[RUNNER-UP]

No. 97-100455

IN THE SUPREME COURT OF THE UNITED STATES
SEPTEMBER TERM 1997

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

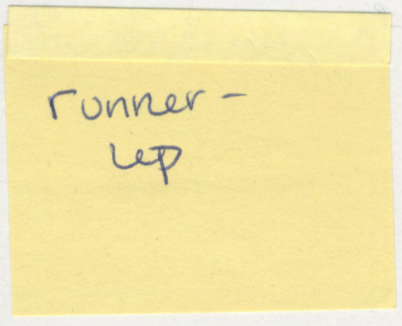
v.

Austin REED,
Respondent.

ON WRIT FOR CERTIORARI TO THE DISTRICT COURT FOR
THE WESTERN DISTRICT OF DAVIS &
THE DISTRICT COURT FOR THE EASTERN DISTRICT OF DAVIS

BRIEF FOR RESPONDENT

Counsel for Respondent,



September 1997

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1. Was the District Court for the Western District of Davis correct in holding that the Line Item Veto Act violates the Presentment Clause of the United States Constitution? Did the District Court for the Eastern District of Davis err in holding otherwise?

2. Was the District Court for the Eastern District of Davis correct in holding that the Line Item Veto Act violates the non-delegation doctrine by conferring an undelegable lawmaking authority to the executive branch? Did the District Court for the Western District of Davis err in holding otherwise?

No. 97-100455

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

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

vs.

Austin REED,
Respondent.

ON WRIT FOR CERTIORARI TO THE DISTRICT COURT FOR
THE WESTERN DISTRICT OF DAVIS &
THE DISTRICT COURT FOR THE EASTERN DISTRICT OF DAVIS

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

The present litigation between Austin Reed and Franklin D. Raines, Director of the Office of Management and Budget (OMB) began on October 27, 1996, when Mr. Reed filed a complaint against Raines in the District Court for the Western District of Davis (Hereinafter the "Western District"). The complaint alleged that the President's veto of a portion of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 204-208 (1996), pursuant to his power under the Line Item Veto Act, Pub. L. No. 204-130, 210 Stat. 1200 (1996) codified at 222 U.S.C. § 691 et seq. was unconstitutional.

The line item veto is a measure enacted by Congress to control rampant government spending. Basically, the Act permits the President to unilaterally cancel certain discretionary appropriations after they have been signed into law. The President exercises this authority by transmitting to Congress a "special message" which indicates his veto of certain appropriations. This veto changes the appropriation law unless Congress disapproves of the alteration, in which case Congress may overrule the cancellation by a two-thirds majority vote. Alternatively, Congress could present the President with a bill specifying that the previously-cancelled item is mandatory.

In the case at hand, the relevant portion of the bill that the President canceled was an $8,500,000 grant to the University of Davis for the construction of an environmental technology facility. Reed brought this action in his capacity as Director of the Board of Trustees of the University of Davis, alleging that the cancellation of the grant adversely affected him. The District Court declared the Line Item Veto Act ("the Act") unconstitutional because (1) the Act violates Article I, Section 7, Clause 2 of the United States Constitution, otherwise known as the

"Presentment Clause," and (2) the Act violates the non-delegation doctrine by conferring upon the President the undelegable authority of legislative repeal. *Reed v. Raines*, No. 96-CV-1171 (W.D. Dav. May 7, 1997).

In December of 1996, Alice Horton, director of the Davis Mountain Wildlife Refuge, brought a similar action against Raines in the District Court for the Eastern District of Davis (Hereinafter the "Eastern District"). Horton alleged that the President's line item veto of the $1.5 million grant to the Davis Mountain Wildlife Refuge found in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 204-208, 210 Stat. 3009 (1996), violated both the Presentment Clause and the non-delegation doctrine. Defendant Raines argued that the Act does not delegate lawmaking power to the President, and characterized the Act as a mere statutory grant of discretion to execute an appropriations law.

