

**TOOLS TO COMBAT DEFICITS AND WASTE:
EXPEDITED RESCISSION AUTHORITY**

HEARING

BEFORE THE

FEDERAL FINANCIAL MANAGEMENT, GOVERNMENT
INFORMATION, FEDERAL SERVICES, AND
INTERNATIONAL SECURITY SUBCOMMITTEE

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

OF THE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

DECEMBER 16, 2009

Available via <http://www.gpoaccess.gov/congress/index.html>

Printed for the use of the
Committee on Homeland Security and Governmental Affairs



U.S. GOVERNMENT PRINTING OFFICE

56-154 PDF

WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office,
<http://bookstore.gpo.gov>. For more information, contact the GPO Customer Contact Center,
U.S. Government Printing Office. Phone 202-512-1800, or 866-512-1800 (toll-free). E-mail, gpo@custhelp.com.

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

JOSEPH I. LIEBERMAN, Connecticut, *Chairman*

CARL LEVIN, Michigan	SUSAN M. COLLINS, Maine
DANIEL K. AKAKA, Hawaii	TOM COBURN, Oklahoma
THOMAS R. CARPER, Delaware	JOHN McCAIN, Arizona
MARK L. PRYOR, Arkansas	GEORGE V. VOINOVICH, Ohio
MARY L. LANDRIEU, Louisiana	JOHN ENSIGN, Nevada
CLAIRE McCASKILL, Missouri	LINDSEY GRAHAM, South Carolina
JON TESTER, Montana	ROBERT F. BENNETT, Utah
ROLAND W. BURRIS, Illinois	
PAUL G. KIRK, JR., Massachusetts	

MICHAEL L. ALEXANDER, *Staff Director*
BRANDON L. MILHORN, *Minority Staff Director and Chief Counsel*
TRINA DRIESSNACK TYRER, *Chief Clerk*

SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT, GOVERNMENT
INFORMATION, FEDERAL SERVICES, AND INTERNATIONAL SECURITY

THOMAS R. CARPER, Delaware, *Chairman*

CARL LEVIN, Michigan	JOHN McCAIN, Arizona
DANIEL K. AKAKA, Hawaii	TOM COBURN, Oklahoma
MARK L. PRYOR, Arkansas	GEORGE V. VOINOVICH, Ohio
CLAIRE McCASKILL, Missouri	JOHN ENSIGN, Nevada
ROLAND W. BURRIS, Illinois	

JOHN KILVINGTON, *Staff Director*
HARLAN GEER, *Professional Staff Member*
BRYAN PARKER, *Staff Director and General Counsel to the Minority*
DEIRDRE G. ARMSTRONG, *Chief Clerk*

CONTENTS

Opening statements:	Page
Senator Carper	1
Senator McCain	12
Prepared statements:	
Senator Carper	37
Senator McCain	40

WITNESSES

WEDNESDAY, DECEMBER 16, 2009

Hon. Russell D. Feingold, a U.S. Senator from the State of Wisconsin	2
Todd B. Tatelman, Legislative Attorney, American Law Division, Congressional Research Service	7
Susan A. Poling, Managing Associate General Counsel, U.S. Government Accountability Office	10
Raymond C. Scheppach, Ph.D., Executive Director, National Governors Association	20
Robert L. Bixby, Executive Director, The Concord Coalition	22
Thomas A. Schatz, President, Citizens Against Government Waste	24

ALPHABETICAL LIST OF WITNESSES

Bixby, Robert L.:	
Testimony	22
Prepared statement	76
Feingold, Hon. Russell D.:	
Testimony	2
Poling, Susan A.:	
Testimony	10
Prepared statement	56
Schatz, Thomas A.:	
Testimony	24
Prepared statement	87
Scheppach, Raymond C., Ph.D.:	
Testimony	20
Prepared statement	71
Tatelman, Todd B.:	
Testimony	7
Prepared statement	46

APPENDIX

Hon. Robert C. Byrd, a U.S. Senator from the State of West Virginia	42
---	----

**TOOLS TO COMBAT DEFICITS AND WASTE:
EXPEDITED RESCISSION AUTHORITY**

WEDNESDAY, DECEMBER 16, 2009

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT,
GOVERNMENT INFORMATION, FEDERAL SERVICES,
AND INTERNATIONAL SECURITY
OF THE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD-342, Dirksen Senate Office Building, Hon. Thomas R. Carper, Chairman of the Subcommittee, presiding.

Present: Senators Carper and McCain.

OPENING STATEMENT OF CHAIRMAN CARPER

Senator CARPER. Well, welcome, everyone. We are delighted to see our witnesses and an audience of thousands of people who have joined us here, and my colleague, Russ Feingold, from Wisconsin.

I have an opening statement that I am going to get into, but I want to simply yield initially to Senator Feingold.

As we know, we are spending way more money than we can afford to in the long term. There is a lot of ideas on how to slow the growth of spending and how to raise some revenues and close that gap between spending and revenues. One of the ideas that I have been interested in for some time is strengthening the President's rescission powers, and, as it turns out, so is Senator Feingold and Senator McCain, who is a ranking Republican on this Subcommittee.

Senator Feingold and I were talking about the hearing today. We were talking last evening in the cloak room, and I said, you may want to come to this hearing and open us this up and start off the hearing with some comments of your own.

I am just going to yield to him to do that at this time, and then go back to my opening statement and allow others to do that, and we will go to our first panel of witnesses.

But thank you for your leadership. If there is anybody here who is determined, committed to reining in budget deficits, I know no one who has a greater commitment to that, a highly principled commitment to that, than Russ Feingold. It is great to serve with you, and it is great for you to join us here today. Please proceed.

(1)

**TESTIMONY OF THE HON. RUSS FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman, for the very kind words and for your exceptional courtesy in letting me go before your opening statement. It is unnecessary but extremely courteous of you.

I want to thank you and, of course, the Ranking Member who is my co-author of the proposal that I will discuss, for allowing me to make a brief statement today on my proposal, and I know you have one as well, to give the President effective line-item veto authority to go after unauthorized, wasteful earmark spending.

As I said, it is a special pleasure to appear before you, Mr. Chairman. I have been proud to work with you on quite a number of critical budget issues, including the restoration of the pay-go budget rule which was so central to our ability to balance the government's books during the 1990s. You have been a true champion of taxpayers, and today's hearing is another example of your leadership on their behalf.

And, as I said, I have been working with Senator McCain for the better part of two decades to go after wasteful spending. People think of us as the campaign finance duo. We were working on these issues before we even got into campaign finance in 1995.

Senator McCain may be the foremost opponent of wasteful earmark spending, and he has been joined in that effort in recent years by other Members of this Subcommittee including Senator McCaskill and Senator Coburn. Those three Senators may have caused more heartburn among those who promote earmark spending than any other group in either house.

And I also want to mention my colleague from Wisconsin, the Ranking Member of the House Budget Committee, Congressman Paul Ryan, whom I have been working with on this issue for the last several years. He and I belong to different political parties, and we differ on many issues, but Congressman Ryan and I do share at least two things in common: Our hometown of Janesville, Wisconsin, and, an abiding respect for Wisconsin's tradition of fiscal responsibility.

The bill I will highlight today is one Congressman Ryan and I have authored. It would grant the President specific authority to rescind or cancel congressional earmarks including earmark spending, tax breaks and tariff benefits. It builds on the landmark earmark disclosure legislation we passed in the last Congress, the Honest Leadership and Open Government Act, and in fact uses the definition of earmark that is laid out in that measure.

Under our bill, when Congress passes a bill, the President has 30 days to propose that some or all of the earmarks in the bill be rescinded or canceled. The President sends that proposal to Congress which then considers the proposed rescissions within a limited time.

Both houses must vote up or down on the measure. If either house defeats the proposal, then the earmarks would take effect. But, if both houses pass the rescissions, the spending is canceled, and the resulting savings is applied to the deficit.

I will be brief because you have a number of distinguished witnesses today, but let me just note that this could not be timelier,

as you were indicating. Congress has just passed another must-pass year-end omnibus appropriations bill. That bill reportedly included nearly 5,000 separate earmark provisions costing billions of dollars.

The President is now faced with a choice, having to sign or veto the entire measure into law. The only way he can get at those thousands of earmarks is to veto the whole bill, and, of course, that is exactly what the authors of the thousands of earmarks want. They have slipped their unreviewed, unauthorized special interest spending provisions in a bill that will be hard for the President to veto.

So, given those two choices, I certainly hope the President does not veto the bill, but we should give the President more options than just these two. The measure that Senator McCain, McCaskill, Coburn, and I proposed would let the President get at those earmarks without having to veto the entire bill.

I know the Subcommittee will consider a variety of different approaches today, but let me just close with this. Whenever someone proposes giving the President this kind of line-item veto authority, the examples they give are like money for a mule museum in Bishop, California, or funds to refurbish the statue of Vulcan in Birmingham, Alabama. That is how the line-item veto is sold.

And I am willing to consider giving the President broader authority, but, at a minimum, any expedited rescission authority we grant the President as a kind of line-item veto would include within its scope cancelling congressional earmarks.

So much has happened this year that we should recall that we began it by enacting an omnibus appropriations bill for fiscal year 2009, and it too was filled with thousands of earmarks. We have, therefore, Mr. Chairman, bookended the year with measures that serve as vehicles for exactly the kind of spending that taxpayers want the President to reject.

This practice has to end, and, if Members of Congress will not restrain themselves, they should at least let the President act to end this abusive and fiscally irresponsible practice.

So, again, thank you so much for your courtesy and for the way in which we share our interest in trying to get something done in this area. Thanks so much, Mr. Chairman.

Senator CARPER. I thank you. We thank you, and I just look forward to working with you on this, you and Senator McCain, as we have on other issues in the past.

And thank you for taking the time to share your thoughts with us, and we will work together. Thanks.

Senator FEINGOLD. Thanks, Mr. Chairman.

Senator CARPER. You bet.

As Senator Feingold leaves the hearing, I want to start off by thanking our witnesses for joining us today and for the testimony that you have provided us and for your willingness to respond to our questions.

We are holding this hearing because, as Senator Feingold has said, our Nation is on a fiscal path that is not sustainable. Our Country has accumulated as much new debt in the first 8 years of this decade as we did in the first 208 years of our Nation's history.

Our national debt is approaching \$12 trillion, and this year we are likely to add another \$1 trillion to it as we begin to come out of this great recession.

As a percentage of GDP, our national debt stands today at almost 85 percent, a level I think exceeded only during World War II, during the past 70 years.

As our Nation emerges next year from this recession, we need to begin easing off of the accelerator with one foot and start tapping the brakes with the other foot, as we begin to slow the growth in spending and again begin to grow revenues.

In this Subcommittee, we have examined many things. This is a wonderful Subcommittee. Federal financial management is part of it, but it enables us to look into all kinds of nooks and crannies in the Federal Government to see where we are not spending money very wisely, and we are trying to do that.

We look at things like closing the tax gap. We have about \$300 billion of revenue that should be paid, ought to be paid. We have some idea who owes it. We are not collecting it. It has been that way for a long time.

Other things are recovering improper payments, something like almost \$100 billion worth of improper payments last year to other issues such as reining in the growth of the Department of Defense cost overruns. Last year, major weapon systems cost overruns exceeded \$295 billion, up from about \$45 billion in 2001. Finally, we've also looked at issues like disposing of much of the Federal Government's surplus property.

Those are all ideas. They are just some of the ideas that we are working on. I hope when the President gives the State of the Union Address in a month, some of those issues, some of those concerns will appear and draw his interest and concern.

But today's hearing will look at the spending side of our goal of deficit reduction. Every year, as Senator Feingold has said, Congress passes a number of spending bills, and, not surprisingly, these bills sometimes include spending on items which many of us would consider of marginal value, some even wasteful, and which contribute unnecessarily to our rising deficit.

While many in Congress and the President may want to remove this waste, their desire to do so is often pitted against an array of interests intent on protecting that spending or by a compelling need to pass those bills in order to direct funds to urgent priorities. So we accept a little waste at the cost of getting bills passed. My guess, it has been that way in the Federal Government, and probably in State and local governments, for a long time.

Having said that, we need to find a better way to reduce wasteful spending without jeopardizing the funding for our top priorities. One of those ways relates, at least in my view, to the President's ability to get Congress to consider, maybe reconsider, spending cuts. Currently, when Congress sends a spending bill to the President, he can sign it and then propose that Congress consider rescinding or reducing spending in certain categories of that bill.

The problem is that Congress is under no obligation to consider these rescissions, and when Congress receives rescissions they often arrive dead on arrival. Congress has tried to fix this in 1996 by passing the Line-Item Veto Act, but that ended quickly with the

Supreme Court affirming that the bill was unconstitutional after it had been struck down by a district court judge.

I agreed with that decision in 1996. The legislation was deemed unconstitutional. It extended extraordinary power to Presidents to veto specific spending and revenue measures within legislation unless super majorities of both the House and Senate voted to override a President's action. The unconstitutional legislation not only dramatically shifted power from the Legislative Branch to the Executive Branch of government, but it did so permanently.

So what was given in 1996 was a right to the President essentially to almost line-item veto discretionary spending, entitlement spending and revenue provisions. That is a pretty broad extension of power, and the only way that the Congress could override it was with a super majority, two-thirds votes in the House and in the Senate. The Court said that seemed like a lot of power shifted to the Executive Branch, and they threw the measure out, and that was 13 years ago.

Today, we have these huge deficits, and we think maybe it is time to improve on that earlier product and still get at part of the concern that earlier efforts attempted to address.

Well, in this hearing, we will explore the President's existing rescission authority, try to determine how successful it has been at reducing spending that most of us, again, would consider to be of marginal value or really wasteful. We will also consider several ways to change that authority or to try to make it more effective.

Before we turn to our first panel of witnesses, I want to take a moment to describe one legislative change that 21 of my colleagues and I have proposed, to strengthen safeguards against wasteful spending that we can no longer afford in the era of trillion dollar deficits.

Over here to my left, to our audience's right, is a chart,¹ and it talks a little bit about S. 907. We are calling it the Expedited Rescission Authority Act, and it guarantees that the President's rescission package gets a vote within 10 days, provided that the President's package does not cut tax benefits or entitlement spending. We do not want to include in our legislation what was included in 1996 and ultimately deemed unconstitutional.

The President's package cannot cut authorized items by more than 25 percent. Unauthorized items could be reduced entirely up to 100 percent.

In order for the rescissions to become law, a majority in both chambers must vote in favor of the package, and the authority would sunset after 4 years.

I describe it as a 4-year test drive with something akin to certainly enhanced rescission authorities for the President. Sometimes people say it is almost like statutory line-item veto. I do not know that I would go quite that far, but it is a 4-year test drive.

If Presidents abuse it, as they could, in order to coerce legislators, Representatives or Senators to vote with the Administration on a particular issue in order to have the legislators' favorite program, protected, then we want to make sure if that kind of behavior is adopted by Presidents, that they will lose this authority in

¹The chart submitted by Senator Carper appears in the Appendix on page 00.

the future because we are only providing it for 4 years. Then we will stop and see how it is working. Is it effective? Is it being abused or not?

We want to protect authorized programs. We want to provide less protection, almost no protection, for unauthorized programs, and we do not want to allow the President, at least through the authority of this legislation, to go after revenues or to go after entitlement spending.

One other thing I would mention, and it is mentioned on the chart, but I will mention it again. The legislation that was deemed unconstitutional in 1996, when the President submitted his rescission proposals to the legislature, to Congress, they became law unless two-thirds of the House, two-thirds of the Senate voted to override the President's proposal.

We are taking a different approach here, and we have consulted with some constitutional scholars who say, well, this was unconstitutional 13 years ago, but what we think that we are doing here is not. And the reason why is that the President would submit his proposal for rescinding spending in certain areas, in conjunction with a particular bill, and we would have to vote on it.

We could vote with a simple majority in the House or the Senate, but we would have to essentially pass the President's proposal. We could not walk away from the vote. We could not ignore the vote. They are not going to go away. The rescission will be there, and we have an expedited timeline during which to vote.

If 51 Senators say, no, we are not interested in doing that, it is dead. If 218 House members say, no, that is not what we want to do, then it is a dead item there too. But if the majority of the House and the majority of the Senate vote for it, then the President's rescissions would become effective.

I only say as a recovering governor whose State constitution gave me line-item veto powers, I just want to be clear: Neither line-item veto powers nor enhanced rescission powers alone will restore fiscal sanity to this government, or really to any government.

