Statement of Todd B. Tatelman
Legislative Attorney
Congressional Research Service

Before

The Committee on Homeland Security and Governmental Affairs
Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security
United State Senate

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On

Enhancing the President's Authority to Eliminate Wasteful Spending and Reduce the Deficit

Chairman Carper, Ranking Member McCain, and Members of the Subcommittee:

My name is Todd B. Tatelman, I am a Legislative Attorney in the American Law Division of the Congressional Research Service at the Library of Congress.[1] I thank you for inviting CRS to testify today regarding the Subcommittee's consideration of S. 102 and expedited rescission authority. Specifically, the Subcommittee has asked for a discussion of the constitutional basis relied upon by the Supreme Court in striking down the Line Item Veto Act of 1996.[2] In addition, you have asked for an assessment of the constitutionality of S. 102, the Reduce Unnecessary Spending Act of 2011.[3]

Line Item Veto Act of 1996

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[1] I would like to acknowledge the significant contribution of my American Law Division colleague, Todd Garvey, who assisted with the preparation of this written statement.
[2] Line Item Veto Act of 1996, Pub. L. No. 104-130, § 692(a)(1), 110 Stat. 1200 (1996) (codified at 2 U.S.C. §§ 691, 692 (1994, Supp II)).
[3] S. 102, 112th Cong. (2011).

In 1996, Congress enacted the Line Item Veto Act, which gave the President the power to "cancel in whole" three types of provisions already enacted into law: first, any dollar amount of discretionary budget authority; second, any item of new direct spending; or third, any limited tax benefit.[4]

The Line Item Veto Act imposed specific procedures for the President to follow whenever he exercised this cancellation authority. Pursuant to the Act, the President had to transmit a special message to the Congress detailing the provisions to be canceled, together with factual determinations required by the law to be made and the reasons for the cancellations, within five calendar days of the enactment of the law containing such provisions.[5] All covered provisions of a law sought to be canceled had to be submitted together in that message.[6] Cancellation of the specified provisions took effect on receipt of the special message by both Houses.[7] If a disapproval bill was enacted, the cancellation was deemed to "be null and void" and the provisions became effective as of the original date of the law.[8] The President was prohibited from attempting to cancel a second time those items that were the subject of a previous special message for which Congress had enacted disapproval legislation.[9]

Supreme Court Decisions

The Supreme Court heard two cases challenging the constitutionality of the Line Item Veto Act. First, in 1997, the Supreme Court decided *Raines v. Byrd*.[10] In *Raines*, the Court held that the plaintiffs – all of whom were Members of Congress who had voted against the Line Item Veto Act – lacked standing because their complaint did not establish that they had suffered an injury that was personal, particularized, and concrete.[11] Although the holding was based on the Court's finding that plaintiffs did not satisfy the personal injury requirement of standing, the Court also questioned whether the plaintiffs could meet the second standing requirement; namely, that the injury be "fairly traceable" to unlawful conduct by the defendants "since the alleged cause of ... [plaintiffs'] injury is not ... [the executive branch defendants'] exercise of legislative power but the actions of their own colleagues in Congress in passing the act."[12] The majority opinion distinguished between a personal injury to a private right, such as the loss of salary presented in *Powell v. McCormack*,[13] and an institutional or official injury.[14] The Court

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[4] *See* 2 U.S.C. § 691(a) (1994, Supp. II).
[5] *See id.* at § 691a(b) (1).
[6] *Id.* at § 691a(a) (stating that "[f]or each law from which a cancellation has been made under this subchapter the President shall transmit a single special message to the Congress").
[7] *Id.* at § 691b(a).
[8] *Id.*
[9] *Id.* at § 691(c).
[10] 521 U.S. 811 (1997).
[11] *Id.* at 818-20.
[12] *Id.* at 830, n.11.
[13] 395 U.S. 486 (1969).
[14] Justice Souter's concurring opinion seemed to attach less importance than the majority to the distinction between personal and official injury, but he nevertheless agreed with the majority that the plaintiffs lacked standing. *See id.* at 831. Justice Breyer, however, dissented, arguing that there is no absolute constitutional distinction between cases involving a "personal" harm and those involving an "official" harm, and would

held that a congressional plaintiff may have standing in a suit against the Executive Branch if it is alleged that the plaintiff(s) have suffered either a personal injury (*e.g.*, loss of a Member's seat) or an institutional one[15] that is not "abstract and widely dispersed," but rather amounts to vote nullification.[16] In *Raines*, the Court concluded that the plaintiffs' votes were not nullified due to the continued existence of other legislative remedies. As the Court explained:

> They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Line Item Veto Act, their votes were given full effect. They simply lost that vote. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressman can pass or reject appropriations bills .... In addition, a majority of Senators and Congressman can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act .... *Coleman* thus provides little meaningful precedent for appellees' argument.[17]

As a result, under *Raines* it appears that a congressional plaintiff is more likely to succeed in establishing standing where there is an allegation of a particular personal injury, as opposed to an injury related to either a generalized grievance about the conduct of government, or an injury amounting to a claim of diminished effectiveness as a legislator.[18] While the Court in *Raines* seemed prepared to recognize the standing of a Member based on a personal injury to a private right, it nevertheless concluded that an injury to a legislator's voting power is an institutional or official injury.[19] As a result of its conclusion that the congressional plaintiffs lacked standing, the Court did not render a decision on the merits of the constitutional challenge to the Line Item Veto Act.

Because the Court in *Raines* did not reach the merits of the constitutionality of the Line Item Veto Act, it left the door open for a second challenge. Shortly after the Court's decision in *Raines*, President Clinton exercised the authority afforded to him under the statute by cancelling a single provision in the Balanced Budget Act of 1997[20] and two provisions of the Taxpayer Relief Act of 1997.[21] Parties affected by the President's decision immediately availed themselves of the provisions of the Act permitting court challenges. The District Court for the District of Columbia held the Line Item Veto Act

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have granted standing. *See id.* at 841-843. Unlike the majority, which viewed injury to a legislator's voting power as an official injury, Justice Stevens, in his dissenting opinion, asserted that a legislator has a personal interest in the ability to vote, and stated that deprivation of the right to vote would be a sufficient injury to establish standing. *See id.* at 837, n.2

[15] *See Chenoweth v. Clinton*, 997 F. Supp. 36, 38-39 (D.D.C. 1998), *aff'd*, 181 F.3d 112 (D.C.Cir. 1999) (holding that personal injury claims are more likely to result in a grant of standing, but mere institutional injury is sufficient under *Raines*); *see also Planned Parenthood v. Ehlmann*, 137 F.3d 573, 577-78 (8th Cir. 1998)(addressing the standing of state legislators).

[16] *See Raines*, 521 U.S. at 826. Therefore, *Raines* did not address the question of whether *Coleman* would warrant granting standing in a suit by federal legislators even though such an action raises separation of powers concerns not present in *Coleman*. *See id.* at 824, n.8.

[17] *Raines*, 521 U.S. at 289.

[18] *See id.*, at 822-24; *see also Moore v. U.S. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

[19] *See Raines*, 521 U.S. at 820-21.

[20] Pub. L. No. 105-33 § 4722(c), 111 Stat. 251, 515 (1997).

[21] Pub. L. No. 105-34 §§ 968, 111 Stat. 788, 895-96, 990-93 (1997).

to be unconstitutional[22] and the Supreme Court, pursuant to the statute, expedited its review.[23] In *Clinton v. City of New York*,[24] the Court – after finding that the plaintiffs had suffered injury sufficient for Article III standing – addressed the merits of the constitutional challenge, holding, by a 6-3 vote, that allowing the President to cancel provisions of enacted law violated the Presentment Clause of the U.S. Constitution.[25]

According to the Court, what the Line Item Veto Act permitted, in both a legal and a practical sense, was for the President to amend Acts of Congress by unilaterally repealing portions of them. The Constitution, the Court held, contains no provision "that authorizes the President to enact, to amend, or to repeal statutes."[26] Rather, the Court held that the Constitution makes clear that the only method by which the federal government may enact statutes is "in accord with a single, finely wrought and exhaustively considered, procedure;"[27] namely, the procedure provided for by Article I, § 7, passage by both houses of Congress and presentment to the President for his signature or veto.[28] To further buttress this conclusion, the Court relied on a statement from President George Washington, who understood the Presentment Clause as requiring that a President either "approve all the part of a Bill, or reject it in toto."[29] In reaching this conclusion, the Court carefully distinguished between a constitutional veto and a line item veto (statutory cancellation) as provided by the statute. From the Court's perspective:

> The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes. [30]

