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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

Tools to Combat Deficits and Waste: Enhanced Rescission Authority

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. I thank you for inviting CRS to testify today regarding the Subcommittee's consideration of enhanced 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.[1] In addition, you have asked for an assessment of the constitutional criteria that Congress must address so that potential future modifications would withstand judicial scrutiny.

Line Item Veto Act of 1996

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

[1] 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)).

amount of discretionary budget authority; second, any item of new direct spending; or third, any limited tax benefit.[2]

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.[3] All covered provisions of a law sought to be canceled had to be submitted together in that message.[4] Cancellation of the specified provisions took effect on receipt of the special message by both Houses.[5] 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.[6] 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.[7]

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*.[8] 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.[9] 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."[10] The majority opinion distinguished between a personal injury to a private right, such as the loss of salary presented in *Powell v. McCormack*,[11] and an institutional or official injury.[12] The Court

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[2] *See* 2 U.S.C. § 691(a) (1994, Supp. II).
[3] *See id.* at § 691a(b) (1).
[4] *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").
[5] *Id.* at § 691b(a).
[6] *Id.*
[7] *Id.* at § 691(c).
[8] 521 U.S. 811 (1997).
[9] *Id.* at 818-20.
[10] *Id.* at 830, n.11.
[11] 395 U.S. 486 (1969).
[12] 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 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

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[13] that is not "abstract and widely dispersed," but rather amounts to vote nullification.[14] 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.[15]

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.[16] 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.[17] As a result of its conclusion that the congressional plaintiff's 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[18] and two provisions of the Taxpayer Relief Act of 1997.[19] 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 to be unconstitutional[20] and the Supreme Court, pursuant to the statute, expedited its

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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

[13] *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).

[14] *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.

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

[16] *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).

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

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

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

[20] *New York v. Clinton*, 985 F.Supp.2d 168, 177-182 (1998).

review.[21] In *Clinton v. City of New York*,[22] 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.[23]

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 an Act 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."[24] Rather, the Court held that the Constitution makes clear that the only method upon which the federal government may enact statutes is "in accord with a single, finely wrought and exhaustively considered, procedure;"[25] 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.[26] 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."[27] 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. [28]

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 or presented to the President for signature."[29] The Court passed no judgment on the

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[21] *See* 2 U.S.C. § 692(c).
[22] 524 U.S. 417 (1997).
[23] 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 …").
[24] *Clinton v. City of New York*, 524 U.S. 417, 438 (1997).
[25] *Id.* at 439-40 (*citing INS v. Chadha*, 462 U.S. 919, 951 (1983)).
[26] 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).
[27] *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").
[28] *See Clinton*, 524 U.S. at 439 (emphasis in original).
[29] *Id.* at 448.

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.[30]

Enhanced or Expedited Rescission Authority

Since the Court's decision in *Clinton v. City of New York*, there has been a significant amount of scholarly writing[31] and numerous proposals offered[32] 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. For purposes of this analysis, CRS will focus on the most recently introduced versions, S. 907, the Budget Enforcement Legislative Tool Act of 2009,[33] and S. 524, the Congressional Accountability and Line-Item Veto Act of 2009.[34]

S. 907 proposes to amend the Congressional Budget and Impoundment Control Act of 1974,[35] by permitting the President, not later than three days after the date of enactment of an appropriations act, to send to Congress a special message proposing to rescind uses of discretionary budget authority.[36] Such a special message shall include accompanying draft bill or joint resolution language for consideration by Congress.[37] Pursuant to the bill, no special message can propose to rescind more than 25 percent of the amount appropriated for any given program, project or activity.[38] 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. In the event that a bill or joint resolution calling for rescissions fails to be enacted by Congress, the bill states that the amount of discretionary budget authority proposed to be

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[30] *Id.* at 449.

[31] *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).

[32] *See, e.g.,* 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).

[33] The Budget Enforcement Legislative Tool Act of 2009, S. 907, 111th Cong. (2007).

[34] The Congressional Accountability and Line-Item Veto Act of 2009, S. 524, 111th Cong. (2007).

[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] *See* S. 907, *supra* note 33 at § 2(b).

[37] *Id.* at § 2(b)(2).

[38] *Id.* at § 2(c)(1).

rescinded "shall be made available for obligation on the day after the date in which either House defeats the bill or joint resolution transmitted with the special message."[39] Finally, S. 907 contains a provision terminating the rescission authority and expedited procedures in 2012 with the sine die adjournment of the 112th Congress.[40]

Similarly, S. 524 also permits the President to submit, within 30 calendar days, a special message proposing to repeal any "congressional earmarks or to cancel any limited tariff benefits or targeted tax benefits."[41] Under S. 524, the President would be limited to only one special message per bill or joint resolution containing such a provision, but would be permitted two special messages for any omnibus budget reconciliation or appropriation measure.[42] The repeal of any congressional earmark or cancellation of any limited tariff benefit or targeted tax benefit will, according to S. 524, only take effect upon the passage of an approval bill into law.[43] In the event that such an approval bill is not enacted into law, all proposed cancellations or repeals are null and void and the congressional earmark, targeted tax benefit, or limited tariff benefit shall be effective as of the original date provided by law.[44] In addition, S. 524 contains an expiration provision, with a date of December 31, 2014.[45]

Distinct from S. 907, however, S. 524 also proposes to provide the President with the authority to withhold obligation of congressional earmarks and suspend implementation of the limited tariff benefits and targeted tax benefits that are included in his special messages.[46] This temporary authority would last for 45 days from the date that the special message was transmitted to Congress.[47]