Sometimes I think the line-item veto powers are oversold, but I think we all realize in addition to the kind of spending restraint that this legislation could bring, entitlement spending must be reined in, revenues that are owed must be collected, and some new revenues may need to be collected. I think they will need to be collected. Programs must be run more cost-effectively.

I wish I could say there are silver bullets in this business. I do not know that there are a whole lot of them. But there are a number of arrows in our quiver that can help, and we need to figure out which ones are most likely to help, and we need to put them to use.

I think this could be one of those arrows in our quiver. As it turns out, so do a number of my colleagues including Senator Feingold and Senator McCain.

If he were here, I would recognize Senator McCain now to make some comments of his. When he comes, I will yield to him to make whatever comments he wants to add. But, as you know, he is the lead sponsor of the bill, lead co-sponsor of the bill that he and Senator Feingold have introduced.

I think that pretty much wraps up what I wanted to say. I think now I get to introduce some witnesses, and one or two of you look pretty familiar.

For our second panel, we are going to start by receiving testimony from Todd Tatelman from the Congressional Research Service, or affectionately known as CRS. The Congressional Research Service is the nonpartisan research arm of our Legislative Branch here in Congress. CRS strives to provide comprehensive legislative research and analysis to Members of Congress and their staff. I have personally benefited, my staff have benefited greatly from the service that the Congressional Research Services provides, and we are grateful.

Mr. Tatelman is a legislative attorney in the American Law Division at the Congressional Research Service. He specializes in the areas of congressional laws and procedures, constitutional law, administrative law, transportation law, and international law.

We thank you for being here.

He is going to be joined at the witness table on this panel by our next witness whose name is Susan Poling, who is Managing Associate General Counsel at the U.S. Government Accountability Office, affectionately known as GAO. Ms. Poling has spent more than 19 years at GAO, starting right out of high school, where she has focused on providing support for GAO audit teams on budget and appropriation issues. Additionally, Ms. Poling, I am told, is responsible for GAO's duties under the Empowerment Control Act, and we will be hearing more about that here in just a minute.

Before joining GAO, Ms. Poling was in private practice and worked as an attorney in the Office for Civil Rights at the U.S. Department of Education.

With that having been said, you all are welcome to come to the table, and we will sit back and listen to your testimony.

Normally, we ask our witnesses to keep their comments to about 5 minutes. If you go way beyond that, I will rein you in. If you do not, then we will just let you fill it up, but try to stay close 5 minutes, please.

OK, Mr. Tatelman, do you want to go first?

Mr. TATELMAN. Certainly, Senator. Thank you.

Senator CARPER. No, we thank you, I think. I am sure we do.

TESTIMONY OF TODD B. TATELMAN,¹ LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. TATELMAN. Mr. Chairman, thank you very much, and thank you for the very kind words about the Congressional Research Service. We certainly appreciate them and do our best to abide by that nonpartisan objective mandate that you laid out.

This afternoon, I have the distinct privilege of offering you testimony related to both the Line-Item Veto Act of 1996, the Supreme Court decisions that flowed from Congress' passage and President Clinton's eventual use of that authority, and then I will talk a little bit about both S. 907, the bill that you have spoken of, and S. 524 which was Senator Feingold's bill, and discuss what might be some

¹The prepared statement of Mr. Tatelman appears in the Appendix on page 46.

of the issues that would arise and how it would differ from the Line-Item Veto Act.

So, to start, I would also like to ask that the full prepared statement be submitted as part of the record. I think there is a lot more detail there than I will be able to cover here.

Senator CARPER. Without objection, the entire testimony of each of our witnesses will be made a part of the record. Thank you.

Mr. TATELMAN. Thank you, Mr. Chairman.

To start, I suppose it is worth going back through in a little bit of detail what the Line-Item Veto Act of 1996 actually provided. Senator, you did that very nicely a minute ago, but I will stress a few points just to make it clear, so that when we discuss the Supreme Court opinions we know exactly what we are talking about.

The Line-Item Veto Act called for the President to have the authority to cancel any dollar amount of discretionary budget authority, any item of new spending or any limited tax benefit. So it was quite a broad base of authority covering a number of different legislative proposals.

In order to effectuate the cancellation or rescission of the bills under the Line-Item Veto Act, the President needed to send a special message up to Congress within 5 days of the enactment's passage. The cancellation legally took effect upon receipt of that special message by either the House or the Senate, whoever got it first.

And, as you mentioned before, in order for the Congress to overturn a presidential cancellation, it needed to pass a disapproval resolution which would render the cancellation legally null and void. That was the language of the statute. And it needed to be done, as you mentioned, by a two-thirds majority in both houses.

Almost immediately after the Line-Item Veto Act passed the Congress, it was facially challenged by a number of Senators who had voted against the bill when it was on the Senate floor. That initial facial challenge resulted in a Supreme Court opinion known as *Raines v. Byrd*. That opinion was handed down in 1997.

Interestingly, *Raines* does not deal with the constitutional question about whether the Line-Item Veto Act was constitutional or not. Rather, *Raines* turns on whether or not the Members of Congress had standing to bring the case before an Article III court. So *Raines* does not answer any of our constitutional questions. Nevertheless, it is a very important decision in its own right having to do with the separation of powers between Congress and the courts.

So I will not spend a tremendous amount of time on *Raines*, but I do note that the impetus for the case was a facial challenge to the line-item veto. The plaintiffs in that case felt that it was facially unconstitutional.

The Court, in *Raines*, indicated that it was not going to decide the constitutional question regarding the Act because, in part, not only did the plaintiffs not have standing, but the Act had not been used by a President yet. The Court indicated very clearly in one of its opinions that a more applied challenge needed to wait until the President actually enacted and used the authority provided to him.

Well, President Clinton did exactly that at the end of 1997 by cancelling two provisions in the Taxpayer Relief Act of 1997 and one provision in the Balanced Budget Act of 1997. The affected

plaintiffs in those instances, the entities that were to receive those benefits under the bills, brought suit pursuant to the statute in 1997, and that statute called for a decision first by a district court here in the District of Columbia who almost immediately held the Act to be unconstitutional.

The Supreme Court, under the same statute, expedited its appeal, and the case went directly from the district court to the U.S. Supreme Court and resulted in the 6 to 3 decision known as *Clinton v. the City of New York*.

The Court was very clear and very narrow in its holding with respect to the line-item veto. They held that it was unconstitutional because it violated Article I, Section VII of the Constitution. According to the Court, the Constitution provides for only a "single finely wrought and exhaustively considered procedure for adopting laws in the United States, namely, passage by both houses of Congress, presentment to the President for his signature or veto."

Nothing in the Constitution, according to the Court, allowed for the President to amend, alter, cancel or rescind provisions of the bill. Because the President, according to the Court, acted unilaterally under the auspices of the Line-Item Veto Act, they felt that that was an unconstitutional use of the President's veto power.

The Court was very careful to distinguish constitutionally permissible vetoes from the vetoes that were provided statutorily by the Act. According to the Court, constitutional vetoes take place before a bill becomes law, whereas the line-item veto provisions or cancellations by the President did not take effect until after he had signed the underlying provision into law. That distinction was incredibly important to a majority of the members of the Court.

Turning now briefly to the two bills and the expedited rescission possibilities, as you described earlier, Mr. Chairman, under S. 907, the bill you have introduced, the President needs to submit his special message to the Congress within only 3 days of passage of the underlying message. Your bill applies only to discretionary budgetary authority and does not appear, at least on its face, to apply to the other areas of law that the Line-Item Veto Act dealt with. Most importantly, it requires Congress to enact a bill or joint resolution approving of the rescission before the rescission or cancellation is legally permitted to take place, and as you mentioned, the authority would expire after 4 years, in 2012.

Similarly, S. 524, sponsored by Senators Feingold and McCain, would also give the President the ability to suggest rescissions to the Congress. However, their bill provides for that suggestion to be made up to 30 days after the bill was permitted, and their bill specifically applies to congressional earmarks, limited tariff and tax benefits. It does not mention discretionary budget authority, but it rather uses the other language that I just mentioned.

Similarly, it requires Congress to enact a bill or joint resolution prior to the rescission or cancellation becoming law. Similarly, it also uses expedited procedure provisions to move the suggestions through the process.

One major difference between S. 524 and S. 907 is that S. 524 also provides the President with temporary authority to withhold legally obligating the funds for up to 45 days from the date that the special message is received from Congress, and something that

S. 907 does not appear to provide for. And, similarly, S. 524 would expire in 2014, as it contains provisions there.

Very briefly, applying the constitutional analysis that the Court used in *Clinton vs. City of New York* to the expedited rescission proposals, both S. 907 and S. 524, would appear to be distinguishable from *Clinton v. City of New York*. Unlike the bill in *Clinton*, the Line-Item Veto Act of 1996, the expedited rescission authorities do not provide the President with unilateral cancellation authority.

Rather, it provides him with the authority to suggest rescissions or cancellations to the Congress and then requires the Congress to take an affirmative action of passing a separate bill or joint resolution before those cancellations would become legally effective. That distinction would appear to abide by the provisions of Article I, Section VII as Congress would, in a sense, have to pass a second bill or joint resolution before the President's suggestion cancellation were to become legally effective.

Because there appears to be a second resolution or bill that would go through the Article I, Section VII procedures, it would seem that if the expedited rescission provisions were to be challenged in a court that the court would easily be able to distinguish the situation from that which appeared before it in *Clinton v. City of New York* and would likely hold it to be at least constitutional under the Article I, Section VII analysis.

Of course, remember the Court does not address any additional constitutional reasons and did not address any additional constitutional holdings in *Clinton v. City of New York*. So, if there are additional arguments that plaintiffs would make against the expedited rescission bills, those have not yet been addressed by any court, including the Supreme Court. They focused very narrowly on that bicameralism and presentment language in Article I, Section VII.

And, with that, I will end and turn it over to my colleague from GAO.

Senator CARPER. Good. Nice job. Thanks very much. Ms. Poling, welcome.

**TESTIMONY OF SUSAN A. POLING,¹ MANAGING ASSOCIATE
GENERAL COUNSEL, U.S. GOVERNMENT ACCOUNTABILITY
OFFICE**

Ms. POLING. Thank you, Mr. Chairman, and Senator McCain.

I am pleased to be here today to discuss GAO's role in the congressional rescission process and to provide some perspective on the use and impact of rescissions. My written statement also includes statistical data on rescissions from 1974 to 2008.

The Impoundment Control Act of 1974 was enacted to tighten congressional control over presidential impoundments and establish a procedure under which Congress could consider the merits of rescissions proposed by the President. Under the Act, the President may propose a rescission when he wishes to withhold funds from obligation. These funds may be withheld for a limited time period, and, if Congress does not approve the rescission during this period, the President must release the funds. The Act also provides for a special discharge procedure permitting 20 percent of the

¹The prepared statement of Ms. Poling appears in the Appendix on page 56.

members of either house to force a floor vote on any presidential rescission proposal.

Since the enactment of the Impoundment Control Act, Presidents have proposed about \$76 billion for rescission, of which Congress has accepted about \$25 billion. Presidents of both major parties have submitted rescission proposals, but, as you can see in Figure 1,¹ which is also in the written testimony, the dollar values proposed vary widely with each administration. The Reagan Administration proposed the largest amount for rescission, a total of \$43.4 billion. In contrast, President George W. Bush did not transmit any proposals for rescission under the Impoundment Control Act; he did propose something called cancellations.

For example, in October, 2005, President Bush sent a letter to Congress proposing the cancellation of \$2.3 billion from 53 different programs. As this was not a rescission proposal under the Act, agencies were not authorized to withhold funds from obligation. However, our study showed that seven agencies withheld budget authority from 12 programs, in violation of the Act. After our inquiry, the agencies released the funds.

Since 1974, the Congress has approved about 33 percent of the President's rescission proposals as measured by dollar value. The approval rate varies by Administration. As you can see in Figure 1, in the Clinton Administration, Congress approved about 54 percent of the rescission proposals as measured by dollar value, but the total amount rescinded under President Clinton, \$3.6 billion, was small in comparison with the amount rescinded under President Reagan, \$15.6 billion.

On its own initiative, Congress has made increasing use of rescissions as a tool to revise enacted budget authority, from \$1.4 billion in 1974 to a high of \$18.9 billion in 1995. Overall, congressionally initiated rescissions are about 2.5 times the amounts proposed by all the Presidents since 1974.

Figure 2² compares by year the amounts proposed by Presidents for rescission which is the short dashed line, presidentially proposed amounts enacted by Congress which is the solid line, and congressionally initiated rescissions which is the large dashed line.

As you look at it, you can see that in the first 10 years of the Act, from 1974 through 1983, Congress accepted \$18.6 billion of the \$37.4 billion of presidential rescission proposals, just under 50 percent in the first 10 years. At the same time, Congress enacted about \$9 billion in rescissions on its own initiative.

Fast-forward to the last 10 years, 1999 through 2008, and you will see that Congress enacted approximately \$17 million, not billion, of the \$163 million proposed for rescission by the President, about 10 percent, while enacting about \$92 billion in congressionally initiated rescissions.

Over time, the share of the total rescissions enacted each year which were proposed by the President has fallen, and the share originating in Congress has increased. While these statistics highlight Congress' increasing use of rescissions, the relatively small

¹ Figure 1 referenced by Ms. Poling appears in the Appendix on page 61.

² Figure 2 referenced by Ms. Poling appears in the Appendix on page 63.

amounts rescinded make clear that rescissions have not been a major tool in reducing spending.

This is in part because discretionary budget authority, which is the only spending for which rescissions can be proposed, constitutes approximately 40 percent of Federal spending. Spending growth is driven by the remaining part of the budget which is spent on such programs as Social Security and Medicare. These mandatory programs and interest on the Federal debt represent about 60 percent of the budget.

This is not to say that rescissions are unimportant. The President's proposals can foster debate between the President and Congress over funding priorities and cuts in specific programs. To enhance accountability and further public debate over spending priorities, there have been a number of proposals presented in Congress over the years for an expedited rescission process.

Although the details of the proposals vary, expedited rescission proposals are designed to ensure rapid and formal congressional consideration of rescissions proposed by the President. An essential element of an expedited rescission procedure is a prompt up or down vote in the Congress on the President's proposals to reduce enacted spending authority. Since budget authority is not cancelled unless a law rescinding existing budget authority is enacted, in accordance with Article I, Section VII of the Constitution, an expedited rescission process does not present the constitutional issues that led the Supreme Court to strike down the Line-Item Veto Act.

Mr. Chairman, this concludes my prepared remarks, but I am happy to answer any questions that you or Senator McCain may have.

Senator CARPER. Good. Ms. Poling, thank you very much for that testimony. We really are grateful to GAO for the good work that you do not just for us, but really for the citizens of this Country.

We have been joined by Senator McCain, and I am going to yield to Senator McCain for any comments that he wants to give, or any questions that he would like to ask of these first two witnesses.

OPENING STATEMENT OF SENATOR MCCAIN

Senator MCCAIN. Well, let me ask Ms. Poling first, were the Congressional rescissions that you pointed to, were they used for deficit reduction or just reallocation to other programs or projects?

Ms. POLING. We cannot actually answer either/or on that question, Senator. They are rescissions, and that is all they are. We do not know how the money was used, or whether it was used at all. So, actually, I cannot answer the question.

Senator CARPER. If I can interrupt, when I heard how much the Congress had rescinded and how relatively little Presidents had rescinded, I thought maybe we are making better use of our rescission powers than the President. I do not know if that is true. I say it partly tongue in cheek.

Senator MCCAIN. Ms. Poling, I think if you checked into it, most of it was not for purposes of reducing spending. It was for moving money around for different priorities and different projects that the Congress had. Members of Congress, particularly members of the Appropriations Committee, it has been my experience. But perhaps you could illuminate on that for us for the record.

Ms. POLING. Just to make sure you understand my comment. If there is a rescission that comes in an appropriation bill, which would be one way of making room for other priorities, that is not counted as a rescission. It is when a rescission is of already enacted budget authority.

Senator MCCAIN. Well, again, I guess my response is that they have a certain budget level, and they meet it, and they move money around. But the budget does not decrease overall, and the spending does not decrease overall.

Ms. POLING. I think that the record is going to show that spending and the budget did not decrease overall for most of the years in question. [Laughter.]

Senator MCCAIN. I guess that goes in the category of a dumb statement.