The Eastern District delivered its opinion on June 22, 1997, exactly 47 days after *Reed v. Raines* was decided. The court examined the holding set forth in the *Reed* case, but ruled contrarily that the Line Item Veto Act *is* constitutional because it violates neither the Presentment Clause nor the non-delegation doctrine. *Horton v. Raines*, No. 96-CV-2274 (E.D. Dav. June 22, 1997).

222 U.S.C. § 692(a) permits any party adversely affected by the Line Item Veto Act to challenge the constitutionality of the Act in any United States District Court. Further, section 692(b) provides that "any order of a United States District Court which is issued pursuant to [a legal challenge to the Act] shall be reviewable by appeal directly to the Supreme Court of the United States." 222 U.S.C. § 692(b). Accordingly, the parties to these cases petitioned this Court for writ of certiorari to determine the constitutionality of the Line Item Veto Act. This

Court consolidated the cases and granted the petitions for certiorari on September 2, 1997.

SUMMARY OF THE ARGUMENT

The Western District was correct in concluding that the Line Item Veto Act violates the Presentment Clause. The Constitution specifies a detailed procedure through which a bill may become a law. Upon presentment of a bill that has properly passed both Houses of Congress, the President has a duty to consider the bill in toto and either sign it, or return the bill to Congress with any objections. The Act betrays this procedure in that it authorizes the President to sign a bill of which he disapproves, rather than returning that bill to Congress for reconsideration.

Further, the act permits the President to repeal those appropriations to which he objects, creating a new law that has not been passed by Congress in that form. Any appropriations bill that the President modifies circumvents the formal procedure delineated by the framers of our constitution. For these reasons, the Eastern District clearly erred in holding that the Act presents no genuine conflict with the Presentment Clause.

The Act also violates the non-delegation doctrine. Congress may, under certain circumstances, delegate legislative authority if it provides "intelligible principles" with meaningful constraints. However, the Act contains no legitimate intelligible principles for the President to follow in exercising the line item veto. Nor does the Act sufficiently constrain the legislative authority delegated to the President. Contrary to the finding of the Eastern District, 222 U.S.C. § 691 purports only to drastically *expand* the President's powers. Limiting language is conspicuously absent.

Additionally, the Act violates the non-delegation doctrine by conferring to the President the undelegable power of legislative repeal. The Eastern District mischaracterized the Act as merely empowering the President with enhanced executory discretion. However, executory

discretion does not imply the power to cancel or alter an existing law. Nor may the line item veto legitimately be characterized as an expansion of the traditional impoundment process. In reality, the power to modify a law amounts to lawmaking because the modification creates a "new law" which never passed through Congress in that form. The Act is unconstitutional because Article I enumerates that it is the province of the Legislative Branch to make laws.

Finally, the Act violates the non-delegation doctrine because it unconstitutionally absolves Congress of responsibility for repealed appropriations, and provokes the aggrandizement of the Executive Branch at the expense of the Legislature.

ARGUMENT

I. THE WESTERN DISTRICT WAS CORRECT IN HOLDING THAT 222 U.S.C § 691 OF THE LINE ITEM VETO ACT VIOLATES THE PRESENTMENT CLAUSE OF THE UNITED STATES CONSTITUTION. THE DISTRICT COURT FOR THE EASTERN DISTRICT OF DAVIS ERRED IN HOLDING OTHERWISE.

The Presentment Clause delineates a "finely wrought and exhaustively considered procedure," *INS v. Chadha*, 462 U.S. 919, 951 (1983), through which a bill may become a law. In order to become a law, a bill that has been passed by both Houses of Congress must be presented to the President of the United States for his signature. Upon presentation, the President's role is very restricted. The President must consider the bill in toto, and "[i]f he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated..." U.S. Const. art. I, § 7, cl.2. The President's signature, which indicates his endorsement of the bill as presented to him, instantly makes that bill a law.