In sum, the Court emphasized that its decision was on the narrow grounds that the procedures authorized by the Line Item Veto Act are not authorized by the Constitution. The Court held that were the Line Item Veto Act valid, "it would authorize the President to create a different law – one whose text was not voted on by either House of Congress

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[22] *New York v. Clinton*, 985 F.Supp.2d 168, 177-182 (D.D.C.1998).
[23] *See,* 2 U.S.C. § 692(c).
[24] 524 U.S. 417 (1997).
[25] U.S. CONST., Art. I § 7, cl. 2 (stating that "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States …").
[26] *Clinton v. City of New York*, 524 U.S. 417, 438 (1997).
[27] *Id.* at 439-40 (*citing INS v. Chadha*, 462 U.S. 919, 951 (1983)).
[28] Specifically, the Constitution provides the President with three options: (1) sign the bill into law within 10 days; (2) veto the bill and return it to the originating House with his objections where it may be subject to an override vote; or (3) allow the bill to become law without his signature by permitting the 10 days to expire. *See* U.S. CONST., Art. I § 7. A fourth option, specifically, the "pocket veto," has developed for situations in which the Congress has adjourned prior to the expiration of the 10 day period. In these cases, the President can veto the legislation without returning it to the originating House and, thereby, avoid a potential veto override vote. *See, e.g., The Pocket Veto Cases*, 279 U.S. 655 (1929).
[29] *Id.* at 440 (citing 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)); *see also* William H. Taft, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS 11 (1916) (stating that the President "has no power to veto part of a bill and the lest become a law").
[30] *See Clinton*, 524 U.S. at 439 (emphasis in original).

or presented to the President for signature."[31] The Court passed no judgment on the desirability of such a line item veto procedure, and suggested that were such a change to take effect it would need to be pursued via the Article V amendment process, not by statutory enactment.[32]

Expedited Rescission Authority

Since the Court's decision in *Clinton v. City of New York*, there has been a significant amount of scholarly writing[33] and numerous proposals offered[34] regarding potential mechanisms that could accomplish much, if not all, of what the intended aims of the Line Item Veto Act of 1996 were, but without the constitutional infirmities. S. 102, specifically attempts to provide the President with expedited rescission authority without violating the constitutional restrictions recognized in *Clinton v. City of New York*.

S. 102 proposes to amend the Congressional Budget and Impoundment Control Act of 1974,[35] by permitting the President, through the Office of Management and Budget (OMB), to send to Congress a special message requesting the rescission of "funding"[36] within a piece of legislation not later than 45 days after the date of enactment.[37] Each rescission request must include the amount to be rescinded, the account and program from which the rescission will occur, the amount of funding, if any, that would remain if the rescission were approved, the reasons for the rescission, and proposed legislative language to effectuate the rescission for consideration by Congress.[38] All rescission

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[31] *Id.* at 448.
[32] *Id.* at 449.
[33] *See, e.g.*, Aaron-Andrew P. Bruhl, *Return of the Line Item Veto? Legalities, Practicalities, and Some Puzzles*, 10 U. PA. J. CONST. L. 447 (2008); Seema Mittal, *The Constitutionality of an Expedited Rescission Act: The New Line Item Veto or a New Constitutional Method of Achieving Deficit Reduction?*, 76 GEO. WASH. L. REV. 125 (2008); Brent Powell, *Line Item Veto*, 37 HARV. J. ON LEGIS. 253 (2000); Matthew Thomas Kline, *The Line Item Veto Case and the Separation of Powers*, 88 CAL. L. REV. 181 (2000); Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto Act*, 20 CARDOZO L. REV. 871 (1999); H. Jefferson Powell & Jed Rubenfeld, *Laying it on the Line: A Dialogue on Line Item Veto Powers and Separation of Powers*, 47 DUKE L.J. 1171 (1998); Roy E. Brownell II, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgement of "National Security Rescission,"* 47 AM. U. L. REV. 1273 (1998); Courteny Worcester, *An Abdication of Responsibility and A Violation of a Finely Wrought Procedure: The Supreme Court Vetos the Line Item Veto Act of 1996*, 78 B.U. L. REV. 1583 (1998); Leon Friedman, *Line Item Veto and Separation of Powers*, 15 TOURO L. REV. 983 (1998).
[34] *See, e.g.*, S. 102, 112th Cong.. (2011); S. 907, 111th Cong. (2009); S. 524, 111th Cong. (2009); S. 1186, 110th Cong. (2007); H.R. 1998, 110th Cong. (2007); H.R. 689, 110th Cong. (2007); H.R. 4890, 109th Cong. (2006); S. 2381, 109th Cong. (2006); S. 3521, 109th Cong. (2006).
[35] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. § 681 *et seq.* (2006)).
[36] "Funding" is defined as "new budget authority and obligation limits except to the extent that the funding is provided for entitlement law." S. 102, 112th Cong. (2011) at §2 (proposed § 1022).
[37] *Id.* at § 1023(a). The President's rescission requests are to be packaged and transmitted to Congress by OMB. The President may transmit two packages of rescission requests for any joint resolution making continuing appropriations, supplemental appropriations bill, or omnibus appropriations bill. *Id.* at § 1023(b). For all other legislation hat provides funding, the President is limited to transmitting one package of proposed rescissions. *Id.* at § 1023 (c).
[38] *Id.* at § 1024.