Ms. POLING. No, I agree with you wholeheartedly, Senator.

Senator MCCAIN. On my part, I mean, Ms. Poling.

You stated that there have been a number of proposals. Senator Carper has a very strong proposal. You have heard them all. What would be the ideal proposal that you think would pass constitutional muster and, at the same time, be most effective? Mr. Tatelman.

Mr. TATELMAN. Well, Senator, I can only speak to the constitutional question.

Senator MCCAIN. Yes.

Mr. TATELMAN. Its effectiveness is something far beyond my own expertise.

In an ideal setting, I am not sure that there is an ideal way to do it. There are a number of possibilities and proposals that would pass constitutional muster in the sense that as of now we only have a court decision that seems to require that whatever happen, it has to happen in accordance with Article I, Section VII, which requires Congress to affirmatively pass either a bill or a joint resolution, and the President must sign that into law before a rescission or cancellation of any budget authority can take place. As long as that centerpiece part of any expedited rescission bill or other rescission proposal is there, I think you are on solid constitutional ground, at least as far as we know from this point.

My written statement indicates there may be some separation of powers questions that would get raised, depending on how the temporary impoundment authority is structured. So providing the President with the ability to temporarily withhold obligation of funds while that second bill or joint resolution is being considered by Congress might, in some people's view, raise constitutional concerns. Then again, it may not as we do not have a direct Supreme Court or even court of appeals opinion on any proposal that includes that temporary withholding obligation.

So there are some potential questions that exist out there, but for now I think we can confidently say that anything that meets that Article I, Section VII requirement would at least pass constitutional muster.

Senator MCCAIN. And the last effort did not meet that constitutional requirement because?

Mr. TATELMAN. Because the President's action, according to the Court, was unilateral in the sense that his line-item veto, according

to the majority of the members of the Court, took place after he signed the bill into law.

So the process was different from Article I, Section VII in the sense that Congress presents the appropriations bill to the President. The President would sign it, therefore creating a law that he arguably has a duty to take care, as faithfully executed under Article II, Section II. Then he would enact the authority, or execute the authority given to him by the line-item veto power, which was an automatic cancellation with no consideration by Congress at the time that the cancellation became legally effective.

So the line-item veto occurred after the bill had become law, which the Court zeroed in on and focused on and pointed out was the constitutional infirmity of that particular act.

Senator MCCAIN. Ms. Poling.

Ms. POLING. With regard to the expedited rescission proposals that I particularly looked at for this hearing, which are S. 524, Senator Feingold's bill, and Senator Carper's bill, S. 907, both of these are generally consistent with the very constitutional issues that Mr. Tatelman brought up. They are consistent with Article I, Section VII, with regard to presentment. Both of them are passed by both houses of Congress and then presented to the President.

They are bills. They take the normal way a bill would go through, with the exception of the rules that get at this expedited consideration on the part of the Congress.

And with regard to the usefulness of this, we leave it in fact to the Congress as a matter of policy about whether it would indeed like to pass this type of legislation.

We do note that it cedes some control over the congressional calendar to have this expedited process. The provisions that limit the number of messages or the time period in which the President can send it, to make it eligible for this fast-track legislation, may help maintain control of the congressional calendar.

But the short timeframes also could present other challenges for the Congress. In the past, under the Impoundment Control Act, the Congress has looked to GAO to provide it with information about the various rescissions. We would go and we would get a copy of the special message at the same time as it is sent to the President, and this is still true under Senator Carper's bill.

But we would get a copy of the bill, and then we would contact the Office of Management and Budget officials to find out the reasons why it is being requested and to double-check their figures. We would talk with program officials to find out how this bill would affect the program, the overall program, this particular type of rescission. Then we would report back to the Congress within 25 working days.

We can still do that under Senator Carper's bill. But obviously, when the time is compressed, there is a limit to how much we can do for the Congress, and there is a limit on how much information the Congress itself can get.

Certainly, Senator Carper's bill also includes the same types that are in the Impoundment Control Act, and there is a list of five things that the President must provide when he sends forward this rescission proposal under the bill. Those will certainly help the

Congress decide whether in fact these are, as a package, what the Congress wants to pass.

So, from our point of view, we do think that it is perhaps important to permit the President to also bring forward to the Congress a rescission proposal outside the expedited process. Senator Carper's bill, by amending the Impoundment Control Act, still permits that process.

So, if in fact after the 3 days have passed, 6 months have passed, and the President looks at the program, and some things have changed, and he wants to bring forward to the Congress the idea that this is something that we can rescind—we either no longer need this program, or we do not need this much money for the program, and we would like to withhold that from budget authority—under the Impoundment Control Act, the President you can still do that.

So you have a dual procedure for bringing things to the Congress' attention—both the expedited procedure and the regular procedure under the Impoundment Control Act.

Senator MCCAIN. Thank you. Thank you, Mr. Chairman. It has been very helpful.

Senator CARPER. You bet. Thank you.

I am going to ask you to answer the next question just for the record, and it is a little bit along the lines of Senator McCain's question, one of his earlier questions. We are just soliciting input for how to improve on what we have drafted and introduced, and I would just ask you to answer for the record, any further thoughts that you have on how we might improve the legislation, whether it is respect to its constitutionality or its potential effectiveness. If you could do that for us, I would be most grateful.

Mr. Tatelman, quite often we have heard that expedited rescission proposals like our bills are proposals, a type of line-item veto that puts too much power in the hands of the Executive Branch. When I looked at the 1996 legislation, as I said earlier, that was a concern to me to give the President these extraordinary powers over discretionary spending, over entitlement spending, over revenue provisions and require a super majority to undo all that. That just seemed like a bridge too far to me.

Knowing what you do know about these proposals, do you think it is fair to characterize expedited rescissions as a type of line-item veto, and do they change the power dynamic between the Legislative and Executive Branches in what you might deem an unfair manner? This would be for you, Mr. Tatelman.

Mr. TATELMAN. I think it is a very good question, and there is certainly a lot of divided opinion on the answer. I am not sure that I can, CRS does not generally tend to, speak in terms of a fair and unfair manner.

I would say that I think there definitely would be a shift in the power dynamic, even under an expedited rescission authority. I would agree, as a matter of constitutionality, it does not go as far as the Line-Item Veto Act of 1996, and it is a very different animal.

I would only add as a matter of sort of process here that I think Ms. Poling's point is one that is incredibly important, which is that the expedited procedure process in and of itself may pose some difficulties in the future for future Congresses, and thus her point

about preserving both the two-track process—both having an expedited manner by which the President can bring rescissions before the Congress and preserving the existing budget Impoundment Control Act process—I think becomes critically important, especially when you consider that in future Congresses those expedited procedure provisions would not be binding in any way, shape or form, not as a matter of law and not as a matter of congressional procedure and not as a matter of constitutionality.

There is nothing unconstitutional at all about Congress limiting its own ability to consider and deliberate per processes, but the 111th Congress cannot put that imposition on the 121st Congress or the 130th Congress, or even the 112th for that matter. So future Congresses are going to need to not only evaluate the rescissions on their merits, but they may also feel compelled to reevaluate the process by which they consider those rescission.

Thus, again, I would stress that I think Ms. Poling's point about a two-track process may in fact prove to be very prescient in the sense that Congress may decide that the expedited procedures do not work for it. Even though it is in the law and even though they have passed them before, they may decide that those are inadequate to deal with the rescissions that a particular President in the future may propose. Thus, preserving that longer-term, more deliberative process may be something worth considering.

Senator CARPER. All right. Thank you.

As has been noted earlier today, our bill, maybe our bills essentially superimpose fast-track authority on top of the President's current rescission authority. I have two questions I just want to ask about this, Mr. Tatelman.

First, has there ever been a constitutional challenge, to your knowledge, to fast-track authority as it is used in other laws?

Second, has there been a constitutional challenge, that you are aware of, to the President's rescission authority as it stands under current law?

Mr. TATELMAN. I think the answer to both questions, to my knowledge, is no, there have not been. And I will be honest that I have not done the adequate research on that question, but to my recollection and knowledge, certainly not on the expedited procedures question.

I am not entirely sure that anybody currently, under current jurisprudence, would have the ability to bring such a challenge. The Supreme Court has ruled in other instances not involving fast-track procedures, that they will not look into and rule on the internal procedures and workings of the Congress in a constitutional manner. You can find cases going all the way back to *United States v. Ballin* in 1890 that will establish that precedent, and there are a host of others, none of which have been on fast-track specifically though. But I think the concept that the Supreme Court is not likely to consider, for political reasons and for jurisprudential reasons, a challenge to fast-track would probably hold.

Again, I have not looked into seeing if there have been constitutional challenges to the rescission authorities that are currently in place.

Senator CARPER. If you could just answer that for the record, I would appreciate that.

I do not want to put words in your mouth with this next question, but let me ask it just the same. Do you think it is fair to say that if S. 907 was to pass, then for the bill to survive judicial review the courts would have to address the constitutionality of both fast-track authority and the President's existing rescission authority?

Mr. TATELMAN. No, I do not think they would have to address those questions in order to issue a ruling. It is impossible to predict what a court case would bring forward and what allegations an affected plaintiff, might raise in bringing such a case. But I do not think as a matter of constitutional law or as necessity they would have to answer either of those two questions, no.

Senator CARPER. OK. Let me yield back to Senator McCain for any other questions that he might have.

Ms. Poling, I do not want to let you escape without any questions. So let me ask one or two of you.

I think a vote has begun. We will go about another 10 minutes and then break for the vote.

Ms. Poling, after reading your testimony, we noticed a provision of the Impoundment Control Act that I believe to be very rarely used or maybe not well known in the Congress, and that provision states that 20 percent of either chamber of Congress can force a floor vote on one of the President's proposed rescissions. Could you explain for us how this works a little bit more and any idea when this might have last been used, this authority?

Ms. POLING. Well, we are unaware of any instance in which any member of any house has actually used this special discharge procedure of forcing the vote. We did a Congressional Record search under the Impoundment Control Act for votes under the Impoundment Control Act, and we found no instances of it. We polled some GAO employees who had been doing Impoundment Control Act work for the last 25 years, and none of them had ever heard of it being used either.

That does not mean that no one has tried to use it. They may have. But if it did not come for a vote, then it is not going to come up in the Congressional Record.

Senator CARPER. A follow-up question if I could, one frustration with the current rescission process is that Congress receives these rescissions from the President, but the cuts are never voted on, or rarely voted on in the Congress because of a few members' desires to thwart the President.

Your testimony says that since 1974 Presidents have requested over 1,000 rescissions. I think it is 1,178. Do you know how many times these rescission requests have resulted in a floor vote in the House or Senate, any idea? If you do not know, we will invite you to just respond on the record.

Ms. POLING. In terms of a floor vote, all the ones that have been enacted rescissions have gotten a floor vote on the bill in which they appeared. But in terms of the President's bill as of a piece, we never did track that in terms of whether one bill went forward. Certainly, our experience in the last 25 years is that is not the way the rescissions are enacted.

The bill goes forward. It goes to the various committees. They get our reports. They decide whether they are going to put it in what-

ever bill is moving at the time. That is the way it generally has worked.

Senator CARPER. All right. Thank you.

Another question for you, Ms. Poling, I know that under the previous administration, President Bush threatened to veto several appropriations bills because they contained spending that he viewed as wasteful. At the same time, he also made a push for his very own type of expedited rescission authorities, as I think you mentioned, in 2006. What did he call it? Cancellations, I think they were called.

Ms. POLING. Oh, cancellations, yes.

Senator CARPER. From my perspective, he was clearly dissatisfied with his existing rescission authority. I believe you said that he never used it in 8 years. But, according to your efforts from fiscal year 2002 to 2008, the President, as I said earlier, did not make a single rescission request.

In your testimony, you explained that he instead started to cancel certain funding. You have talked about this a little bit, but could you just go into a little bit more detail about what happened from 2002 to 2008 on this front? Why do you suppose it happened that way?

Ms. POLING. Well, we do not really know why President Bush decided not to use the rescission authority under the Impoundment Control Act.

Now a President can propose a rescission in a bill at any time. He does not need to use the Impoundment Control Act. By using the Impoundment Control Act, the President is permitted to withhold that budget authority, to actually impound those funds for the 45 legislative days, to give Congress the time to act on it.

When we talked to Office of Management and Budget officials with regard to the cancellations, they explained to us very clearly that the President was not proposing these under the Impoundment Control Act and that none of the agencies were being permitted in fact withhold the funds from obligation.

So I am not sure I can say what the reasons are behind President Bush's decision, but we do know that he was not using the Impoundment Control Act method for asking for rescissions.

Senator CARPER. OK. All right.

Mr. Tatelman, one more question if I could, for you, and I do not think I asked this. In your testimony, you say that S. 907 would not be susceptible to the constitutional concerns that overturned the Line-Item Veto Act of 1996. Do you have any other additional concerns about S. 907 that were part of the 1996 line-item veto debate?

Mr. TATELMAN. No, none that I can think of, Senator. I think they are sufficiently distinct, that many of the issues that came up in 1995 and 1996 when it was being debated and being heard by the courts would not be the same types of concerns that would be raised by S. 907.

Senator CARPER. OK. Thanks.

And last question before we break for a vote, and this is for Ms. Poling, you have been tracking for quite a while now these matters. Can you identify any use for presidential rescission authority if the

President cannot get a vote in Congress on the rescissions that he or she proposes?

Or, to put it another way, if Congress does not give the President a vote on his or her rescissions, is there any additional use for this authority?

Ms. POLING. The Impoundment Control Act has two aspects to it. One is a proposal for rescissions, and the other is a proposal for deferring budget authority. Both of them permit the President to impound and not spend the funds until the statutory framework has taken its regular procedure, including the 45 legislative days, and this actually has come before the courts. The courts have said that the President may not impound the funds beyond the 45-day period.

So, in terms of what the President can do if Congress is not giving him a vote on the particular programs, I think all the President can do is have someone introduce another bill that would specifically mention whichever programs he feels very strongly about.

Senator CARPER. OK. Thanks.

Again, we are very grateful for your testimony, for being here today, for your preparation and your willingness to respond to our questions and then some questions for the record. Some of our colleagues, I am sure, will want to submit other questions for the record, and I appreciate your responding to those.

I will get in the business of gathering co-sponsors. I think we have maybe 21 on the bill that I have introduced, S. 907. If you all want to sign up as a co-sponsor later on, when you submit your responses, you can add that as a P.S. for us, OK.

In the meantime, happy holidays and thank you again for the good work that you do for all of us. Thank you.

Ms. POLING. Thank you very much.

Senator CARPER. You bet. We are going to take a recess. Hopefully, I will be back in about 20 minutes. Thanks very much.

For now, we stand in recess.

[Recess.]

Senator CARPER. I am going to call the Subcommittee back to order.

As we start off our third panel, let me just first of all say thank you for your patience with us. We voted once. We will probably be voting again, but my goal is to conclude our hearing before we have to reconvene on the floor for votes.

We are going to hear from some people whose names are well known around here and highly regarded. Let me start off our third panel by introducing Ray Scheppach, who I was privileged to serve with when I was governor for 8 years for the State of Delaware. His official title is Executive Director of the National Governors Association (NGA), a position he has held since 1983. That is an amazing feat, 26 years. I was really grateful to him for his continued service.

As Executive Director, Dr. Scheppach oversees the day to day operations of the association and works closely with the NGA chair and vice chairs and heads of the NGA's respective committees as they help develop priorities for our Nation's governors and our States.

Prior to his position at the NGA, Dr. Scheppach worked for 7 years at the Congressional Budget Office—I had forgotten that—serving his last 2 years as Deputy Director.

And Dr. Scheppach has testified before the Congress on many occasions, including to the full Senate Homeland Security and Governmental Affairs Committee earlier this year.

So our thanks to you for joining us, and we look forward to hearing your testimony.

Our next witness is Robert Bixby, Executive Director of the Concord Coalition. The Concord Coalition, for those who may not know, is a nonpartisan, nonprofit organization established by a couple of former Senators, Warren Rudman and Paul Tsongas, and by Commerce Secretary Peter Peterson, in order to educate our public about the causes and consequences of Federal budget deficits.

For the past 17 years, Mr. Bixby has served in a variety of positions including field director, policy director and for the past decade as executive director. He frequently represents Concord's views on budget reform policy at congressional hearings and in the national media, and I have been privileged to be on panels where he has appeared before, and I always enjoy that and appreciate it.