The framers of the Constitution considered the Presentment Clause imperative and took great pains to ensure that this procedure could not be circumvented. *INS v. Chadha*, 462 U.S. at 947. However, the President's cancellation powers under the Line Item Veto Act violate the Presentment Clause in two different ways. First, the President violates his duty to consider the appropriations bill in toto and return it to Congress with his "objections." Second, the Act permits the President to modify the bill, effectively creating a new piece of legislation. This "new law" clearly violates the procedures set forth in the Presentment Clause because it originates in the Executive Branch. Accordingly, the Act is unconstitutional.

A. THE ACT PERMITS THE PRESIDENT TO VIOLATE HIS OBLIGATION TO CONSIDER A BILL IN ITS PRESENT FORM, AND EITHER DEMONSTRATE HIS APPROVAL BY SIGNING IT INTO LAW, OR RETURN THE BILL TO CONGRESS WITH HIS OBJECTIONS.

Both the Eastern and Western District Courts erroneously rejected the argument that the Presentment Clause imposes upon the President the duty to either approve a bill as presented to him, or to return that bill to Congress should he object to any portion of the bill. In the case at hand, the President signed the appropriation bill into law, and immediately repealed certain provisions pursuant to his powers under the Act. The President's cancellations indicated that he did *not* approve of the bill as presented to him. Despite the President's obvious disapproval of that bill, both District Courts ruled to the effect that "the act of signing a bill is the critical requirement of the Presentment Clause...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." *Reed v. Raines*, No. 96-CV-1171, slip op. at 5 (W.D. Dav. May 7, 1997).

However, the lower courts ignored the fact that the "finely wrought and exhaustively considered procedure," *INS v. Chadha*, 462 U.S. 919, 951 (1983), detailed in the Presentment Clause commands that the President "*shall* return" a bill, U.S. Const. art. I, § 7, cl. 2 (emphasis added), should the President disapprove. Further, the clause specifically requires the President to state his objections to the bill so that Congress may reconsider the relevant portions. This language implies that the President has a *duty* to return a bill to which he objects. Further, "[i]t is never to be forgotten that, in the construction of the language of the Constitution..., as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument." *Ex Parte Bain*, 121 U.S. 1,

12 (1887). Thus, this Court must look to the *purpose* of the Presentment Clause to confirm the existence of this obligation.

The framers intended these detailed provisions of the Presentment Clause to ensure liberty through separation of powers. *Chadha*, 462 U.S. at 951. All legislative powers are vested in a Congress, and the President functions to limit, or "check" the power of the Legislative branch. To so limit the legislature, the President *must* return unsigned a bill to which he has objections. If the President endorses a bill he does not wholly approve of, he violates his constitutional duty, and the purpose behind the Presentment Clause becomes moot. Thus, both the specific language of the Presentment Clause the purpose behind these detailed provisions refute the lower courts' finding that the President's subjective approval of a bill "has no independent operative significance." *Reed*, slip op. at 5.

B. THE ACT PERMITS THE PRESIDENT TO MODIFY A LAW, CREATING A "NEW LAW" WHICH HAS NOT BEEN PASSED BY CONGRESS IN THAT FORM.

The Line Item Veto Act also violates the Presentment Clause by permitting the President to modify an existing law. The Eastern District noted that the appropriations statute in question became a law in accordance with the Presentment Clause procedures. Indeed, the bill successfully passed both Houses of Congress and was signed into law on September 30, 1996. *Reed v. Raines*, No. 96-CV-1171, slip op. at 2 (W.D. Dav. May 7, 1997). However, the Court incorrectly concluded that "[b]ecause 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." *Reed* slip op. at 3. The Court erroneously

viewed the President's powers under the Act as executory rather than legislative in nature. In reality, the Act confers upon the President a power far beyond the power to "implement" an appropriation statute--the Act permits the President to materially alter the law itself.