The salient feature of both S. 907 and S. 524 appears to be that rescission requests submitted pursuant to the proposals shall be subject to expedited consideration in both the House and Senate. 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. In this case, it appears that the intent is to increase the likelihood that Congress will actually take action on a President's rescission request. Comparable to other expedited procedures, those proposed in both S. 907 and S. 524 contain the following features: (1) mandatory introduction of such a measure, often promptly after the House and Senate receive a message that the President is required to submit;[48] (2) a requirement for the committee to which the measure is referred to report it within a certain number of days;[49] (3) a provision for automatic discharge of a committee, if the

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[39] *See* S. 907, *supra* note 33 at § 2(f).
[40] *Id.* at § 3.
[41] *See* S. 524, *supra* note 34 at § 2
[42] *See id.*
[43] *See id.*
[44] *See id.*
[45] *See id.*
[46] *See id.*
[47] *See id.*
[48] *See* S. 907, *supra* note 33 at § 2(d)(1)(A); *see also* S. 524, *supra* note 34 at § 2.
[49] *See* S. 907, *supra* note 33 at § 2(d)(1)(B); *see also* S. 524, *supra* note 34 at § 2.

measure is not reported within a specified time;[50] (4) privileged access for the measure to the House and Senate floor for consideration;[51] (5) limitations on the length of time that each house can debate or consider the measure on the floor;[52] and (6) prohibitions against Members proposing floor amendments to the measure and offering certain other motions during its consideration.[53]

Applying the Court's analysis in *Clinton v. City of New York* to both S. 907 and S. 524, it appears possible to argue that the type of expedited rescission proposals previously described 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. 907 and other similar expedited rescission proposals appear to fully comply with the requirements of Article I, § 7. Both S. 907 and S. 524, as discussed above, require 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 establish its own rules[54] 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. 907, S. 524, or another similar proposal is enacted into law by the 111th Congress. Further assume that its effective date is extended and that

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[50] *See* S. 907, *supra* note 33 at § 2(d)(1)(B); *see also* S. 524, *supra* note 34 at § 2.
[51] *See* S. 907, *supra* note 33 at § 2(d)(3)(A); *see also* S. 524, *supra* note 34 at § 2.
[52] *See* S. 907, *supra* note 33 at § 2(d)(3)(B); *see also* S. 524, *supra* note 34 at § 2.
[53] *See* S. 907, *supra* note 33 at § 2(e); *see also* S. 524, *supra* note 34 at § 2.
[54] U.S. CONST., Art. I, § 5, cl. 2 (stating that "Each House may determine the Rules of its own Proceedings").

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.[55] The Constitution provides that, "*All* legislative Powers herein granted shall be vested in a Congress of the United States."[56] Thus, the 111th 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. [57]

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,[58] implementing legislation for a U.S.-Colombia Free Trade Agreement (CFTA) was introduced in the 110th Congress on April 8, 2008.[59] As provided for by statute, trade 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.[60] 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

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[55] *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).
[56] U.S. CONST., Art. I, § 1, cl. 1 (emphasis added).
[57] *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* Brhul, *supra* note 31 at 467-470 (discussing the non-legal effect of expedited procedures).
[58] Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).
[59] *See* H.R. 5724, 100th Cong. (2008); *see also* S. 2830, 110th Cong. (2008).
[60] *See* Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978 (1974).

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.[61] 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.[62] 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.[63] 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.[64]

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 issue that is worth noting with respect to some expedited rescission proposals is the issue of executive deferral or impoundment. Some expedited rescission proposals have no set time-frame within which the President must send up a rescission proposal after a law is enacted. Conversely, some previous proposals had provided that when the President does send up a rescission proposal he may suspend the covered provision(s) designated for up to 180 calendar days.[65] These proposals, when potentially combined with the existing 45-day rescission authority of the Congressional Budget and

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[61] *See* H. Res. 1092, 110th Cong. (2008).
[62] *See supra* notes 8-17 and accompanying text.
[63] *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).
[64] *See, e.g., Massachusetts v. Mellon*, 262 U.S. 447 (1923)
[65] *See* S. 2381, 109th Cong. (2006); *see also* H.R. 4890, 109th Cong. (2006).

Impoundment Control Act,[66] 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."[67] Supporters of these bills have noted that the 180-day period is designed to "prod action" by Congress and would only come into effect when Congress takes long recesses. According to a spokesperson for the Office of Management and Budget, were Congress to reject a rescission request prior to the expiration of the 180-day period, it was the Administration's intention to end the deferral immediately.[68] S. 524, for example, as discussed above, proposes permitting such temporary deferral authority for a period of 45-days from the time of the President's transmission of a special message asking that provisions be cancelled or rescinded.[69] Conversely, S. 907 does not appear to contain language permitting deferral or impoundment beyond the limited time that the proposed rescission legislation is pending before Congress.[70]

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,[71] and the existing separation of powers cases do not seem to provide 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.[72] Other cases have relied on more flexible, functional approaches to separation of powers questions.[73]

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[66] 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)).

[67] *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).

[68] *See id.*

[69] *See* S. 524 *supra* note 34 at § 2.

[70] *See* S. 907, *supra* note 33.

[71] 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); *see 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., *Special 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 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).

[72] *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).

[73] *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).

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, proposals like S. 907 and S. 524 – which rely on expedited procedures for congressional consideration, but nevertheless require the passage of a bill or joint resolution and presentment to the President – appear to be consistent with Article I, § 7 and, therefore, arguably are not susceptible to the constitutional analysis that fated the Line Item Veto Act.

That said, there remain 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 if the proposal provides for extended periods of executive deferral or impoundment they may be interpreted to be a violation of the doctrine of separation of powers. As with many issues, specific constitutional analysis would need to be done with respect to enhanced or expedited rescission proposals on a case-by-case basis and may differ depending on the specifics of a given proposal.