We welcome you back today to testify and look forward to your input on today's hearing topic.

Our final witness will be Thomas Schatz. Mr. Schatz is the President of Citizens Against Government Waste, a nonpartisan organization dedicated to eliminating government waste. He has been at Citizens Against Government Waste for 22 years.

He has testified before Congress on numerous occasions about government waste. I think once or twice before panels that I was privileged to serve on.

Before joining Citizens Against Government Waste, Mr. Schatz spent 6 years as legislative director for one of my old colleagues, Ham Fish, in the House of Representatives.

Thank you for your service to our Country, and we thank you for your testimony today.

Normally, we do not swear in witnesses to try to verify veracity. I am tempted to swear in Ray Scheppach. But, no, I am kidding. I will not. We are not going to do that.

We are delighted you are all here.

In presenting your testimony, try to stick close to 5 minutes. Your full testimonies will be made part of the record.

But again, welcome. We are happy to hear from you. Thank you. Please proceed, Dr. Scheppach.

TESTIMONY OF RAYMOND C. SCHEPPACH, PH.D.,¹ EXECUTIVE DIRECTOR, NATIONAL GOVERNORS ASSOCIATION

Mr. SCHEPPACH. Senator Carper—I will not use the term governor—I am pleased to appear before you today on behalf of the Nation's governors to talk about line-item veto.

I would first say that the timing on this is unusual in that just last week I was a panelist at a major conference down at the Miller Center at the University of Virginia that focused essentially on this question of how do countries manage with increasing amounts of

¹The prepared statement of Mr. Scheppach appears in the Appendix on page 71.

debt. They had budget experts from a number of countries, and international economists as well.

I would say that one of the conclusions is that there is an increasing concern among everybody internationally about the potential unraveling of the international financial system because of these high levels of debt. It could start with the value of the dollar. It could start with such small things like Dubai or Greece—although they in themselves are fairly small, it could touch off a run where you found individual investors, dumping dollars on the market.

So the first point I think is that the risk of this is growing every year now, not only because of the U.S. debt but because of the total amount of international debt.

I would say the second reason why we need to get this debt down is that the interest now, as a percentage of total spending, is getting quite significant on the order of magnitude of \$700 billion, which limits your ability to invest in other things. And also, I think it is an inter-generational problem of leaving a huge debt to our children.

The final reason I think you need to be concerned is that the components that you are cutting are probably the investment components of budget. It is the R&D, it is the education, and so on.

Let me move on to State budget procedures. Let me first make the point, following up what the Senator mentioned, that you do have to be careful in pulling out one particular component or one tool because State budgeting processes and the Federal processes differ quite dramatically. States have balanced budgets; the Federal Government does not. States have capital budgets; the Federal Government does not. One of the big differences is that most governors really have the ability to make cuts across the board on previous appropriations without essentially going to the legislature.

In terms of the line-item veto, 41 States have line-item veto authority on appropriations. In addition, 15 States have veto authority over selected words. Even four have the ability to change words.

About 15 governors actually have the ability to reduce their appropriations. So, if something came in at \$100 million, you could essentially amend it down to \$50 million, and these would have to be overridden by some super majority. So line-item veto authority is fairly strong.

If you look at the evidence among States, in terms of what the academics have looked at, there has been some interviews of governors, very extensive interviewing of seven governors in Georgia. Most felt very strongly that the mere fact that you had veto authority was a discipline in of itself, but they also felt that it was used a lot, and there are indications where you have major savings.

Concerning other statistical evaluations, many of them found that in the short run you had major reductions in spending, although more questions about the long-run impact.

I thought I would just review a couple of States very quickly: Missouri and Wisconsin. Last year, Governor Nixon of Missouri used the veto 50 times and believes that they saved \$105 million out of a total of about \$8 billion.

The feeling was that this line-item veto is used mostly in good times where there is disagreement over the underlying policy

issues, but also in bad times you find that governors use them quite extensively, mostly to get rid of low priority items.

A similar experience in Wisconsin, as they went from 457 vetoes in 1991 down to 33 vetoes in 2007, but averaged a couple hundred per year over that period, used extensively to maintain discipline.

So I would say the conclusion is that we are in times right now where the risk of debt is huge and increasing, and I think what that requires is a pretty fundamental change in budget processes, including giving the executive a lot more authority to help control deficits.

I would argue that there is a lot of evidence at the State level that they are done for low priority items, actually, what the Federal Government might call earmarks, because they are essentially things that State legislative leaders put in appropriations bills for a highway in their district or some other type of thing, which is similar to what happens here. And I would argue that this is probably one of the most effective ways at getting at those particular issues.

I guess in the recent omnibus there was close to \$4 billion in set-asides or earmarks. So it would be very valuable in doing that.

So governors tend to support more power, veto authority for the executive, the President.

Thank you, Mr. Chairman.

Senator CARPER. Thank you very much.

Who was the governor of Wisconsin in 1991? It was not a guy named Thompson, was it?

Mr. SCHEPPACH. Thompson, I think.

Senator CARPER. I thought it was.

Mr. SCHEPPACH. Who did not very much like OMB as I remember.

Senator CARPER. Maybe not, that is true. All right, thank you. Thank you, Dr. Scheppach.

Mr. Bixby, please proceed. Thank you. Welcome.

**TESTIMONY OF ROBERT L. BIXBY,¹ EXECUTIVE DIRECTOR,
THE CONCORD COALITION**

Mr. BIXBY. Thank you, Senator Carper. Thanks for inviting me to discuss the role of enhanced rescission in combating Federal budget deficits and waste. Given our Nation's unsustainable fiscal outlook and the rising public concern over mounting debt, this is a very timely and relevant discussion.

I am here representing the Concord Coalition, as you mentioned, co-chaired by your former colleagues, Warren Rudman and Bob Kerrey. The Concord Coalition believes that the current budget process suffers from a lack of transparency and accountability, and this has contributed to the unsustainable fiscal path that we are engaged in, and it has engendered corrosive public cynicism about government finances.

So the testimony that I will give today will emphasize four points:

One is that the public is increasingly frustrated with how Federal tax dollars are spent. We find that on our Fiscal Wake-Up

¹The prepared statement of Mr. Bixby appears in the Appendix on page 76.

Tour and on other projects that we have done. Of course, you have been a guest speaker on the Fiscal Wake-Up Tour.

The second point is that restoring public trust is essential to winning broad support for needed hard choices.

Third is that enhanced rescission can help to restore public trust in the budget process.

And, fourth, the enhanced rescission alone will not have a meaningful effect on the budget deficit.

To reiterate what everybody else has said, we find ourselves at a time of uncontrollable, or uncontrolled, Federal budget deficits. The task right now is to try to find some way to bring them under control.

I look at the numbers going forward, and I think the projected cost of interest and the cost of debt is just astronomical. Today's 20-year-olds are facing a situation, that by the time they are in their early 40s and in their prime working years, would just be economically ruinous. So it is really the challenge of our generation to do something about that, and in doing that you really have to use all of your policy tools.

As you mentioned at the beginning, what is driving the long-term budget problem is not earmarks or out of control discretionary spending. It is really the underlying dynamic of entitlement programs and lagging revenues, and you put that together, and that is what is really driving us over a cliff.

But that does not mean that we should not bring all of our weapons to bear on resetting priorities in the best possible way. Enhanced rescission is a pretty good tool for doing that.

I think that the value of enhanced rescission should not be measured by the dollar figures alone. I would certainly agree that you are not going to save a huge amount of money with enhanced rescission. But the value I think is from showing the public that somebody cares and that somebody is taking a look at the priorities, and so it is not just anything goes.

I think that is really important because I believe in entitlement reform. You believe in it. I believe that we are going to have to put revenues on the table as well. But I do not believe the public is going to go for it if they think that the money is just going to be wasted.

So here is where something like enhanced rescission comes in. The President can send some bills back to Congress and say, "take another look at these. Are these really high priority in a time of budget deficits and rising debt?"

That allows Congress to say, well, OK, maybe this was not high priority.

I think that would help restore public trust that something good was happening with the budget process.

Unfortunately, there is no line-item in the budget that is labeled waste, fraud and abuse. So there are always going to be differences. That is a matter of interpretation.

Now there are a couple of issues with enhanced rescission that have come up earlier in the discussion. I certainly agree with you that it is not a massive transfer of authority to the Executive Branch. That was true with the line-item veto. I think what we are

doing here is just giving the executive a chance to ask Congress to take a second look.

I would say with S. 907, your bill, there are a couple of suggestions I would have. One is I think there should be some sort of mechanism that would help ensure that the savings that you got did go to deficit reduction, whether it would be adjusting the budget caps and the budget resolution or having it go towards pay-go, I think would be important.

I would test the waters a little bit and apply it to targeted tax provisions and mandatory spending as well. There is probably more money there, certainly on the targeted tax cuts.

Tax entitlements are really a sleeping giant in the budget, and I think that we should put some attention on that side and not just think that if it is not a discretionary program, it is not waste. It can be waste if it is mandatory spending or taxes as well.

So I would put everything on the table, and I would just summarize by saying that nobody should expect that the enhanced rescission authority would be a panacea. But you do not need a panacea. You need to bring all your tools to bear. I think that this is a very common-sense one, and I think it would have great public support.

Senator CARPER. Thanks for your testimony. Thanks also for your constructive ideas, and we will take those under advisement. If you have some more, we would welcome those as well.

Mr. Schatz, again, thanks. Welcome. Please proceed.

**TESTIMONY OF THOMAS A. SCHATZ,¹ PRESIDENT, CITIZENS
AGAINST GOVERNMENT WASTE**

Mr. SCHATZ. Thank you, Mr. Chairman.

Citizens Against Government Waste was created 25 years ago, following the report of the Grace Commission under President Reagan. The commission made 2,478 recommendations to save \$424 billion over 3 years. At the time, the commission projected that if those recommendations were not adopted the Federal Government would have a \$2 trillion deficit and a \$13 trillion debt in the year 2000.

We are not saying we would have saved the world, but it is interesting to note that we will soon have a \$13 trillion debt and we have a \$1.4 trillion deficit in the last year and possibly the same in the current fiscal year.

One of the commission's recommendations was the line-item veto, which would give the President the authority to eliminate wasteful programs and earmarks.

Senate Majority Leader Harry Reid once said that earmarking has been going on since we were a Country. But nothing could be further from the truth. For much of the Nation's history, constitutional objections from Members of Congress, the President and State legislatures were effective in limiting this kind of spending.

Thomas Jefferson wrote to James Madison about Madison's proposition for improvements to roads, using a system of national mail delivery. Jefferson wrote, "I view it as a source of boundless patronage to the Executive, jobbing to Members of Congress and their friends, and a bottomless abyss of public money. You will begin by

¹The prepared statement of Mr. Schatz appears in the Appendix on page 87.

only appropriating the surplus of post office revenues; but soon other revenues will be called into their aid, and it will be a scene of eternal scramble among the members, who can get the most money wasted in their State; and they will always get the most who are meanest.”

In 1822, President James Monroe argued that Federal money should be limited to great national works only since, if it were unlimited, it would be liable to abuse and might be productive of evil.

Now we have certainly heard Members of Congress, including Senator McCain, talk about the consequences of earmarking and pork barrel spending: Members of Congress going to jail, corruption of the appropriations process.

And, of course, we all understand it is not the biggest part of the budget, but it seems to have the greatest value to Members of Congress because they will argue forever about this 0.5 of 1 percent of the \$3.6 trillion budget because they think that it is their right to go spend that money.

Now since 1991, CAGW's annual Congressional Pig Book has identified 100,849 pork barrel projects which have cost taxpayers \$290 billion.

A constitutional line-item veto, which everyone seems to agree would occur under your bill and Senators McCain's and Feingold's bill, would have an impact on the number and cost of earmarks as well as duplicative and nonessential programs. It would not upset the balance of power. In fact, it would restore some of the imbalance that has occurred following the 1974 Budget and Impoundment Control Act.

We support what you have proposed. We support what Senators Feingold and McCain have proposed, and whatever comes out would be better than what we have now. We would prefer not to have a 25 percent restriction on authorized earmarks or programs, but whatever ends up being agreed to and passed by the Congress would be more important than arguing over which is the better approach.

One of the things that we even see within the current process is despite requirements for transparency even those rules are not being followed:

57 percent of the cost of earmarks in the fiscal year 2009 Defense Appropriations Act were anonymous. That included \$465 million for the alternate engine for the Joint Strike Fighter.

In the fiscal year 2010 DOD Appropriations Act, the Senate version has \$9.3 billion in earmarks; 71 percent of the cost is anonymous. That included \$2.5 billion for 10 additional C-17 aircraft.

There is a good example. In both cases, the alternate engine and the C-17s, with enhanced rescission they could come back on both of those items and force the House and the Senate to vote. The alternate engine was defeated in the Senate, in the authorization bill. Yet it was stuck back in, in the conference between the House and Senate, and now we do not know where it is because nobody has seen the DOD Appropriations Act.

Mr. Chairman, successive Presidents have asked Congress to provide them with the line-item veto. It is the very least we can do with this record deficit and debt. Adopting many of the other larger items on budget reform, whether it is alone or part of a

package, it is something that will really help and give the taxpayers a little bit of perhaps an improved view of Congress right now since they do not seem to be very happy with how much money is being spent.

Thank you for allowing me to testify today.

Senator CARPER. You bet. Thanks. Thanks very much and thank you especially for your mentioning of some of our weapon systems. I mentioned earlier in my opening comments that we have seen cost overruns for major weapons systems grow from \$45 billion in 2001 to I think about \$295 billion last year.

We finally got to the F-22 which has never flown in Iraq, never flown a mission in Afghanistan. I think the cost per flight hour is about \$40,000. The cost per aircraft, I am not sure what it was, but it was in the tens of millions of dollars.

I think the President finally saying, if you include funding again for the F-22, I am going to veto the bill, and that was very helpful. We still had a fight over it, but we got the job done.

Dr. Scheppach, in your testimony you mentioned it was 41 States have some kind of line-item veto authority, and 38 States give their governor the ability to make budget cuts without legislative approval.

We have heard criticisms of our rescission proposals, which is actually quite modest when compared to some of the powers that you just shared with us. But some have criticized our proposals as being the equivalent of an Executive Branch power grab that will only result in the President abusing his authority and maybe intimidating legislators to get them to go along with his or her priorities.

In the time that you served at the NGA for all these years, do you recall any instance where a State legislature decried the governor's line-item veto authority as being too powerful and shifting too much power to the State's executive?

I ask that question knowing there are a lot of people who serve in the State legislatures who want to be governor. So I think they might want to be careful how they would criticize a governor's line-item veto power. Do you recall ever hearing of that?

Mr. SCHEPPACH. No, I do not. I mean basically what happens is particularly what we have seen over the last 2 years is that States have cut over \$200 billion worth of previously appropriated funds. I mean that is just a huge amount.

So what happens, though, is the legislature really does not want to do it. So their attitude is let the governor do it. Then the governor is willing to do it. So we have not seen any sort of public and/or legislatures rebelling at that. It really works.

Senator CARPER. Good point.

One of the findings that you presented in your testimony is that line-item veto authority is used much more frequently during periods of economic stress and hardship. I think it was Governor Nixon of Missouri that you mentioned, pointing out that he used his power 50 times last year to eliminate lower priority items, cutting out some \$105 million on a revenue base of about \$8 billion.

Those funding cuts were only about 1 percent of his State's revenue base. So the vetoes did not have a huge impact on the State's budget. However, is it possible that the frequent use of a line-item

veto by Governor Nixon could serve as a warning to the State legislators that in a time of economic hardship, wasteful spending will not be tolerated?

Mr. SCHEPPACH. I think so. I mean most governors you interview really believe that the mere fact that you have the line-item veto creates a certain amount of fiscal discipline, particularly when you realize that it is almost never overridden. If the governor does it, it pretty much stays. It does, over time, sort of erode the desire of legislatures from putting in all those special projects. So, yes.

Senator CARPER. All right. Thanks.

Why are line-item veto authorities so prevalent in States? You seem to indicate it is because 49 States have balanced budget requirements. Maybe that is part of it.

I really cannot understand why line-item veto is good enough for 41 States, but when it comes to the Federal level a much tamer expedited rescission authority is viewed by some as an unacceptable shift in power from one branch to another. Maybe if the Federal Government had a true balanced budget requirement and we were forced to live in our means as many States do, then the prospect of expedited rescission authority would be better.

