 763, 765 (1950). In addition, Congress authorized the Executive Branch to reduce spending by "at least" $550 million below appropriated levels, while only specifying that the reductions not "impair national defense." *Id.* at 768.

In the 1970s, President Nixon asserted the authority to impound appropriated funds. As the *Reed* court noted, the President's frequent resort to impoundments prompted many lawsuits. *Reed*, slip op. at 3; *See City of New Haven v. United States*, 634 F. Supp. 1449, 1454 (D.D.C. 1986), *aff'd*, 809 F.2d 900 (D.C. Cir. 1987). The Supreme Court in *Train v. City of New York*, 420 U.S. 35 (1975), analyzed one such impoundment by the Executive branch. The question

presented was whether under the amendments to the 1972 Water Pollution Control Act the Administrator of the Environmental Protection Agency was permitted to allot to the states an amount less than the entire amount appropriated. The Court determined that the statute did not confer such authority to impound funds to the Administrator. *Id.* at 41. The courts have resolved disputes over Executive Branch impoundments by construing the applicable appropriations statutes to determine whether Congress intended for the executive branch to have discretion over the expenditure of funds.

In 1974, Congress responded to the impoundment controversy by enacting the Impoundment Control Act of 1974 (hereinafter the "ICA"), Pub. L. No. 93-344, 88 Stat. 332 (1974), which explicitly set forth the amount of discretion the President possessed with respect to appropriated funds. As the *Reed* court noted, the ICA provided procedures for two types of impoundments: deferrals and rescissions. *Reed*, slip op. at 3. The ICA clarified the previously disputed roles of the President and Congress with respect to impoundments. In 1996, Congress decided to amend the ICA with the Line Item Veto Act by expanding the President's discretion over appropriated funds in the form of a cancellation power. The President is allowed a brief period of time during which to determine whether or not to spend. The Act is consistent with the historical understanding of Congress's power to confer spending discretion on the Executive Branch. The fact that it may grant more discretion to the President than the original ICA does not render the Act unconstitutional.

The Line Item Veto Act does not present a genuine Presentment Clause issue. Instead, the proper analysis is under the standards governing statutory grants of discretion to the Executive Branch in its administration of duly enacted laws. "The bicameral process is not necessary as a check on the Executive's administration of the laws because his administrative activity cannot reach beyond the limits of the statute that created it--a statute duly enacted pursuant to Art. I, §§ 1, 7." *Chadha*, 462 U.S. 919, 954 n.16 (1983).

The Non-Delegation Doctrine

Separation of powers does not mean that the three branches of government "ought to have no partial agency in, or no [control] over the acts of each other." *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting The Federalist No. 47 at 325-26 (James Madison) (J. Cooke ed.

1961)) (emphasis omitted); *see also Loving v. United States*, 116 S. Ct. 1737, 1743 (1996). However, "it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Id.* Article I, Section 1 of the United States Constitution vests all legislative powers in the Congress. "The fundamental precept of the delegation doctrine is that lawmaking belongs to Congress and may not be conveyed to another branch or entity." *Loving*, 116 S. Ct. at 1744; *See also Field v. Clark*, 143 U.S. 649, 692 (1892). Nevertheless, the non-delegation doctrine "[does] not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta*, 488 U.S. 361, 372 (1989). The non-delegation doctrine does not mean that the three branches "each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928).

The *Reed* court held that the delegation to the President under the Act transferred the function of repealing a provision of statutory law. *Reed*, slip op. at 8s. Therefore, according to that court, "[t]he power to 'make' the laws of the nation is the exclusive, non-delegable power of Congress which the Line Item Veto Act purports to alienate in part." *Id.* The *Reed* court misconstrued the delegation at issue. "Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving v. United States*, 116 S. Ct. 1737, 1744 (1996). "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law." *Field*, 143 U.S. at 693-694 (quoting *Cincinnati, W. & Z.R. Co. v. Commissioners*, 1 Ohio St. 77, 88-89 (1852)). Congress may delegate to the President the authority or discretion to execute a law under and in pursuance of its terms. *Loving*, 116 S. Ct. at 1744.

When analyzing congressional delegations, the "intelligible principle" test is used to determine whether there has been an unlawful delegation of legislative authority. As long as Congress has provided an intelligible principle to which the person authorized to exercise the delegated authority must conform, "such legislative action is not a forbidden delegation of legislative power." *Mistretta*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton*, 276 U.S. at

409). The Court has made clear the deference given to Congress under this standard: "Applying this 'intelligible principle' test to congressional delegations, our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress cannot do its job absent an ability to delegate power under broad general directives." *Mistretta*, 488 U.S. at 372. Accordingly, delegations are deemed constitutionally sufficient if Congress "delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Id.* at 373.