When presented with a bill, the President may either sign, return, or ignore the *whole* bill. The President's signature instantly turns *every* portion of that bill into law. Thus, the President's cancellation of certain appropriations replaces the existing law with a new, altered piece of legislation which differs from the original bill passed by Congress. The Act "effectively allows any portion of a bill enacted by Congress that the President signs but does not cancel to become a law, in spite of the fact that Congress will never have voted on the bill in the precise configuration in which it has become a law." Michael J. Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 Cornell J.L. & Pub. Pol'y 233 (1997).

Nowhere in the Presentment Clause is the President given the power to dissect or invalidate a portion of the bill. Certainly the framers would have been capable of including such language had they wanted to allow the President to approve only certain portions of a bill. But the language conferring this power simply does not exist. As the court observed in *Lear Siegler v. Lehman*, 842 F.2d 1102, 1124 (9th Cir. 1988), "Art. I, § 7 does not empower the President to revise a bill, either before or after signing. It does not empower the President to employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees." The Act unquestionably violates the Constitution, for the "particular form a bill should have as a law is, as the Supreme Court has said, the 'kind of decision that can be implemented only in accordance with the procedures set out in Article I." Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 Cornell J.L. & Pub. Pol'y 233, 237 (1997) (quoting Chadha, 462 U.S 919, 954 (1983)).

The Act further distorts the procedures set forth in the Presentment Clause because the President's "new law" requires a supermajority of Congress to overrule the cancellation. The result is an unconstitutional reversal of the lawmaking procedure delineated in the Presentment Clause. Should Congress disapprove of the President's modification, Congress may either 1) overrule the modified statute with a two-thirds majority, or 2) pass a new bill which includes the canceled item, and designate that item as mandatory, non-discretionary spending. The new bill must also be presented to the President who may then veto the bill in whole as if there was no line-item veto. This altered lawmaking scheme impermissibly adds to and reverses the "finely wrought and exhaustively considered" *INS v. Chadha*, 462 U.S. 919, 951 (1983), procedure of the Presentment Clause.

This Court recognized in *Chadha* that the "legislative steps outlined in Art. I are not empty formalities," *Id.* at 958, and this principle must be applied in the present case. Indeed, under the restraints of the Presentment Clause, the "only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and to state those objections upon returning the bill to Congress." *Lear Siegler v. Lehman*, 842 F.2d at 1124. The Line Item Veto does not exist in the United States Constitution, and cannot exist without a constitutional amendment. Michael J. Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 Cornell J.L. & Pub. Pol'y 233, 246 (1997); *see also* J. Gregory Sidak, The Line-Item Veto Amendment, 80 Cornell L. Rev. 1498, 1502 (July 1995). However, implementing such an amendment has not yet attracted the necessary support from Congress or the public. Gerhardt, The Bottom Line at 246. Until such an amendment, this Court must affirm the finding made by the District Court for the Western District that a cancellation by the President is indeed a

legislative repeal that may not circumvent the Presentment Clause procedures. *Reed*, slip op. at 5.

II. THE WESTERN DISTRICT WAS CORRECT IN HOLDING THAT 222 U.S.C § 691 OF THE LINE ITEM VETO ACT VIOLATES THE NON-DELEGATION DOCTRINE BY DELEGATING TO THE PRESIDENT THE UNDELEGABLE POWER OF LEGISLATIVE REPEAL. THE EASTERN DISTRICT ERRED IN HOLDING OTHERWISE.

The non-delegation doctrine renders the Line Item Veto Act unconstitutional for two reasons. First, the Act provides no intelligible principles or meaningful constraints for its execution. Second, the Act impermissibly delegates to the President the non-delegable power of legislative repeal. Contrary to what the Eastern District held, the Act does *not* simply give the President discretionary authority over the implementation of future appropriations acts. *Horton v. Raines*, No. 96-CV-2274, slip op. at 8 (E.D. Dav. June 22, 1997). Instead, the Act confers a power much greater than the authority of discretionary execution--it allows the President to legislate.