But would you just comment briefly on the applicability of some of these States' rescission authorities to the Federal level?

Mr. SCHEPPACH. I personally think a lot of it does come from the balanced budget requirement, and, as you say, the line-item veto authority is kind of the mild side of it. The much bigger power really is for the governor to have the right at any time to just go back and cut previous appropriations, and that is a pretty powerful type of tool.

But again, I think most of it is dictated by the balanced budget requirement, and so when revenues go down in a decline, a sort of economic dip, there is no alternative. You have to get back to the balanced budget requirement. So I think legislatures are very willing to give the power to governors.

Senator CARPER. Did you say there were four States where the governor can just go back and take money out of appropriated spending, on his own? Was that it?

Mr. SCHEPPACH. Well, there are 39 States that can go back and can cut previous appropriations. Now some of those States, like Connecticut, will limit it to 1 percent. Some States, I think Iowa, says it has to be across the board. Some States say you can do it everywhere but the legislative appropriation bill. So there are some restrictions on some of the States, but about 38 States have some sort of ability to cut across the board.

Senator CARPER. All right. Thank you.

Mr. Bixby, you made a similar point to Dr. Scheppach in that I think you both mentioned that the use of rescission authority, budget rescission authority will not yield, is not likely at least to yield dramatic budget savings that will save a State's budget problems or help close the Federal deficit, and I agree with you in that assessment.

However, while this is true, would not expedited rescission authority at least have some sort of positive effect on the overall budget process you spoke, at least to some extent?

In my mind, the threat of voting on a rescission would at least help to deter legislators from trying to advance wasteful spending in the first place. We saw this with the earmark reforms in Congress in the last year or so. While those reforms did not prohibit earmarks, the transparency requirements certainly have deterred members from introducing earmarks, and as a result our appropriations bills are containing fewer earmarks.

Do you think that expedited rescission authority can have a positive effect here on the budget process? I think I heard that from you already, but I am going to ask that question anyway just for the record.

Mr. BIXBY. Yes, the explicit answer is yes. In fact, that is why the Concord Coalition supports it.

I think sometimes budget process things are sold for the wrong reasons or misunderstood or judged by the wrong standards. I look at enhanced rescission as a mechanism to accomplish just what you mentioned. It increases the accountability of the budget process, the transparency of the budget process, the priority-setting.

It is sometimes sold as a deficit reduction tool, and, if that is how you sell it, it is easy to dismiss it.

So I think speaking from the Concord Coalition's point of view, the value in enhanced rescission is the deterrent effect it would have, the exposing. The ability to have a President that took earmark reform as seriously as Senator McCain, making it a crusade, would have a substantial deterrent effect.

Senator CARPER. Thank you.

Again, Mr. Bixby, we have often heard that expedited rescission proposals are just attempts to restore some sort of line-item veto power in the Executive Branch or to the Executive Branch. They argue that this authority will shift the balance of power, as I mentioned earlier, from a state of equilibrium between the President and the Congress to a situation that gives too much power to the President.

You have seen several presidential administrations propose the Federal budgets, and you have seen even more Congresses pass spending bills accompanying these budgets. Do you think that a proposal that guarantees that Congress will vote, must vote on President's rescissions would alter the power balance in the negative way that I have just described?

Mr. BIXBY. No, I really do not. Maybe it gives the President another card to play, but I think that is actually a good thing. I do not think it would be a major shift.

The fear would be of something that would give the President maybe the sort of line-item powers that some of the governors have. I can imagine Congress may not want to do that, and it would probably be deemed as unconstitutional.

But here you are giving the President a role in looking at the priorities of Federal spending. All he is doing is saying, take another look at this. Here are some items I want you to look at again.

And Congress retains the power. The President cannot. This is not a veto. It is not that the line-item veto was declared unconstitutional. This is not a major shift of power because Congress would still have to vote to approve the rescissions that the President recommends.

So, if Congress retains the absolute power here, I do not think it is a major shift.

Senator CARPER. Good. Thank you.

Mr. Bixby, your testimony mentions that an expedited rescission authority could restore the public's trust in the Federal Government. You just reiterated that.

Can you explain how this public trust has eroded with regards to our budget and what this improvement could mean for future budgets and how the rescission bill could play into this? I do not know if you want to add anything to what you have already said. I think you already addressed this pretty well.

Mr. BIXBY. I do, and I do not want to belabor the point, but I do think it is a hidden strength of the enhanced rescission process.

What we find in our field events consistently is that we have our charts with unsustainable entitlement programs, and you lay them out. But inevitably we get questions about waste because it is on people's minds and it bothers them.

They like Medicare. They like Social Security. They may understand that they are unsustainable, and we have to make hard choices. They do not like waste. So, even if it is a small amount of money, they want something to be done about it.

I look ahead to the sort of hard choices that we are going to have to make in the future, and the public is going to be very resistant to do that if they keep coming back to a reset point in their mind that says, but it is going to go to a bridge to nowhere. Why should I cut Medicare or Social Security or pay more taxes if it is going to be wasted?

So I think the credibility of the Congress, and even entitlement scolds like myself, is at stake here. We have to do something to restore public trust, and this is a way to do it. It is one way to do it.

Senator CARPER. In your next to last sentence, you mention the term entitlement scolds. It seems like every day I learn something new. That is the first time I have heard that.

Mr. BIXBY. I have been called that, but it is not the worst thing.

Senator CARPER. Well, I am sure.

Mr. BIXBY. What do you mean, you are sure?

Senator CARPER. I know it is not as bad as some of the things my colleagues and I have been called.

OK, well, entitlement scold or not, we are delighted you took the time to be with us. Thanks for responding to those questions.

Mr. Schatz, a couple comments if I could for you, and then I want to go back to ask one question.

We are hearing what the States have done, what powers have been provided to the executives, chief executives of our States in these regards. Before we close, I will ask all of our panelists if they have heard anything, any steps, any powers provided in other countries along these lines, to help contribute to fiscal responsibility. So you all be thinking about that.

But, in the meantime, Mr. Schatz, your organization has been tracking issues regarding wasteful Federal spending for 25 years. I remember well as a deficit hawk when I was in the House of Representatives, working with people like Tim Penny, Buddy MacKay, Charlie Stenholm, and others.

Clearly, you are well acquainted with the relationship with the Executive Branch and the Legislative Branch when it comes to this kind of waste, and you have seen Presidents make rescission requests time and again only to have Congress, in many cases, ignore them.

In your opinion, what purpose does this rescission authority serve if Congress never or rarely considers any of the proposed cuts?

Mr. SCHATZ. In this case, the legislation requires Congress to vote. So there is a different process that did not exist previously.

And I want to briefly address, if you are not asking me, the question you asked Mr. Bixby about how this affects overall spending. Senator CARPER. Sure.

Mr. SCHATZ. There was an interesting report by Professor James Savage at the University of Virginia about the administrative cost of earmarks. He did a study on the Office of Naval Research and just the time that is spent answering to members on earmarks. They do not get extra money to administer the earmarks, and yet they become the high priority.

In addition, the appropriations staff spends an inordinate amount of time because in many cases there is no set process for how to review these. There is no statutory authority. They do not fit into the legislature's or I should say the agencies' process.

And there has been another report. Senator Coburn asked for a report in September 2007. The Inspector General of the Department of Transportation talked about the impact on higher priorities at many of the agencies and FAA. Yes, at Department of Transportation, including FAA replacement towers where they were 3 years behind the high priority replacement towers because of earmarks.

So the impact is not just on the budget because it is not a large amount. It is on other priorities. It is also on how Members of Congress view legislation. If they were not necessarily voting for this tiny, little \$500,000 teapot museum in Sparta, North Carolina, for example, they might not necessarily support the entire piece of legislation. So there is a larger amount that is addressed by this enhanced rescission authority.

Senator CARPER. OK. Thank you. Those are some points that I had not thought of before, and I appreciate those.

Of all our witnesses here today, I think your organization seems to be the most vocal about the Federal Government's and especially Congress' lack of good management practices with respect to our taxpayers' dollars. I think you said in your written testimony, "The Constitution does not give Congress a blank check to spend tax dollars on anything that it wants."

Some have criticized expedited rescission authority, saying that if it passes, then it will give the President license to abuse his or her power. Are you concerned that Presidents, future Presidents will abuse this authority in the same way that Congress has abused, allegedly abused, our authority when it comes to spending?

Mr. SCHATZ. Well, there is a check on this. You have a 4-year sunset. I think the taxpayers will certainly be watching this, concerned about whether the President will trade something of value in return for his own priorities or maybe higher spending, saying, I am going to reduce this earmark unless you vote for \$25 billion

more in spending. Those kind of things will hopefully be transparent and the opposite impact of what we would really want to see.

Based on what Dr. Scheppach has said, it seems to work at the State level. You, of course, had that experience as governor, where the balance does work out pretty well. So I am not really concerned because there is currently an imbalance, and some of that would be restored under this enhanced rescission.

Senator CARPER. I mentioned one of the questions I wanted to ask of all of you is if you are aware of any powers that are used or bestowed upon, if you will, chief executives in other countries along these lines. Do you all have any thoughts along those lines? Dr. Scheppach.

Mr. SCHEPPACH. Yes, let me just make a couple comments. One is that there seems to be a growing consensus that any country that has an outstanding debt of 60 percent or more of GNP is definitely getting in the risk category.

Senator CARPER. Say that number again.

Mr. SCHEPPACH. Any country that has a debt-to-GDP ratio of more than 60 percent is getting into the risky area. The Pew Foundation with an advisory group, I think funded by Peterson, came out with that the other day. The European Market Community has that. The IMF has made that recommendation.

So, first off, I think at some point Congress needs to think about once you hit certain points that are risky, maybe you ought to change the budget process and provide emergency authority, so that you can help correct that. In other words, one approach is to say, all right, maybe you go this direction now, but if in fact you get over 60 percent, maybe you go to a stronger line-item veto authority or other things. That is point one.

Number two is Germany was at this conference, and they are an example of a country that has completely changed their budget process, and at least for the first year or two they have been making progress in bringing that debt down. Now it is a different form of government, so I am not sure whether it works here or not.

Another point I would make is that there was a person—John Hilley, who used to work up here. I think he may have worked for Majority Leader Mitchell at one time—but that perhaps you ought to think about changing the baseline. Coming from CBO, the baseline is very clear. You build in inflation on discretionary items and defense, and your entitlements are best estimates.

What Mr. Hilley said was freeze everything. No inflation adjustment for discretionary spending. Freeze the COLA, no COLA. No increase in reimbursement rates for any of the entitlements. Then you set a pile of money aside, a box, and you have to decide how much is in that box. But everything competes for that money, which is then forcing entitlements to compete against discretionary.

But I think you are at the point, in all seriousness, that you have to think about much more draconian types of things.

The only other thing I will add is that we are not starting that at the State level. This downturn now has sent repercussions through States that are going to last eventually 8 to 10 years. We are not going to be back to the previous revenue levels of 2008

until 2014, and that is in nominal terms. Then the overhang of needs is phenomenal.

So it is like essentially States have to understand that their revenue path in the last 2 decades has been 6 percent. It is now going to be 3.5 to 4 percent. So we are now, at NGA, going through the process of how you cut to core services on a sustainable way, and that is going to start.

As you know, we are probably going to have 28 new governors next November, and we are going to start working with them on that because we are in what we call the new normal now. Everything we have had up to now gets thrown out. We are in a very different revenue path. We got to get looking at it as sustainable. Otherwise, at some point, this thing comes apart, and I do not think we have the fiscal policy or monetary policy tools to deal with it if and when it does.

Senator CARPER. Thank you very much.

Mr. Bixby, any idea, anything out there we can learn from other countries in this regard?

Mr. BIXBY. Well, resuming my role as the entitlement nag, scold, I am actually more familiar with what they do on that front than on the discretionary front, and I do think that other countries are ahead of us on that. Countries with even older societies and more ambitious health care plans are realizing that they have to do some of the things that Mr. Scheppach was talking about.

We do need to have more automatic controls, triggers, that sort of thing that are sprinkled throughout the budget process. I was part of a group that signed a document called "Taking Back Our Fiscal Future" last year, including several former CBO directors. What we were essentially saying is let's take programs like Medicare and Social Security and Medicaid and put them on a budget, which we do not have now.

Now other countries do that sort of thing, and that is where they are ahead of us. That is where the game is in controlling spending.

I do like the idea that Mr. Scheppach mentioned of combining these things with the debt limit in the way that if you go over a certain point of debt as a percentage of your economy. Say it is 60 percent, which we are getting very close to. I think we may be there by the end of next year. Then it might trigger enhanced rescission, where Presidents have an even greater authority to cut spending simply because that would be a deterrent effect on Congress.

So I think we are going to have to look at things like that.

I am not aware of what other individual countries are doing with respect to the line-item veto. I will inquire and get back to you for the record if I can.

Senator CARPER. OK. Yes, thank you so much. Mr. Schatz, please.

Mr. SCHATZ. Yes, Mr. Chairman. We have met in recent years with a lot of organizations from other countries. They are just trying to figure out how to address their excessive spending, the debt that has been discussed here.

I do not recall anyone specifically mentioning line-item veto. It is a recommendation, among many others, that we suggest to these organizations, mostly nongovernmental organizations, and some-

times individuals who just want to get something started in certain countries. We might be able to get you some more specifics based on the information, or at least some links to the groups that do exist.

I do not want to spend a lot of time again on this issue that they have discussed, but we are talking about a massive amount of new spending—the bill that was just approved by the House and Senate, has a 12 percent increase. It is really difficult to sit here and say, and even to hear Members of Congress say, we have to get spending under control, when they are talking about a massive new entitlement in health care and they just passed a 12 percent increase in the appropriations bills.

Yet, the President says, we are going to have fiscal discipline. Members of Congress say, we are going to have fiscal discipline. Our question is when?

Senator CARPER. OK. Last question I would ask of each of you, take off your entitlement scold hat or any other hat you might be wearing and put on a critic or the hat of someone who is skeptical of what we are trying to do with the legislation that Senator Feingold, Senator McCain and the legislation that I have introduced with a number of my colleagues. Maybe just share with me what you think the most valid criticism of what we are trying to do might be, the most legitimate and valid criticism, and then rebut that for me.

Try that, Dr. Scheppach.

Mr. SCHEPPACH. It is a very targeted, very mild approach. I realize due to the previous court decisions and so on, and having worked at CBO and we were set up by the Impoundment Act, I am pretty sensitive to the balance of power issues that you are dealing with. But it is a very mild approach, and I think it would end up focusing largely on these earmarks. That is a good thing, though.

I would rather, if this is as aggressive as you can get through the House and Senate, then I would support it because any small adjustment there that even on the margin helps control it I think is a good thing.

So I would say it is very mild, particularly relative to what States do. But having some appreciation of how difficult it is and the balance of power and the sensitivity in the Congress, I would not be a critic. I would be supportive. Move it, if you can.

Senator CARPER. Thank you. Mr. Bixby.

Mr. BIXBY. I think that the most legitimate question raised would be sort of the bang for the buck issue. Presidents have not made aggressive use of the authority they now have, and so one could question whether as a matter of politics a President would make aggressive use of the enhanced rescission authority. So it may be you would go through all this, and still the President would say, I do not want to roil the waters here.

I think a little of that happened actually in the early President Bush years. You remember when Mitch Daniels was the OMB Director, and he came up with the nickname “the Blade” and testified a few times about earmarks. There was a quite pushback from the Hill, quite a vocal pushback. As we saw in the earlier panel, President Bush actually never proposed any rescissions at all.

So you do have to have the President actually use the authority that would be given, and so one could make the argument that you really would go through all this and frankly not accomplish much.

My rebuttal to that would be you need to put the mechanisms in place before they can be used. You have to be standing in the end zone before you can catch a touchdown. Now it may be that somebody is standing in the end zone, and they are going to drop the ball. There is nothing you can do about that. But you have to put in place the mechanisms.

So I think that if you put in enhanced rescission, given the fiscal pressures that we are going to have coming, I think it is inevitable that a future President would make greater use of this. So you want to have a good process in place. That would be how I would handle that criticism.

Senator CARPER. Good. Thank you.

Mr. Schatz, you get the last word on this question.

Mr. SCHATZ. Thank you, Mr. Chairman, and I agree with what the other two witnesses have said.

But recalling what you quoted from my remarks about the constitutional prerogative and Article I, Section VII and Members of Congress who view this as their absolute right, I recall one of our porkers of the month, in fact, Congressman John Mica of Florida said, this is the most important thing we do.