requests associated with a piece of legislation are to be incorporated into a single package.[39]

Once a package of Presidential rescission requests is received by the House, the Chairman of the House Committee on the Budget—after consultation with the Chairman of the Senate Committee on the Budget, the Congressional Budget Office, the Government Accountability Office, and the House and Senate committees with jurisdiction over the funding— may remove any individual rescission request from inclusion in the bill that "does not refer to funding or includes matter not permitted under a request to rescind funding."[40]

Rescission requests submitted pursuant to the proposed bill shall be subject to expedited consideration in both the House and Senate.[41] Such expedited procedures, sometimes referred to as "fast-track" procedures, are often proposed as chamber rules or enacted into law to increase the likelihood that one or both houses of Congress will vote in a timely way on a certain kind of measure. Expedited procedures under S. 102 in both the House and Senate include the following features: (1) prompt introduction of the proposal;[42] (2) a requirement for the committee to which the measure is referred to report it within a certain number of days;[43] (3) a provision for automatic discharge from a committee, if the measure is not reported within a specified time;[44] (4) privileged access for the measure to the House and Senate floor for consideration;[45] (5) limitations on the length of time that each house can debate or consider the measure on the floor;[46] and (6) prohibitions against Members proposing floor amendments to the measure and offering certain other motions during its consideration.[47] Should a bill or joint resolution pass and be signed by the President, the funds would be lawfully rescinded and the President would not be legally obligated to make the funds available for expenditure.

It appears that the intent of S. 102 is to increase the likelihood that Congress will take action on a President's rescission request in a timely manner. However, S. 102 does not mandate that the House or Senate actually hold a vote on the President's rescission package. The bill only provides that "it shall be in order for any member to move to proceed to consider the bill."[48] In the House, if the proposal is not acted on within 5 session days, the bill "shall be removed from the calendar."[49]

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[39] *Id.* at § 1023(b)-(c).
[40] *Id.* at § 1026(a)(2).
[41] *See, id.* § 1026.
[42] *See, id.* at § 1026(b) ("[N]ot later than 4 days of session of the House after its transmittal…").
[43] *Id.* at § 1026(c)("[N]ot more than 5 days of session of the Hose after the referral."); *Id.* at § 1026(f)(2) "[N]ot later than 3 days of session of the Senate after the referral."
[44] *Id.* at § 1026(c); *Id.* at § 1026(f)(3).
[45] *Id.* at § 1026(d); *Id.* at § 1026(f)(4).
[46] *Id.* at § 1026(e)(3); *Id.* at § 1026(f)(5).
[47] *Id.* at § 1026(e)(2); *Id.* at § 1026(f)(6).
[48] *Id.* at § 1026(d); *Id.* at § 1026(f)(4) ("[I]t shall be in order for any Senator to move to proceed to consider the bill in the Senate."). Once the Clerk of the House receives a package of rescissions from OMB, the Clerk converts the package into the form of a House bill. *Id.* at § 1026(a)(1).
[49] *Id.* at § 1026(d)(4).