A. THE ACT PROVIDES NO INTELLIGIBLE PRINCIPLES FOR THE PRESIDENT TO FOLLOW.

Article I, Section 1 of the Constitution vests "[a]ll legislative Powers" in both Houses of Congress. Article II charges the President with the duty to faithfully execute the laws and to defend and preserve the Constitution. U.S. Const. art. II, § 1, cl. 8. For 150 years, the Supreme Court repeatedly held that the Congress could not relinquish any of its power to legislate to administrators or other branches of the government. Jerry L. Mashaw ET AL., Administrative Law, 52 (3rd ed. 1992). However, the "old" non-delegation doctrine eventually evolved and the Court recognized that Congress could not prescribe rules for every detail of regulated activity.

Id. at 53.

In *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928), the Supreme Court held that the non-delegation doctrine permits the three branches of the government to "invoke the action of the other two branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch." That case spawned the "intelligible principle test" according to which Congress may delegate a limited degree of legislative power. Since 1935, the Court has consistently "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 116 S.Ct. 1737,1750 (1996). Thus, the modern view is that the non-delegation doctrine does "not prevent Congress from obtaining assistance of its coordinate branches," *Mistretta v. United States*, 488 U.S. 361, 372 (1989). Congress may indeed relinquish some of its legislative authority as long as the receiver of that power is directed by the Congress to conform to an intelligible standard with meaningful limits.

The Eastern District mistakenly found that the Line Item Veto Act satisfies the intelligible principle test by providing "significant guidance to the President to determine if a cancellation is permitted." *Horton v. Raines*, No. 96-CV-2274, slip op. at 8 (E.D. Dav. June 22. 1997). However, this guidance is insufficient. The Act authorizes the President to "cancel in whole (1) any dollar amount of discretionary budget authority; or (2) any item of direct spending" if the President finds 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). These "principles" clearly lack substance and provide the President with little or no guidance at all. Instead, these directives merely restate the *purpose* of the Act: to reduce

the Federal budget deficit without harming the nation.

Nevertheless, the Eastern District repeatedly cites to *Mistretta* to support the finding that Congress has adequately "'delineate[d] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority.'" *Horton*, slip op. at 8 (citing *Mistretta v. United States*, 488 U.S. 361, 373 (1989)). In *Mistretta*, Congress established the United States Sentencing Commission and delegated to that agency the power to devise guidelines to be used for sentencing in criminal cases. In determining that the delegation of legislative authority was constitutional, the Court applied the "intelligible principle test." *Mistretta* at 374. The Court found that Congress' delegation of authority to the Sentencing Commission was "sufficiently specific and detailed to meet constitutional requirements." *Id.*

Congress charged the Commission with three goals and specified four purposes that the Commission must pursue in executing its authority. *Id.* Further, Congress mandated that the specific tool for the Commission to use in regulating sentencing was to be the guidelines system. *Id.* Congress also directed the Commission to establish sentencing ranges which were to be consistent with Title 18 of the United States Code. *Id.* at 375. Moreover, Congress provided the formula for developing minimum and maximum sentences for each offense, mandating that the agency use current averages "'as a starting point.'" *Id.* In addition, Congress directed the Commission to consider seven factors in its formulation of offense categories, and set forth eleven factors to consider in establishing categories for defendants. *Id.* "In other words, although Congress granted the Commission substantial discretion in formulating guidelines, in actuality it legislated a full hierarchy of punishment--from near maximum imprisonment, to substantial imprisonment, to some imprisonment, to alternatives--and stipulated the most

important offense and offender characteristics to place defendants within these categories." *Id.* at 377. The Eastern District mistakenly relied on *Mistretta* to justify their finding that the Line Item Veto Act "certainly passes the "intelligible principle" standard." *Horton,* slip op. at 7. The guidelines found within the Act pale in comparison to those explicit directives articulated by Congress in *Mistretta.* The court is in error to suggest otherwise.