How can somebody realistically say adding a teapot museum or a bridge to nowhere is the most important thing that we do?

That is where I think the criticism comes from is your colleagues who believe that they just can do this and not worry about it because they view it as a way to get reelected. They view it as something that they have to do, although more and more Senators and Representatives are saying no to earmarks, period, because they understand it is just not worth the time and effort and a lot of the criticism that they get.

So I think it is a matter of convincing them that this is one thing that should be done, and they do get a second bite at the apple. If their project is so worthy, then there should be a separate vote in the House and in the Senate, rather than sticking this in, in the middle of the night, air dropping it in conference, having bills that get approved when nobody knows exactly what is in them.

There is so much talk about accountability and transparency. The Administration has new transparency rules for agencies. This would be a nice way to open up what is going on, on Capitol Hill, and allow members to defend these wonderful projects on the floor.

Senator CARPER. Thank you. That reminds me of something I have said from time to time: I am not a prolific earmarker. I am actually a piker compared to most. To some, I should say.

I have always said that if I cannot convince 50 of my colleagues to support a request that I have made, then I am in the wrong business, or at least I am picking the wrong projects. So I would welcome that challenge.

That reminds me of the old saying, be careful what you ask for. [Laughter.]

This has been terrific, and you all are great to come and share your thoughts, your expertise, your literally invaluable expertise and experience. To add up the years that you all have thought

about these issues, worked on these issues, focused on these issues, it is just a real treasure trove here of experience and wisdom. So we thank each of you.

As I said earlier to the first panel, some of my colleagues will probably want to submit some questions in writing, and, if you would take the time to respond to them in a forthright manner, we would be grateful.

But again, thanks for your service. Thanks for your presence here today. And Merry Christmas, Happy New Year. Thanks.

With that, this hearing is adjourned.

[Whereupon, at 4:58 p.m., the Subcommittee was adjourned.]

APPENDIX

FOR IMMEDIATE RELEASE



TOM CARPER

UNITED STATES SENATOR · DELAWARE



FOR RELEASE: Dec. 16, 2009
CONTACT: Bette Phelan (202) 224-2441

**SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT, GOVERNMENT
INFORMATION, FEDERAL SERVICES, AND INTERNATIONAL SECURITY**

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

HEARING: "Tools to Combat Deficits and Waste: Expedited Rescission Authority"

Opening Statement of Senator Thomas R. Carper, Chairman

We are holding this hearing because our nation is on a fiscal path that is not sustainable.

America has accumulated as much new debt in the first eight years of this decade as we did in the first 208 years of our nation's history. Our national debt is approaching \$12 trillion, and this year we likely will add another \$1 trillion to it. As a percentage of GDP, our national debt stands today at about 85 percent, a level exceeded only during World War II during the past 70 years.

As our nation emerges next year from the worst recession since the Great Depression, we need to begin easing off the accelerator with one foot and start tapping the brakes with the other, as we begin to slow the growth in spending and start to grow revenues again.

In this subcommittee, we have examined any number of ways to do this – ranging from closing the tax gap, to recovering improper payments, to reining in DOD cost overruns, to disposing much of the federal government's surplus property.

Today's hearing will look at the spending side of this goal.

Every year, Congress passes a number of spending bills. Not surprisingly, these bills sometimes include spending items many of us would consider wasteful, and which contribute unnecessarily to our rising deficit.

While many in Congress and the President may want to remove this waste, their desire to do so is often pitted against an array of interests intent on protecting it or by a compelling need to pass these bills in order to direct funds to urgent priorities.

So, we accept a little waste as the cost of getting bills passed.

Having said that, we need to find a better way to reduce wasteful spending without jeopardizing the funding for our top priorities.

One of those ways relates – at least in my view – to the President’s ability to get Congress to consider – or reconsider – spending cuts.

Currently, when Congress sends a spending bill to the President, he can sign it and then propose that Congress consider rescinding – or reducing – spending in certain categories of that bill.

The problem is that Congress is under no obligation to consider these rescissions. When Congress receives the rescissions, they are often dead on arrival.

Congress tried to fix this in 1996 by passing the Line Item Veto Act, but that ended quickly with the Supreme Court affirming that the bill was unconstitutional.

I agreed with that decision. The legislation extended extraordinary power to presidents to veto specific spending and revenue measures within legislation unless super majorities of both the House and Senate voted to override a president’s action. The vetoed legislation not only dramatically shifted power from the legislative branch to the executive branch of our government, but it did so permanently.

In this hearing, we will explore the President’s existing rescission authority and try to determine how successful it has been at reducing spending that most of us would consider to be wasteful. We will also consider several ways to change that authority in order to make it more effective.

Before we turn to our witnesses, I want to take a moment to describe one legislative change that 21 of my colleagues and I have proposed to strengthen safeguards against wasteful spending that we can no longer afford in an era of trillion dollar deficits.

We’ve introduced legislation in this Congress – S.907 – that modifies a President’s current rescission authority so that Congress can no longer ignore rescission proposals. We would have to actually vote on them. And, our bill does not make that shift of authority permanent. Rather, it provides for what I call four-year test drive after which the Congress and the President may elect to extend that authority, amend it or allow it to end.

Under our proposal, a president’s rescissions must meet the following criteria:

First, a president’s proposed rescissions would apply to discretionary spending, not to revenue measures or to entitlement spending.

Second, rescissions may not reduce any authorized category of spending by more than 25 percent.

This means the President can recommend rescinding as much as 100 percent of funds for any unauthorized item -- including unauthorized earmarks – but may not propose to rescind more than 25 percent of a spending category that is authorized.

In order for the cuts proposed by a president to become law, they must pass both the House and Senate by a simple majority vote. If the vote fails in one chamber, the proposed rescissions are dead.

Lastly, the authority sunsets after four years, allowing both our legislative and our executive branches to test drive this new power.

As a former governor whose state constitution gave me line-item veto powers, let me be clear. Neither line-item veto powers nor enhanced rescission powers alone will restore fiscal sanity in our federal government.

Entitlement spending must be reined in. Revenues that are owed must be collected, and some new revenues may need to be collected. Programs must be run more cost effectively. There aren't any silver bullets in this business, but there are a number of arrows in our quiver that can help. We need to figure out which ones are most likely to help, and we need to put them to use.

###

STATEMENT OF SENATOR JOHN MCCAIN, RANKING MEMBER
SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT, GOVERNMENT
INFORMATION, FEDERAL SERVICES AND INTERNATIONAL SECURITY
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

“Tools to Combat Deficits and Waste: Expedited Rescission Authority.”

December 16, 2009

Senator Carper, thank you for holding this important hearing to examine expedited rescission authority – a type of line-item veto authority – as a tool for bringing our fiscal house into order. I want to welcome our panel of witnesses this afternoon. I am glad to see my good friend Senator Feingold here today. He and I introduced a bill earlier this year on expedited rescission authority and we are fortunate that he will be sharing his insights with us today.

Let me begin today with a little straight talk about our current fiscal predicament. Our current national debt is \$12.1 trillion and soon we may be debating whether or not to raise the national debt ceiling by up to another \$1.8 trillion. The federal deficit has ballooned to approximately \$1.6 trillion. Add in unfunded entitlement spending, the current severe recession and 10 percent unemployment and, simply put, you have a recipe for disaster.

Americans all over this country are hurting. People are waking up every morning wondering if they will lose their savings, their job, or their home. The issues we are facing as a nation require all of us, including Congress, to make sacrifices. As we limp towards the end of another appropriations cycle, however, I regret that our holiday gift to the American people is simply business as usual.

Congress has once again passed appropriations bills containing thousands of earmarks costing the taxpayers billions of dollars. The omnibus appropriations bill the Senate just passed spends \$450 billion, and is loaded up with 4,752 earmarks, totaling \$3.7 billion. I am sure Americans will be pleased to learn that \$2.7 million of their money is going towards supporting surgical operations in outer space; \$800,000 for jazz at the Lincoln Center; \$3.4 million for a rural bus program in Hawaii; \$1.6 million to build a tram between the Huntsville Botanical Garden and the Marshall Flight Center in Alabama; and \$750,000 for the design and fabrication of exhibits to be placed in the World Food Prize Hall of Laureates in Iowa.

This is a repeat of the \$410 billion omnibus appropriations bill the President signed earlier this year containing approximately 9,000 earmarks. Some examples of earmarks in that bill include \$1.7 million for pig odor research in Iowa; \$6.6 million for termite research in New Orleans; \$2.1 million for the Center for Grape Genetics in New York; \$650,000 for beaver management in North Carolina and Mississippi; \$870,000 for wolf breeding facilities in North Carolina and Washington; \$819,000 for catfish genetics research in Alabama; and the list goes on and on.

Many of these projects were not authorized or competitively bid in any way. No hearings were held to judge whether or not these were national priorities worthy of scarce taxpayer dollars.

Congress's earmarking practices have grown worse, not better, just about every year I have served in the Senate. Members continue to elevate parochialism and patronage politics over the true needs and welfare of this nation. Given Congress' failure to take action, I am disappointed the President has not honored his campaign pledge to work to eliminate earmarks - "go through the federal budget - page by page, line by line - eliminating those programs we don't need," as he said.

Given the abysmal state of our economy, it is time for a bigger toolbox to address these problems, which is why we should provide the President with line-item veto authority. Earlier this year, Senator Feingold and I, along with Congressman Paul Ryan, introduced legislation to grant the President specific authority to rescind or cancel congressional earmarks, including earmarked spending, tax breaks, and tariff benefits. Granting the President the authority to propose rescissions which then must be approved by the Congress could go a long way toward restoring credibility to a system that encourages waste, special interest pork, and outright corruption.

This not a Democratic or Republican issue - it is a good government issue. Our current economic situation and our vital national security concerns require that now, more than ever, we put an end to wasteful spending. The American people are tired of what amounts to a broken process and they are tired of watching their hard-earned money go down the drain.

Statement of Senator Robert C. Byrd

Mr. Chairman,

I am not a member of the Homeland Security and Governmental Affairs Committee, and so I thank you for the courtesy of allowing me to submit a statement for the record related to the line-item veto, otherwise known as enhanced or expedited rescission authority.

The idea behind enhanced rescission authority is that we should give the President a more forceful hand in eliminating spending items from larger bills, based on the specious premise that the President knows better than the Congress how to identify waste in the Federal budget.

I have long rejected this argument, knowing that the Congress can balance the budget, as it has done in the past, without altering the Constitution or disrupting the balance of powers between the Legislative and Executive branches, which the line-item veto would certainly do.

In 1993, I delivered 14 speeches, later published as The Senate of the Roman Republic, Addresses on the History of Roman Constitutionalism, on the line-item veto.

After President Clinton signed the Line-Item Veto Act of 1996, I joined with U.S.

Senators Carl Levin and Daniel Patrick Moynihan in bringing suit in Federal court against the Director of the Office of Management and Budget (OMB), then Franklin Raines, arguing that the Act authorized the President to cancel spending and revenue measures without observing the procedures outlined in the Presentment Clause of Article I, Section 7. That suit, *Raines v. Byrd*, was dismissed by the U.S. Supreme Court for lack of standing, but the arguments were later validated in 1998 when the Court nullified the Line-Item Veto Act in *Clinton v. City of New York*.

I have served with the twelve Democratic and Republican Presidents who have asked for line-item veto authority, and cheered as the Senate said no to all but one. And when the Senate erred in yielding to a President's request for such power, I was there when the Supreme Court nullified the Senate's actions.

The Constitution is explicit and precise about the role of the President in the legislative process. Article I, Section 7 reads: "Every Bill...shall, *before* it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it...."

Enhanced rescission authority creates a third option for the President. He can sign a spending bill into law, and then strip the provisions he does not like. The President alone

would have that authority. He alone would dictate the rescission packages the Congress must consider under expedited procedures, and the Congress would have to lamely submit – voting to accept or reject the President’s proposals, without amendment.

Enhanced rescissions would subject every Member – and the interests of their constituents and states – to the political, capricious, and unchecked whims of the White House. The President would be empowered to unravel delicately crafted legislative compromises. He could target spending items for certain lawmakers, or make promises not to target them, using his authority to intimidate and reward Members of Congress. Every debate between the Congress and the White House could be swayed by this new power of the President to influence Senators – to say nothing about how this power could be abused in the days and weeks before an election.

The U.S. Senate has a responsibility to strengthen and protect the Constitutional system of checks and balances. It falls to the Senate, before the courts, to determine if legislation impermissibly disrupts the balance of power between the Executive and Legislative branches. We should not rely on the courts alone to determine whether a suspect bill passes Constitutional muster.

In my addresses on the history of Roman Constitutionalism, I argued that “Gaius Julius

Caesar did not seize power in Rome. The Roman Senate thrust power on Caesar deliberately with forethought, with surrender, with intent to escape from responsibility.” Our founding fathers placed the power of the purse and the power to write legislation in the Congress, in order to provide a check on the centralized power of the executive. By handing our Constitutional responsibilities to the President, and asking that he do our work for us, we surrender the people’s control of the purse strings, and, with it, our most significant check on the Executive.

Let us work together to find a better way to balance the budget and control waste. Let us do so without eroding the people’s most potent check on their Government.



**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**

December 16, 2009

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

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 one¹³ 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 1997¹⁸ 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 unconstitutional²⁰ and the Supreme Court, pursuant to the statute, expedited its

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

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 rest 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 tremendous amount of scholarly writing³¹ and numerous proposals offered³² 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 version, S. 907, the Budget Enforcement Legislative Tool Act of 2009.³³

S. 907 proposes to amend the Congressional Budget and Impoundment Control Act of 1974,³⁴ by permitting the President, not later than 3 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.³⁵ Such a special message shall include accompanying draft bill or joint resolution language for consideration by Congress.³⁶ 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.³⁷ The salient feature of S. 907 appears to be that rescission requests submitted pursuant to this proposal 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

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 Vetoes 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. 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 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)).

³⁵ See S. 907, *supra* note 33 at § 2(b).

³⁶ *Id.* at § 2(b)(2).

³⁷ *Id.* at § 2(c)(1).

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 S. 907 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;³⁸ (2) a requirement for the committee to which the measure is referred to report it within a certain number of days;³⁹ (3) a provision for automatic discharge of a committee, if the measure is not reported within a specified time;⁴⁰ (4) privileged access for the measure to the House and Senate floor for consideration;⁴¹ (5) limitations on the length of time that each house can debate or consider the measure on the floor;⁴² and (6) prohibitions against Members proposing floor amendments to the measure and offering certain other motions during its consideration.⁴³

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 is fails to be enacted by Congress, the bill states that the amount of discretionary budget authority proposed to be 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."⁴⁴ Finally, S. 907 contains a provision terminating the rescission authority and expedited procedures in 2012 with the sine die adjournment of the 112th Congress.⁴⁵

Applying the Court's analysis in *Clinton v. City of New York* to S. 907, it appears possible to argue that expedited rescission proposals 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 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. S. 907, as discussed above, 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 arguably 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.

³⁸ *Id.* at § 2(d)(1)(A).

³⁹ *Id.* at § 2(d)(1)(B).

⁴⁰ *Id.*

⁴¹ *Id.* at § 2(d)(3)(A).

⁴² *Id.* at § 2(d)(3)(B).

⁴³ *Id.* at § 2(e).

⁴⁴ *Id.* at § 2(f).

⁴⁵ *Id.* at § 3.

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 rules⁴⁶ 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, or a similar proposal, is enacted into law by the 111th 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 appears to be legal and within the constitutional authority of Congress.

The principal at issue is that one Congress cannot bind a future Congress.⁴⁷ The Constitution provides that, "All legislative Powers herein granted shall be vested in a Congress of the United States."⁴⁸ 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

⁴⁶ U.S. CONST., Art. I, § 5, cl. 2 (stating that "Each House may determine the Rules of its own Proceedings").

⁴⁷ 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).

⁴⁸ U.S. CONST., Art. I, § 1, cl. 1.

rulemaking power and, therefore, subject to amendment pursuant to the same procedures used to amend any other chamber rule.⁴⁹

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 2002,⁵⁰ implementing legislation for a U.S.-Colombia Free Trade Agreement (CFTA) was introduced in the 110th Congress on April 8, 2008.⁵¹ 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 2002.⁵² 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.⁵³ 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.⁵⁴ 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.⁵⁵ 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.⁵⁶

⁴⁹ 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).