S.102 also proposes to provide the President with authority to temporarily withhold funds without the approval of Congress. Pursuant to proposed § 1025, once the President requests a rescission, OMB may temporarily withhold those funds from obligation. However, withheld funds must be made available for obligation on the earliest of:

> (1) the day on which the President determines that the continued withholding or reduction no longer advances the purpose of legislative consideration of the rescission request;
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> (2) starting from the day on which OMB transmitted a message to Congress requesting the rescission of funding, 25 calendar days in which the House of Representatives has been in session or 25 calendar days in which the senate has been session, whichever occurs second; or
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> (3) the last day after which the obligation of the funding in question can no longer be fully accomplished in a prudent manner before its expiration.[50]

Finally, S. 102 contains a "sunset" provision terminating the rescission authority and all expedited procedures on December 31, 2015.[51]

Applying the Court's analysis in *Clinton v. City of New York* to S.102, it appears possible to argue that the expedited rescission proposals contained in the bill do not raise the same constitutional infirmities that caused the Line Item Veto Act to be held unconstitutional. As discussed above, the Court's concern with the Line Item Veto Act was that it did not comply with the "finely wrought and exhaustively considered, procedure" of Article I, § 7. Rather, the Line Item Veto Act permitted an unilateral alteration of enacted law by the President without the consideration or approval of Congress and, for that reason, was held to be unconstitutional. In contrast to the Line Item Veto Act, S. 102 and other similar expedited rescission proposals appear to fully comply with the requirements of Article I, § 7. As discussed above, S. 102 requires the President to request a rescission from Congress as opposed to unilaterally effect a rescission by cancelling a provision of validly enacted law. Moreover, Congress is required to affirmatively enact a bill or joint resolution approving the rescission request, and presentment to the President of said bill or joint resolution for his signature is necessary before the item can legally be considered rescinded. This procedure apparently comports with Article I, § 7 and, therefore, would appear to be distinguishable from *Clinton v. City of New York* and would likely be upheld by a reviewing court.

Other Potential Constitutional Issues

Expedited Procedures

In general, there do not appear to be any constitutional issues with Congress imposing on itself requirements to take legislative actions within a limited period of time, or with the institution curtailing or eliminating certain procedural and deliberative processes. That said, it is important to note that such internal constraints, even if placed in the text of a statute, are, nevertheless, exercises of Congress's constitutionally-based authority to

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[50] *Id.* at § 1025(c).
[51] *Id.* at § 5.

establish its own rules[52] and, therefore, can be changed at any time without having to enact, amend, or repeal a separate law.

The potential issues regarding expedited procedures can best be illustrated through the use of a hypothetical. Assume that S. 102, or another similar proposal is enacted into law by the 112th Congress. Further assume that its effective date is extended and that it remains in effect at the time the 121st Congress is sworn in on January 3, 2027. In addition, assume that the President and leadership of the 121st Congress are of different political parties, and that the appropriations process has been particularly contentious and dominated by partisan political considerations. The President, seeing an opportunity to force the opposition congressional leadership to take politically difficult rescission votes, requests a number of rescissions consistent with the authority provided him by the law. The congressional leadership in the House of Representatives, seeing the difficult votes and the potential political complications, responds by simply adopting a resolution discontinuing the expedited procedures of the law and either holding the rescission requests up in committee; thereby never permitting them to come to a vote or defeating them with other procedural tactics. Despite the fact that no new law, amendment to an existing law, or repeal of provisions of the expedited rescissions law were adopted by Congress and signed by the President, the actions of the House of Representatives described above would appear to be legal and within the constitutional authority of Congress.

The principal at issue is that one Congress cannot bind a future Congress.[53] The Constitution provides that, "*All* legislative Powers herein granted shall be vested in a Congress of the United States."[54] Thus, the 112th Congress is constitutionally entitled to all the powers that the 1st Congress enjoyed, as is the 121st Congress. Limitations on procedures and other deliberative processes, while constitutionally permissible under Article I, § 5, must remain subject to repeal or amendment by future Congresses. Moreover, the fact that a rulemaking provision is adopted as part of a law and enacted into statute does not change the nature of the action. It is still an act of Congress's rulemaking power and, therefore, subject to amendment pursuant to the same procedures used to amend any other chamber rule.[55]

A recent example of exactly this principal occurred during consideration of the U.S.-Columbia Free Trade Agreement in the 110th Congress. Pursuant to the Trade Act of 2002,[56] implementing legislation for a U.S.-Colombia Free Trade Agreement (CFTA) was introduced in the 110th Congress on April 8, 2008.[57] As provided for by statute, trade