B. THE ACT PROVIDES NO MEANINGFUL CONSTRAINTS ON THE LEGISLATIVE AUTHORITY GRANTED TO THE PRESIDENT.

This Court has upheld certain delegations of legislative power when Congress provides intelligible principles "and the boundaries of this delegated authority." *Mistretta v. United States*, 488 U.S. 361, 373 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). These boundaries enable a reviewing court to determine if the agency is furthering the will of Congress, or is exceeding its delegated authority. The Eastern District incorrectly characterizes the President's powers under the Line Item Veto Act as "quite limited." *Horton*, slip op. at 7. The court based its finding on the language of 222 U.S.C. § 691(a) which permits the President to only cancel certain items "in whole." The court also deemed the delegation as "limited" because "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." *Horton*, slip op. at 7. However, the limiting language that the Eastern District characterized as constraining the President's power actually functions in the statute to *expand* the President's power. Accordingly, this Court must recognize that this "limiting" language appears in the statute in the context of expanding the President's authority.

In reality, the Act places insufficient boundaries on the President's power of legislative

repeal. Although the President may only cancel limited discretionary appropriations, the Act delegates to the executive the power of legislative repeal. Although Congress may re-present to the President a non-discretionary bill containing the canceled item, this results in an unduly extended process. Further, "it is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive...powers; they are, plainly and simply, standards for further legislation." *Mistretta v. United States*, 488 U.S. 361, 419 (1989). Indeed, Congress has never delegated a power so extensive as the power to materially alter an existing law. *Reed*, slip op. at 7. Such a broad delegation of legislative authority necessitates intelligible principles with explicit limitations and boundaries which are clearly absent here.

C. THE ACT IS UNCONSTITUTIONAL BECAUSE IT DELEGATES TO THE PRESIDENT THE UNDELEGABLE POWER OF LEGISLATIVE REPEAL.

Congress may delegate some authority to the Executive Branch when it provides intelligible principles and meaningful constraints. However, as The Western District correctly held, "[b]efore 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." *Reed*, slip op. at 7. Such "basic functions" include pure lawmaking power, for this Court recently recognized that "[t]he fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress and may not be conveyed to another branch or entity." *Loving v. United States*, 116 S.Ct. 1737,1744 (1996). This observation reaffirms the principle that "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President." *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). Accordingly, if

the Act delegates the power to make laws, it violates the non-delegation doctrine and must be found unconstitutional.

The Eastern District misconstrued the Act as an expansion of the authority granted to the President under the Impoundment Control Act of 1974 (hereinafter the "ICA"). *Horton*, slip op. at 5. Like the Line Item Veto, the ICA was an effort to control rampant spending by the government. The ICA acknowledges two kinds of impoundments: "deferral" and "rescission." *Id.* at 3. A deferral withholds the expenditure of budget authority when the President transmits to Congress a "special message containing statutorily required information." *Id.* However, unlike a line item veto, deferrals "expire with the end of the fiscal year." *Id.* The other form of impoundment under the ICA is a rescission. "A rescission under the ICA is the cancellation of budget authority." *Id.* The President proposes a recession in to Congress, and Congress exercises its discretion in choosing whether or not to enact the proposed recession. *Id.* Should Congress choose to ignore the proposed recession, it expires after 45 days. *Id.*

Despite a long history of accepted presidential impoundments, the authority conferred by the Line Item Veto to *cancel* a statutory provision vastly exceeds the power granted by the ICA. Neither form of impoundment actually alters an appropriations bill. The line item veto has become known as an "enhanced rescission" because it eliminates the "need for congressional action." *Id.* However, this "enhancement" is precisely what makes the Act unconstitutional.

The Eastern District mistakenly perceived the Act as merely authorizing the President the discretion to execute the law "under and in pursuance of its terms." *Id.* at 6 (quoting *Loving v. United States*, 116 S. Ct. 1737,1744 (1996). However, the cancellation authority under the Act in no way resembles the President's Article II duty to execute laws, for the duty "[t]o 'execute' a

statute...emphatically does not mean to kill it." Arthur S. Miller, The President and the Faithful Execution of the Laws, 40 Vand.L.Rev. 389, 398 (1987). Thus, the Eastern District failed to recognize that executing a law "under and pursuance of its terms," *Id.*, does not include *changing* or *repealing* the terms of that law.