⁵⁰ Trade Act of 2002, Pub. L. No. 107-210, 116 Stat. 933 (2002).

⁵¹ See H.R. 5724, 100th Cong. (2008); see also S. 2830, 110th Cong. (2008).

⁵² See Trade Act of 1974, Pub. L. No. 93-618, § 151, 88 Stat. 1978 (1974).

⁵³ See H. Res. 1092, 110th Cong. (2008).

⁵⁴ See *supra* notes 8-17 and accompanying text.

⁵⁵ 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).

⁵⁶ See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447 (1923)

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. Although this does not appear to be an issue with S. 907, some expedited rescission proposals have set no time-frame within which the President must send up a rescission proposal after a law is enacted. Conversely, some proposals provide that when the President does send up a rescission proposal he may suspend the covered provision(s) designated for up to 180 calendar days.⁵⁷ These proposals, when potentially combined with the existing 45-day rescission authority of the Congressional Budget and Impoundment Control Act,⁵⁸ 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.”⁵⁹ 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 an 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.⁶⁰

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 address the issue, 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.⁶¹ Other cases have relied on more flexible, functional approaches to separation of powers questions.⁶²

⁵⁷ See S. 2381, 109th Cong. (2006); see also H.R. 4890, 109th Cong. (2006).

⁵⁸ 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)).

⁵⁹ 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).

⁶⁰ See *id.*

⁶¹ 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).

⁶² 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 – 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.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, Committee on Homeland Security and Governmental Affairs, U.S. Senate

For Release on Delivery
Expected at 2:30 p.m. EST
December 16, 2009

**IMPOUNDMENT
CONTROL ACT**

**Use and Impact of
Rescission Procedures**

Statement of Susan A. Poling,
Managing Associate General Counsel
Office of General Counsel



GAO-10-320T

December 16, 2009



Highlights of GAO-10-320T, a testimony before the Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, Committee on Homeland Security and Governmental Affairs, U.S. Senate

Why GAO Did This Study

The Impoundment Control Act of 1974 (ICA) was enacted to tighten congressional control over presidential impoundments and establish a procedure under which Congress could consider the merits of rescissions proposed by the President. Under the ICA the President may propose a rescission when he wishes to withhold funds from obligation permanently or submit a deferral when the withholding of funds is temporary. Funds proposed for rescission may be withheld from obligation for 45 days of continuous congressional session. If Congress does not approve the rescission during this period, the President must release the funds on the 46th day. The ICA also provides a special discharge procedure permitting 20 percent of the members of either house to force a floor vote on any presidential rescission proposal.

In March 2009, at the request of the Chairman and Vice Chairman, Committee on Appropriations, U.S. Senate, we prepared statistical data concerning rescissions proposed and enacted since the passage of the ICA in 1974. As requested by the Subcommittee, this testimony discusses the use and impact of the rescission procedures under the ICA and includes the statistical data we prepared earlier this year.

View GAO-10-320T or key components. For more information, contact Susan A. Poling at (202) 512-2667 or polings@gao.gov.

IMPOUNDMENT CONTROL ACT

Use and Impact of Rescission Procedures

What GAO Found

Since 1974, presidents have submitted rescission proposals totaling \$76 billion, of which Congress accepted and rescinded \$25 billion. Both Republican and Democratic presidents have submitted rescission proposals since the enactment of the ICA in 1974. The number and dollar values proposed have varied widely with each administration. For example, the Reagan administration proposed the highest number (245 in 1985) and the highest dollar value (\$15.4 billion in 1981). On the other hand, President George W. Bush did not submit any proposals under the ICA. In October 2005, however, President Bush sent a letter to Congress proposing the "cancellation" and rescission of budget authority. The Office of Management and Budget stated that the letter was not a special message proposing rescissions under the ICA. Nevertheless, 7 agencies withheld budget authority from 12 programs in anticipation of congressional enactment of the proposals the President made in his letter. Since the President had not transmitted a special message to Congress under the ICA, we found that the 7 agencies withheld budget authority in violation of the ICA.

Since 1974, Congress has approved about 39 percent of presidential rescission proposals, totaling about 33 percent of the budget authority proposed for rescission. The approval rate varies by administration. In the Clinton administration, Congress approved about 67 percent of the rescission proposals, covering 54 percent of the budget authority proposed for rescission. In the George H.W. Bush administration, Congress approved about 20 percent of the proposals, covering 18 percent of the budget authority proposed for rescission.

Congress, on its own initiative, has made increasing use of rescissions as a tool to revise enacted budget authority. Overall, since 1974, congressionally initiated rescissions total about \$197 billion. This amount exceeds the approximately \$76 billion proposed by all presidents since 1974. While these statistics highlight Congress' increasing use of rescissions, the amounts rescinded, relative to the entire federal budget, make clear that rescissions have not been a major tool to reduce spending. This is in part because discretionary budget authority—the only spending for which rescissions can be proposed—constitutes approximately 40 percent of federal spending.

United States Government Accountability Office

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the Government Accountability Office's role in the congressional rescission process and to provide some perspective on the use and impact of rescissions.

The Impoundment Control Act of 1974 (ICA) was enacted to tighten congressional control over presidential impoundments and establish a procedure under which Congress could consider the merits of impoundments proposed by the President. Under the ICA, the President may propose a rescission when he wishes to withhold funds from obligation permanently or submit a deferral when the withholding of funds is temporary. Funds proposed for rescission may be withheld from obligation for 45 days of continuous congressional session. If Congress does not approve the rescission during this period, the President must release the funds on the 46th day. The ICA also provides a special discharge procedure permitting 20 percent of the members of either house to force a floor vote on any presidential rescission proposal.

Rescissions under the ICA have not historically served as a significant spending reduction tool. Since enactment of the ICA in 1974, presidents have proposed 1,178 rescissions totaling \$76 billion. Congress has accepted 461 of those proposals (39%), totaling \$25 billion (33%). During this period, Congress has initiated \$197.1 billion in rescissions to revise spending decisions.

The Comptroller General's Role

As this committee knows, the President is required to send a copy of the special message proposing rescissions or deferrals to the Comptroller General on the same day it is sent to Congress. Under the ICA, the Comptroller General is required to review each special message and report his findings to Congress as soon as practicable. We review each message to verify the facts surrounding, as well as the justification for, and the estimated program effect of, the proposed impoundment. We do this by talking with program officials, reviewing the latest agency budget documents, and discussing the proposed rescission with Office of Management and Budget (OMB) officials. We also review each message to ensure that it is not misclassified, such as a rescission proposal reported as a deferral. We report our findings on each special message to Congress, typically within 25 working days after receipt of the President's message.

The ICA also requires the Comptroller General to report to Congress any impoundment which the President has failed to report. Obviously, it would

be impractical to attempt to continuously review every account of the government, but we have found that this is unnecessary. When an unreported withholding takes place, concerned Members or Committees of Congress, intended recipients, or our auditors typically bring it to our attention. In fact, we last reported that an agency had withheld funds from obligation in August of 2006 after the Senate Committee on Appropriations requested that we undertake an assessment of whether executive branch agencies had withheld funds that had been proposed for cancellation in President Bush's Budget for Fiscal Year 2007.

After the President submits an impoundment message to Congress, we are responsible for monitoring the status of affected funds. For example, we monitor deferred budget authority to ensure that the funds are released in time to allow for prudent obligation. Well before the expiration of deferred appropriations, we initiate inquiries at OMB to verify that the funds will not be permitted to expire. If it appears that funds may expire, we report the deferral to Congress as a de facto rescission. We also monitor the 45-day statutory time limit associated with proposed rescissions to ensure that funds are released promptly following congressional disapproval or the expiration of the 45-day time limit. If the funds are not promptly released after the expiration of the 45-day period, the Comptroller General is empowered to bring a civil action in the United States District Court for the District of Columbia to require release of the budget authority. Prior to bringing suit, the Comptroller General must report to the Speaker of the House of Representatives and the President of the Senate the circumstances giving rise to the need to bring suit. We may not initiate a suit until the passage of 25 days of continuous session of Congress.

During the initial years of the ICA, we filed 25-day reports on several occasions and filed suit on one occasion. In each case, the funds were released. In recent years, it has not been necessary to resort to these procedures.

Finally, we provide statistical summaries and analyses on the impoundment process, as an adjunct to the above roles. In the past, we informally provided a variety of data to Congress. As the level of interest in this area has increased, we have prepared and periodically submitted to Congress formal summaries of the number and dollar amounts of the President's proposed and enacted rescissions, and of congressionally

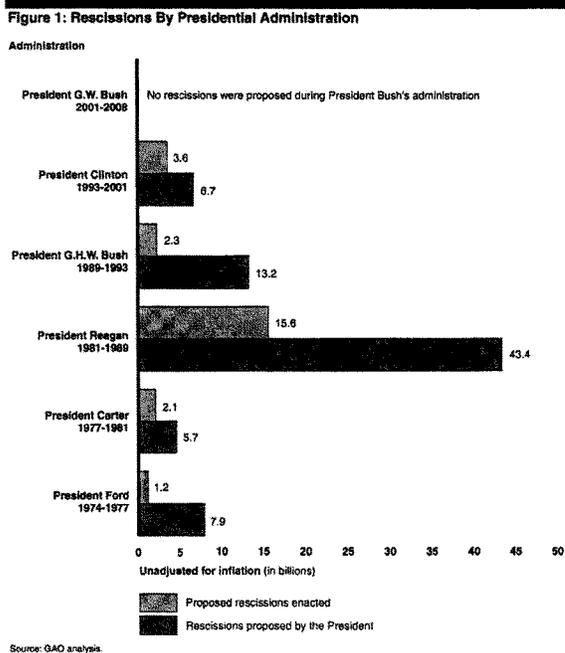
initiated rescissions.¹ Attachment I summarizes all proposed and enacted rescissions since 1974.

Mr. Chairman, I would now like to turn to our rescission data to provide some perspective on the use of rescissions by both the President and Congress since the ICA was enacted.

Use and Impact of the Rescission Process

Both Republican and Democratic presidents have submitted rescission proposals. As shown in Figure 1, the number and dollar values proposed have varied widely with each administration. For example, the Reagan administration proposed the highest number (245 in 1985) and highest dollar value (\$15.4 billion in 1981). On the other hand, President George W. Bush did not submit any proposals for rescission under the ICA.

¹ B-310950.2, Mar. 12, 2009.



Although President George W. Bush submitted no special messages to Congress under the ICA, he did transmit communications to Congress that proposed the "cancellation" and rescission of budget authority. For example, in October 2005, the President sent a letter to Congress proposing the "cancellation" and rescission of \$2.3 billion from 53 different programs. Seven agencies withheld budget authority from obligation from 12 programs in anticipation of congressional enactment of the proposals the President made in his letter. When we asked OMB about the

President's letter and the proposed cancellations, OMB explained that the letter was not a special message under the ICA. Since the President had not transmitted a special message to Congress under the ICA, we found that the 7 agencies withheld budget authority in violation of the ICA.² President Bush made similar proposals for "cancellations" and rescissions in his budgets for fiscal years 2007 and 2008, which were not special messages under the ICA. For his budget proposal for fiscal year 2007, the President requested the "cancellation" or rescission of previously appropriated funds from 40 programs, administered by 13 agencies. This time only one agency withheld funds from obligation in violation of the ICA and released the funds after our inquiry.³

Since 1974, Congress has approved about 39 percent of presidential rescission proposals, totaling about 33 percent of the budget authority proposed for rescission. The approval rate varies by administration. In the Clinton administration, Congress approved about 67 percent of the proposals, covering 54 percent of the budget authority proposed for rescission. In the George H.W. Bush administration, Congress approved about 20 percent of the proposals, covering 18 percent of the budget authority proposed for rescission. The comparable numbers for the Reagan administration were about 36 percent of both the rescissions proposed and the associated budget authority. In the Carter administration, the comparable numbers were 56 percent of the rescissions proposed and 46 percent of the budget authority.

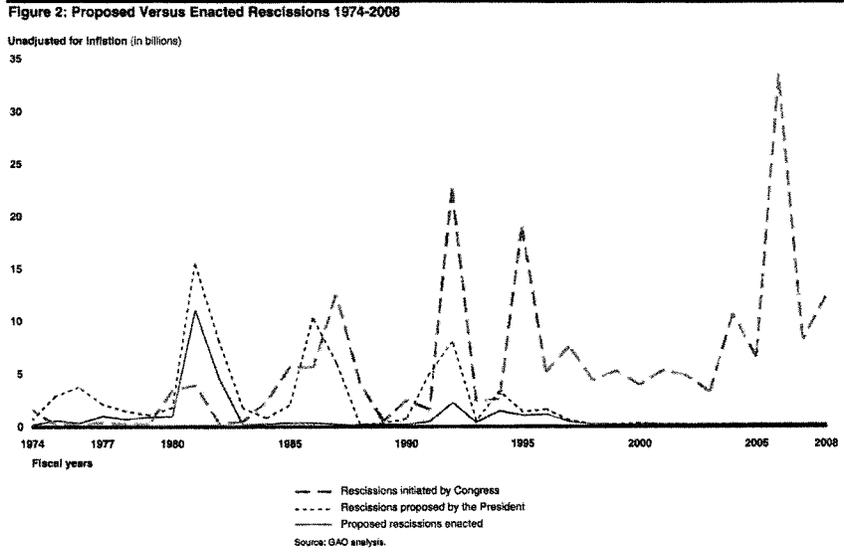
Congress, on its own initiative, has made increasing use of rescissions as a tool to revise enacted budget authority.⁴ As shown in Figure 2, Congress has not merely reacted to presidential proposals, but also has initiated its own rescissions. Overall, since 1974, congressionally initiated rescissions total about \$197 billion. This amount exceeds the approximately \$76 billion proposed by all presidents since 1974.⁵

² B-307122, Mar. 2, 2006.

³ B-308011, Aug. 4, 2006.

⁴ These congressionally initiated "rescissions" are independent of the Impoundment Control Act of 1974.

⁵ These estimates do not include rescissions of an indefinite amount of budget authority; that is, rescissions that do not cancel a specific dollar value at the time of enactment.



These data suggest an evolution in the use of rescissions as a budgetary tool. In 1974, at the time of enactment of the Impoundment Control Act, the rescission procedure was envisioned as a mechanism to accommodate a President's desire to impound funds by providing for congressional review and approval of presidential rescission proposals. Congress, of course, can always rescind enacted budget authority on its own initiative, either to reduce spending or to adjust spending priorities. Over time, the share of total rescissions enacted each year which were originally proposed by the President has fallen and the share originating in Congress has increased. Attachments I and II provide rescissions data by year and by presidential administration.

In the 11 years prior to the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985, Congress enacted approximately \$18.6 billion (or about \$1.7 billion/year) of the \$38 billion proposed for rescission by the President, while enacting approximately \$11.2 billion (or \$1 billion/year) in congressionally initiated rescissions. From 1985 through 1990, the years under the Balanced Budget Act, Congress enacted approximately \$355 million (or \$59 million/year) of the \$18.5 billion proposed for rescission by the President, while enacting approximately \$29.7 billion (or about \$5 billion/year) in congressionally initiated rescissions. From 1991 through 2002 under the Budget Enforcement Act of 1990, Congress enacted approximately \$6 billion (or about \$498 million/year) of the \$19.4 billion proposed for rescission by the President, while enacting approximately \$82.5 billion (or about \$6.8 billion/year) in congressionally initiated rescissions. Since the expiration of the Budget Enforcement Act, there have been no rescissions proposed by presidents but Congress enacted approximately \$73.6 billion (or about \$12.3 billion/year) in congressionally initiated rescissions.

While these statistics highlight Congress's increasing use of rescissions, the amounts rescinded, relative to the entire federal budget, make clear that rescissions have not been a major tool to reduce spending. Under the ICA, the President can propose rescissions only for funding provided by annual appropriations or supplementals—referred to as discretionary spending. As this Committee knows, under the Budget Enforcement Act, this category was constrained by statutory caps. Today it is limited by the totals set in the Budget Resolution. It is important to recognize, however, that this spending represents less than 40 percent of the budget. Spending growth is driven by the remaining part of the budget, which is spent on such programs as Social Security, Medicare, and Medicaid. These “mandatory programs” and interest on the debt represent about 60 percent of the budget. Under the ICA, the President cannot propose rescissions in mandatory spending.