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[52] U.S. CONST., Art. I, § 5, cl. 2 (stating that "Each House may determine the Rules of its own Proceedings").
[53] *See, e.g., Cooper v. Gen. Dynamics*, 533 F.2d 163, 169 (5th Cir.1976) (holding that one Congress cannot insulate a statute from amendments by future Congresses).
[54] U.S. CONST., Art. I, § 1, cl. 1 (emphasis added).
[55] *See* H. Rep. No. 109-505, pt 1 at 22 (stating that "Congress is constitutionally empowered to deactivate any expedited consideration procedures if either House chooses ..."); *see also* Bruhl, *supra* note 33 at 467-470 (discussing the non-legal effect of expedited procedures).
[56] Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).
[57] *See* H.R. 5724, 100th Cong. (2008); *see also* S. 2830, 110th Cong. (2008).

agreements negotiated during a specific period of time were eligible for congressional consideration under "fast track," a version of expedited procedures for trade agreements first adopted in the Trade Act of 1974 and subsequently renewed by the Trade Act of 2002.[58] It was expected that the CFTA was one of the agreements that qualified for congressional consideration pursuant to these procedures. The leadership of the House of Representatives, however, took the position that the President had submitted the legislation to implement the agreement without adequately fulfilling the requirements of Trade Promotion Authority statute. As a result, on April 10, the House of Representatives voted on a House Resolution that made the expedited procedures inapplicable to the CFTA implementing legislation, thereby effectively preventing adoption of the agreement.[59] Thus, despite the fact that Congress had included the "fast track" procedures in statute twice, the House was nevertheless able to amend its rules to prohibit their use in a specific situation.

In the event that a future Congress were to take a similar action, under current Supreme Court jurisprudence, it appears unlikely that there would be an eligible plaintiff to seek court enforcement and/or force a vote on the President's proposed rescissions. As discussed above, *Raines v. Byrd* strongly suggests that no Member of Congress would have Article III standing to pursue litigation seeking enforcement of the law.[60] Moreover, the Court has made clear that persons do not have Article III standing to sue in federal court when all they can claim is that they have an interest or have suffered an injury that is shared by all members of the public.[61] In addition, the fact that there may be taxpayer savings by congressional action on Presidential rescission requests does not appear to give rise to Article III standing. The Court has also held that litigants lack Article III standing when they attempt to sue to contest governmental action that they claim injures them as taxpayers.[62]

The apparent inability to seek judicial redress appears to mean that the only means of future enforcement of such an expedited rescission system is political. Provided that the political will on the part of both the President and Congress exists, the system can function and appears to be able to do so constitutionally. Absent the requisite political will, however, the system may not withstand internal institutional changes and challenges.

Potential Impoundment Issue

Another constitutional issue that is worth noting with respect to S. 102 is the issue of executive deferral or impoundment. Pursuant to the Act, once the President proposes a

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[58] *See* Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978 (1974).
[59] *See* H. Res. 1092, 110th Cong. (2008).
[60] *See supra* notes 10-19 and accompanying text.
[61] *See, e.g., Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *see also Lance v. Coffman*, 127 S. Ct. 1194, 1198 (2007) (per curiam); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-77 (1992); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Allen v. Wright*, 468 U.S. 737, 754 (1984); *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 483 (1982);*United States v. Richardson*, 418 U.S. 166, 176-77 (1974).
[62] *See, e.g., Massachusetts v. Mellon*, 262 U.S. 447 (1923)

rescission of funding, OMB may "temporarily withhold that funding from obligation" for up to 25 calendar days without first obtaining approval from Congress.[63] The debate over temporary withholding or deferral authority is not new. Past proposals to grant the President temporary deferral authority, when potentially combined with the existing 45-day rescission authority of the Congressional Budget and Impoundment Control Act,[64] have led some critics to suggest that such deferral periods "could effectively kill various items by withholding funding until the end of the fiscal year on September 30, even if Congress had acted swiftly to reject his proposed cancellations."[65] Supporters of these bills have noted that the temporary deferral period is designed to "prod action" by Congress and would only come into effect when Congress takes long recesses. Critics have also asserted that under some proposals, the President could substantially extend the period of deferment by repeatedly submitting a request for rescission.[66]

S. 102 attempts to mitigate these criticisms through restrictions on the President's ability to temporarily withhold funding. First, the President may invoke his withholding authority no more than once for any act.[67] Second, the President must submit his rescission proposal within 45 days of the date of enactment of the funding rather than delay a request later into the fiscal year.[68] Third, OMB must make withheld funding available no later than the point at which the funding "can no longer be fully accomplished in a prudent manner before its expiration."[69] Thus, the President is prevented from effectively rescinding funding without Congress's approval by repeatedly submitting rescission requests or by delaying his rescission request and using his temporary deferral authority to withhold funding beyond the point at which the funding could still be effectively obligated within the fiscal year.