The Act, by its terms, confers a conditional cancellation power upon the President. 222 U.S.C. § 691(a). Once the President signs an appropriations bill into law, the legislative action is complete. Thereafter the President has a duty under Article II, Section 3 to execute both the law subject to the Line Item Veto Act and the Line Item Veto Act itself. The President, based upon the principles mandated in the Act, determines whether the conditional cancellation authority will be executed.

Although the Supreme Court struck down two delegations in 1935 for lack of an intelligible principle, the Court since then has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving*, 116 S. Ct. at 1750. The delegation contained herein certainly passes the "intelligible principle" standard and places constitutionally sufficient constraints on the President's exercise of discretion over federal spending.

The Act confers on the President only the power to cancel certain items "in whole." 222 U.S.C. § 691(a). This limits the President's discretion by requiring an all or nothing decision. In addition, this all or nothing decision may only be made on two types of spending provisions: any dollar amount of discretionary budget authority or any item of new direct spending. 222 U.S.C. § 691(a)(1)-(2). In reality, the President's powers are quite limited. For example, § 691(e)(3) of the Act defines the term "direct spending" to include entitlement authority. Since the only items of direct spending that the President may cancel under § 691(a)(1) are items of "new direct spending," existing entitlement spending is beyond the President's conditional power. These entitlements, such as Social Security, Medicare, and Medicaid, make up a substantial portion of all federal outlays. Therefore, very little of the federal government's spending actually falls within the purview of the Act.

The Act also provides significant guidance to the President to determine if a cancellation is permitted. The President may cancel certain spending items only if the President "determines that such cancellation will (i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 222 U.S.C. § 691(a)(A). In addition to this explicit guidance, the President is required to consider "the legislative history, construction, and purposes of the law which contains" the canceled items and "any specific sources of information referenced in such law." 222 U.S.C. § 691(b). Since Congress has "delineate[d] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority," *Mistretta v. United States*, 488 U.S. 361, 373 (1989), the exercise of the cancellation authority under the Act represents the President's Article II power to execute the laws of the United States. Congress has not the delegated the legislative power vested in itself.

The Line Item Veto Act does not authorize the President to repeal legislation. Instead, by making individual items in spending legislation permissive rather than mandatory, the Act simply gives the President discretionary authority over the implementation of future appropriations acts. This kind of power is not tantamount to a legislative repeal under Article I.

For the reasons stated herein, it is ORDERED that the Line Item Veto Act is adjudged and declared constitutional.

APPENDIX A: FINDINGS OF FACT

1. The factual findings of the court in *Reed v. Raines*, No. 97-7777 (W.D. Dav. May 7, 1997) are adopted by this Court.

2. The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 204-208 (1996), when passed by the House of Representatives and the Senate contained the following appropriations award:

> For expenses necessary for conservation, management, protection, and maintenance of the herd of long-horned cattle on the Davis Mountain Wildlife Refuge, $1,500,000, to remain available until expended.

3. The President vetoed the above provision in accordance with the requirements of 222 U.S.C. § 691a.

4. Alice Horton is the director of the Davis Mountain Wildlife Refuge and holds responsibility for maintenance of the herd of long-horned cattle referred to in the above appropriation.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

Franklin D. RAINES, Office of Management and Budget, Petitioner

v.

Austin REED, Respondent

No. 97-100455.

Alice HORTON, Petitioner

v.

Franklin D. RAINES, Office of Management and Budget, Respondent

No. 97-100456

September 2, 1997.

ORDER

Cases below, *Reed v. Raines*, 998 F. Supp. 27; *Horton v. Raines*, 999 F. Supp. 56.

The petitions for writ of certiorari to the United States District Court for the Western District of Davis and the United States District Court for the Eastern District of Davis are hereby granted limited to the following questions: Whether the Line Item Veto Act violates the Presentment Clause of the United States Constitution and, whether the Line Item Veto Act violates the non-delegation doctrine by conferring an undelegable lawmaking authority to the executive branch. Probable jurisdiction noted, cases consolidated, and a total of one half hour allotted for oral argument. The briefs of the parties are to be filed with the Clerk of the Court on or before 5:00 p.m., Friday, September 26, 1997. Cases are set for oral argument in the October 1997 term of this Court.