The Line Item Veto Act grants the President the power to prevent certain "budget authority from having legal force or effect." 222 U.S.C. § 691e(2)(B)(i). Clearly, the Act delegates the power of legislative repeal, for the President assumes the role of Congress when striking an item of discretionary spending from the appropriations statute. Because the repeal essentially creates a new law, the Act effectively grants the President affirmative law-making power. As this Court has noted, the "repeal of statutes, no less than enactment, must conform with Art. I." *INS v. Chadha*, 462 U.S. 919, 954 (1983). Thus, the Act delegates to the President one of Congress' "basic functions," *Reed*, slip op. at 7, and must be declared unconstitutional. "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also* Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.")

The non-delegation doctrine is "essential to the preservation of two constitutional safeguards that protect each individual's liberty and property: Congressional accountability and Judicial review." *United States v. Eastland*, 694 F. Supp. 512, 514 (N.D. Ill., E.D. 1988); *See also* United States v. Williams, 691 F. Supp. 36, 43 (M.D. Tenn. 1988). Section 692 of the statute prescribes the process for Judicial review. The Act clearly provides that an order of a

United States District Court "shall be reviewable by appeal directly to the Supreme Court of the United States." 222 U.S.C. § 692(b). However, the Act betrays that function of the non-delegation doctrine which seeks to preserve Congressional accountability.

The framers vested Congress with all "legislative Powers," U.S. Const. art. I, § 1, with the intent that the Congress be held accountable for their actions. Accordingly, Congress, which has been entrusted with the power of the purse, has an implied *duty* to answer for the budgetary laws of our nation. The Court expounded this duty in *Arizona v. California*, 373 U.S. 546 (1962), observing that the non-delegation doctrine "insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." The Line Item Veto Act allows Congress to delegate both lawmaking power to the President and the responsibility for those laws. Hence, the Act violates the non-delegation doctrine by relinquishing Congressional accountability, a function "vital to preserving the separation of powers required by the Constitution." *Id.*

Further, the Act violates that purpose of the non-delegation doctrine which seeks to prevent the aggrandizement of one branch of government at the expense of another. The framers feared the union of the powers of the purse and sword and "took great pains to vest the power of the purse in, and primary federal budget authority to, the Congress." Michael J. Gerhardt, The Bottom Line on the Line-Item Veto Act of 1996, 6 Cornell J.L. & Pub. Pol'y 233, 234 (1997). Empowering the Executive Branch to repeal budgetary laws betrays the carefully considered design of the framers. Under the Act, Congress relinquishes its guarantee that the appropriations bills it presents to the President will retain their configuration once signed into law. Undoubtedly, the Act violates the separation of powers between the Legislature and the

Executive Branch, and there may come a time when even the budget of the Judiciary Branch becomes subject to Presidential whim. Robert Destro, *Whom Do You Trust? Judicial Independence, the Power of the Purse & the Line Item Veto*, 44-JAN Fed. Law. 26, 30 (1997). Moreover, this nation might one day be forced to endure an alliance between the Executive and Legislative Branches, as they agree to "exchange or commingle their duties and prerogatives" for mutual gain. J. Gregory Sidak, The Line-Item Veto Amendment, 80 Cornell L. Rev. 1498, 1502 (1995). It is precisely this "gradual concentration of the several powers in the same department," The Federalist No. 51, at 347, 349 (James Madison)(Jacob E. Cooke ed., 1961), that the framers sought to prevent.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court to affirm the ruling of the District Court for the Western District of Davis as to the unconstitutionality of the Line Item Veto Act.

Respectfully submitted,

Counsel for Respondent