It is far from clear what a reviewing court would hold regarding the potential use of an expedited rescission program to effectuate an impoundment. No court has ever directly addressed the issue,[70] and the existing separation of powers cases do not seem to provide

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[63] *See* S. 102, 112th Cong. (2011) at § 1025.

[64] Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (1974) (codified as amended at 2 U.S.C. § 681 *et seq.* (2006)).

[65] *See* Jonathan Nicholson, "Six-Month Budget Impoundment Time With 'Veto' Seen Raising Issues In Congress," *BNA Daily Report for Executives*, March 24, 2006; *see also "The Constitution and the Line Item Veto," Hearing Before the House Judiciary Subcommittee on the Constitution*, 109th Cong., (April 27, 2006) (testimony of Cristina M. Firvida).

[66] *See, "The Constitution and the Line Item Veto," Hearing Before the House Judiciary Subcommittee on the Constitution*, 109th Cong., (April 27, 2006) (testimony of Cristina M. Firvida).

[67] S. 102, 112th Cong. (2011) at § 2 (proposed § 1025(b)).

[68] *Id.* at § 1023(a).

[69] *Id.* at § 1025(c)(3).

[70] The use of impoundments by President Nixon, however, was litigated repeatedly in the 1970s. In over 50 cases the reviewing courts vitiated the impoundment, compared with only four decisions upholding the President's action. *See Byrd v. Raines*, 956 F.Supp. 25, 29 (D.D.C. 1997); s*ee also, e.g., Train v. City of New York*, 420 U.S. 35 (1975) (municipal waste treatment projects); *Guadamuz v. Ash*, 368 F.Supp. 1233 (D.D.C.1973) (environmental and housing rehabilitation funds); *National Council of Community Mental Health Centers, Inc. v. Weinberger*, 361 F.Supp. 897 (D.D.C.1973) (public health funds); Joint Comm. on Congressional Operations, 93d Cong., 2d Sess., S*pecial Report on Court Challenges to Executive Branch Impoundments of Appropriated Funds* (Comm. Print 1974) (containing a complete list of impoundment cases); House Comm. on Government Operations, 93d Cong., 2d Sess., *Report on Presidential*

adequate analogous situations from which to extrapolate a consistent rationale. Some of the separation of powers cases, including *Clinton v. City of New York*, seem to suggest that a rigid, formalistic approach is to be taken when core constitutional prerogatives are involved.[71] Other cases have relied on more flexible, functional approaches to separation of powers questions.[72]

Conclusion

In sum, it appears possible to draft enhanced or expedited rescission proposals that will satisfy the Supreme Court's analysis in *Clinton v. City of New York*. For such a proposal to be considered constitutional, it appears to need to comply with the strictures of Article I, § 7, which requires passage by both Houses of Congress and presentment to the President for his signature or veto. Thus, S. 102 – which relies on expedited procedures for congressional consideration, but nevertheless require the passage of a bill or joint resolution and presentment to the President – appears to be consistent with Article I, § 7 and, therefore, arguably is not susceptible to the constitutional analysis that fated the Line Item Veto Act.

That said, there remain lingering constitutional questions related to enhanced or expedited rescission authority. Among these include the lack of authority to legally bind future congresses to act on Presidential rescission requests, as well as the possibility that authorized periods of executive deferral or impoundment may be interpreted to be a violation of the doctrine of separation of powers.

Impoundment of Congressionally Appropriated Funds: An Analysis of Recent Federal Court Decisions (Comm. Print 1974) (same); Cathy S. Neuren, *Addressing the Resurgence of Presidential Budgetmaking Initiative: A Proposal to Reform the Impoundment Control Act of 1974*, 63 TEX.L.REV. 693, 697, n. 24 (1985) (same).

[71] *See, e.g., Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252 (1991); *INS v. Chadha*, 463 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986).

[72] *See, e.g., Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *see also* Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency*, 72 CORNELL L. REV. 488 (1987).