Expedited Rescission Proposals

This is not to say that rescissions are unimportant. Certainly, the President's rescission proposals can foster debate between the President and Congress over funding priorities and cuts in specific programs. To enhance accountability and further public debate over spending priorities, there have been a number of proposals presented in Congress over the years for an expedited rescission process. Although the details of the proposals vary, expedited rescission proposals are designed to ensure rapid and formal congressional consideration of rescissions proposed by the President. An essential element of an expedited rescission procedure

is a prompt up-or-down vote in the Congress on the President's proposals to reduce enacted spending authority. Since budget authority is not canceled unless a law rescinding existing budget authority is enacted in accordance with Article I, section 7 of the U.S. Constitution, an expedited rescission process does not present the constitutional issues that led the Supreme Court to strike down the Line Item Veto Act. (*Clinton v. City of New York*, 524 U.S. 417 (1998).)

The necessity for, and the form of, an expedited rescission process are, of course, a matter for Congress to decide. I should like to raise a few logistical concerns. As noted earlier, most expedited rescission proposals require a prompt vote within a fixed period of time—for example, within 10 days of the introduction of a bill containing the President's proposal. Any fixed time frame cedes some control over the congressional calendar to the President. In addition, a time frame such as 10 days would limit our ability to support congressional review of the President's proposed rescissions.

Conclusion

In summary, Mr. Chairman, we believe that 35 years of experience show that the rescission process as designed has been used by presidents to advance their own priorities for spending cuts. But rescissions have also been increasingly used by Congress as a vehicle to express its own view of changing priorities, especially in an era of tight discretionary spending caps. As Congress has come to enact greater reductions in budget authority than those proposed by presidents, the debate has shifted from deciding whether to cut to deciding where to cut.

Thank you, Mr. Chairman. This concludes my prepared remarks. I would be happy to answer any questions you may have.

Attachment I

Summary of Proposed and Enacted Rescissions, Fiscal Years 1974-2008 (All Legislative Action Through October 1, 2008)								
Fiscal year	Rescissions proposed by president	Dollar amount proposed by president for rescission	Proposals accepted by Congress	Dollar amount of proposals enacted by Congress	Rescissions initiated by Congress	Dollar amount of rescissions initiated by Congress	Total rescissions enacted	Total dollar amount of budget authority rescinded
2008*	0	\$0	0	\$0	126	\$12,201,184,028	126	\$12,201,184,028
2007*	0	\$0	0	\$0	56	\$8,035,711,005	56	\$8,035,711,005
2006*	0	\$0	0	\$0	89	\$33,361,184,156	89	\$33,361,184,156
2005	0	\$0	0	\$0	76	\$6,351,133,468	76	\$6,351,133,468
2004	0	\$0	0	\$0	49	\$10,515,464,056	49	\$10,515,464,056
2003	0	\$0	0	\$0	47	\$3,123,436,524	47	\$3,123,436,524
2002	0	\$0	0	\$0	78	\$4,621,092,342	78	\$4,621,092,342
2001	0	\$0	0	\$0	67	\$5,148,137,497	67	\$5,148,137,497
2000	3	\$128,000,000	0	\$0	81	\$3,757,774,500	61	\$3,757,774,500
1999	3	\$35,040,000	2	\$16,930,000	105	\$5,081,426,930	107	\$5,098,226,930
1998	25	\$25,260,000	21	\$17,276,000	43	\$4,180,814,234	64	\$4,198,090,234
1997	10	\$407,111,000	6	\$285,111,000	96	\$7,381,253,000	102	\$7,666,364,000
1996	24	\$1,425,900,000	8	\$963,400,000	104	\$4,974,852,131	112	\$5,938,252,131
1995	29	\$1,199,824,000	25	\$845,388,805	248	\$18,868,380,121	273	\$19,713,768,926
1994	85	\$3,172,180,000	45	\$1,293,478,546	81	\$2,374,416,284	126	\$3,667,894,830
1993	7	\$356,000,000	4	\$206,250,000	74	\$2,205,336,643	78	\$2,411,586,643
1992	128	\$7,679,473,690	28	\$2,067,546,000	131	\$22,526,953,054	157	\$24,594,499,054
1991	30	\$4,859,251,000	8	\$286,419,000	26	\$1,420,467,000	34*	\$1,706,886,000
1990	11	\$554,258,000	0	\$0	71	\$2,304,986,000	71	\$2,304,986,000
Subtotal:	335	\$20,042,297,690	145	\$5,981,668,351	1,628	\$158,434,002,973	1,771	\$164,415,672,324
Subtotal:	843	\$55,980,052,000	316	\$19,025,035,366	254	\$38,657,219,022	570	\$57,682,254,388
Subtotal:	1,178	\$76,022,349,690	461	\$25,006,704,717	1,880	\$197,091,221,995	2,341	\$222,097,926,712*
Grand Total:								
1974-2008								

*The President proposed "cancellations" and rescissions in his budget for fiscal years 2007 and 2008 but did not submit a special message under the Impoundment Control Act. These were not rescission proposals under the Impoundment Control Act. For more information, see B-308011, Aug. 4, 2006.

*The President sent a letter to Congress in October 2005 proposing the "cancellation" and rescission of \$2.3 billion from 53 different programs. The letter was not a rescission proposal under the Impoundment Control Act. For more information, see B-307122, Mar. 2, 2006.

*The Military Construction Appropriations Act of 1991 approved certain rescissions proposed by the President in 1990 (41 days after the funds were released) for obligation under the Impoundment Control Act. Presidential rescission proposals R90-4, R90-5, and R90-10 totaling about \$41 million were not approved.

Fiscal year	Rescissions proposed by president	Dollar amount proposed by president for rescission	Proposals accepted by Congress	Dollar amount of proposals enacted by Congress	Rescissions initiated by Congress	Dollar amount of rescissions initiated by Congress	Total rescissions enacted	Total dollar amount of budget authority rescinded
1989	6	\$143,100,000	1	\$2,053,000	11	\$325,913,000	12	\$327,966,000
1988	0	\$0	0	\$0	61	\$3,888,663,000	61	\$3,888,663,000
1987	73	\$5,835,800,000	2	\$36,000,000	52	\$12,399,390,675	54	\$12,399,390,675
1986	83	\$10,126,900,000	4	\$143,210,000	7	\$5,409,410,000	11	\$5,552,620,000
1985	245	\$1,856,087,000	98	\$173,699,000	12	\$5,458,621,000	110	\$5,632,320,000
1984	9	\$636,400,000	3	\$55,375,000	7	\$2,186,689,000	10	\$2,244,064,000
1983	21	\$1,569,000,000	0	\$0	11	\$310,605,000	11	\$310,605,000
1982	32	\$7,907,400,000	5	\$4,365,486,000	5	\$48,432,000	10	\$4,413,918,000
1981	133	\$15,361,900,000	101*	\$10,880,935,550	43	\$3,736,490,600	144	\$14,617,426,150
1980	59	\$1,618,100,000	34	\$777,696,446	33	\$3,238,206,100	67	\$4,015,902,546
1979	11	\$908,700,000	9	\$723,609,000	1	\$47,500,000	10	\$771,109,000
1978	12	\$1,290,100,000	5	\$518,655,000	4	\$67,164,000	9	\$585,819,000
1977	20	\$1,926,930,000	9	\$813,690,000	3	\$172,722,943	12	\$986,412,943
1976	50	\$3,582,000,000	7	\$148,331,000	0	\$0	7	\$148,331,000
1975	87	\$2,722,000,000	38	\$396,295,370	1	\$4,999,704	39	\$391,295,074
1974	2	\$495,635,000	0	\$0	3	\$1,400,412,000	3	\$1,400,412,000
Subtotal: 1974- 1989	843	\$55,980,052,000	316	\$19,025,035,366	254	\$38,657,219,022	570	\$57,682,254,388*

*The total estimate of budget authority rescinded is understated. This table does not include rescissions which eliminate an indefinite amount of budget authority.

*Thirty-three rescissions proposed by President Carter and totaling over \$1.1 billion are not included in this table. These rescission proposals were converted to deferrals by President Reagan in his Fifth Special Message for Fiscal Year 1981 dated February 13, 1981.

Attachment II

Rescissions by Presidential Administration Under the Impoundment Control Act							
Fiscal year	Rescissions proposed by President G.W. Bush		Presidential proposals accepted by Congress			Rescissions initiated by Congress during G.W. Bush Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
2008 ^a	0	\$0	0	\$0	0	126	\$12,201,184,028
2007 ^a	0	\$0	0	\$0	0	56	\$8,035,711,005
2006 ^b	0	\$0	0	\$0	0	89	\$33,361,184,156
2005	0	\$0	0	\$0	0	76	\$6,351,133,468
2004	0	\$0	0	\$0	0	49	\$10,515,464,056
2003	0	\$0	0	\$0	0	47	\$3,123,436,524
2002	0	\$0	0	\$0	0	76	\$4,621,092,342
2001	0	\$0	0	\$0	0	0 ^c	\$0
Total	0	\$0	0	\$0	0	519	\$78,209,205,579

^aThe President proposed "cancellations" and rescissions in his budgets for fiscal years 2007 and 2008 but did not submit a special message under the Impoundment Control Act.

^bThe President sent a letter to Congress in October 2005 proposing the "cancellation" and rescission of \$2.3 billion from 53 difference programs. The letter was not a rescission proposal under the Impoundment Control Act. For more information, see B-30712, Mar. 2, 2006.

^cAll appropriations bills were completed by Congress prior to the end of calendar year 2000. Thus, no rescissions were initiated by Congress during the remainder of fiscal year 2001, which coincided with the President's first eight months in office.

Fiscal year	Rescissions proposed by President Clinton		Presidential proposals accepted by Congress			Rescissions initiated by Congress during Clinton Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
2001	0	\$0	0	\$0	0	67	\$5,148,137,487
2000	3	\$128,000,000	0	0	0	61	\$3,757,774,500
1999	3	\$35,040,000	2	\$16,800,000	67	105	\$5,081,426,930
1998	25	\$25,260,000	21	\$17,276,000	84	43	\$4,180,814,234
1997	10	\$407,111,000	6	\$285,111,000	60	96	\$7,381,253,000
1996	24	\$1,425,900,000	8	\$963,400,000	33	104	\$4,974,852,131
1995	29	\$1,199,824,000	25	\$845,388,805	86	248	\$18,868,380,121
1994	65	\$3,172,180,000	45	\$1,293,478,546	69	81	\$2,374,416,284
1993	7	\$356,000,000	4	\$206,250,000	57	66	\$1,962,511,000
Total	166	\$6,749,315,000	111	\$3,627,704,351	67	871	\$53,729,565,687

Fiscal year	Rescissions proposed by President G.H.W. Bush		Presidential proposals accepted by Congress			Rescissions initiated by Congress during G.H.W. Bush Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
1993	0	\$0	0	\$0	0	8	\$242,825,643
1992	128	\$7,879,473,690	26	\$2,067,546,000	20	131	\$22,526,953,054
1991	30	\$4,859,251,000	8	\$286,419,000	27	26	\$1,420,467,000
1990	11	\$554,258,000	0	\$0	0	71	\$2,304,986,000
1989	0	\$0	0	\$0	0	11	\$325,913,000
Total	169	\$13,292,982,690	34	\$2,353,965,000	20	247	\$26,821,144,697

Fiscal year	Rescissions proposed by President Reagan		Presidential proposals accepted by Congress			Rescissions initiated by Congress during Reagan Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
1989	6	\$143,100,000	1	\$2,053,000	17	0	\$0
1988	0	\$0	0	\$0	0	61	\$3,888,663,000
1987	73	\$5,835,800,000	2	\$36,000,000	3	52	\$12,359,390,675
1986	83	\$10,126,900,000	4	\$143,210,000	5	7	\$5,409,410,000
1985	245	\$1,856,087,000	98	\$173,699,000	40	12	\$5,458,621,000
1984	9	\$636,400,000	3	\$55,375,000	33	7	\$2,188,689,000
1983	21	\$1,569,000,000	0	\$0	0	11	\$310,605,000
1982	32	\$7,907,400,000	5	\$4,365,486,000	16	5	\$48,432,000
1981	133	\$15,361,900,000	101	\$10,880,935,550	76	43	\$3,736,490,600
Total	602	\$43,436,587,000	214	\$15,656,758,550	36	198	\$33,400,301,275

Fiscal year	Rescissions proposed by President Carter		Presidential proposals accepted by Congress			Rescissions initiated by Congress during Carter Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
1981	33	\$1,142,364,000	0	\$0	0	0	\$0
1980	59	\$1,618,100,000	34	\$777,696,446	58	33	\$3,238,206,100
1979	11	\$908,700,000	9	\$723,609,000	82	1	\$47,500,000
1978	12	\$1,290,100,000	5	\$518,655,000	42	4	\$67,164,000
1977	7	\$791,552,000	2	\$96,090,000	29	3	\$172,722,943
Total	122	\$5,750,816,000	50	\$2,116,050,446	41	41	\$3,525,593,043

Note: The 33 rescissions proposed by President Carter were converted to deferrals by President Reagan in his Fifth Special Message of Fiscal Year 1981, dated February 13, 1981.

Fiscal year	Rescissions proposed by President Ford		Presidential proposals accepted by Congress			Rescissions initiated by Congress during Ford Administration	
	Number	Dollar amount	Number accepted	Dollar amount	Percent accepted	Number	Dollar amount
1977	13	\$1,135,378,000	7	\$717,600,000	54	0	\$0
1976	50	\$3,582,000,000	7	\$148,331,000	14	0	\$0
1975	87	\$2,722,000,000	38	\$386,295,370	44	1	\$4,999,704
1974	2	\$495,835,000	0	\$0	0	3	\$1,400,412,000
Total	152	\$7,935,013,000	52	\$1,252,226,370	34	4	\$1,405,411,704



James H. Douglas
Governor of Vermont
Chair

Joe Manchin III
Governor of West Virginia
Vice Chair

Raymond C. Scheppach
Executive Director

Statement of

Raymond C. Scheppach, Ph.D.
Executive Director
National Governors Association

before the

Homeland Security and Governmental Affairs Committee

Subcommittee on Federal Financial Management, Government
Information, Federal Services, and International Security

United States Senate

on

“Tools to Combat Deficits and Waste: Enhanced Rescission Authority”

December 16, 2009

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today on behalf of the nation's governors on the issue of state line item veto rules.

Economic Risks Associated with Increasing Debt

The timing of this hearing is interesting as just last week I was on a panel at the 2009 Caplin Conference on the World Economy "Governing through Debt and Deficit" hosted by the Miller Center of Public Affairs at the University of Virginia. The bottom line of this conference was that most countries around the world have taken on huge amounts of new debt due not only to the long-term trend toward additional public debt, but due to the recent financial crisis. This has led many nations to reevaluate their budget rules to eliminate the bias for more spending and in fact to find additional ways to limit spending over the long-run. This is obviously also true of the United States, who is currently running an all-time high deficit for this fiscal year of \$1.4 trillion and now has an outstanding debt of well over \$12 trillion with much of it held by foreign governments, many that are not particularly friendly to the U.S. The risk of this situation and ultimately to economic growth and the real income of United States citizens is huge.

There are essentially three major economic risks to the U.S. First, there is the risk that foreign individuals or governments will no longer want to hold U.S. bonds and they sell existing ones on the market. This could trigger a rapid fall in the value of the dollar followed by huge falls in the value of both equities and bonds worldwide. To stabilize the situation the U.S. would have to dramatically increase interest rates, which could trigger a national and perhaps even world recession. Second, the interest on the public debt is now about \$700 billion, which not only takes away from spending on other needs but it is transferring a huge debt to our children. Third, the huge debt is forcing us to cut research and development, infrastructure and education spending, which we need to maintain and increase U.S. competitiveness.

State vs. Federal Budget Processes

In evaluating the usefulness of the line item veto authority, it is important to stress that there are substantial differences between budget rules and procedures in most states and the federal government. For example, all states with the exception of Vermont have either constitutions or laws that require balanced budgets. Most states also have capital and operating budgets while the federal government only has the latter. Also, there are a number of states that have prohibitions against any debt. There are also differences in both transparency of information and the relative powers of the executive vs. the legislative branch. For example, many states require agency budget requests to be published in the executive

budgets. Also, 38 states allow the governor to make budget cuts without legislature approval to meet balanced budget requirements. There are, however, some restrictions on this authority. For example, Connecticut only allows the executive to do this for 1 percent of the budget. Similarly, Iowa only allows across-the-board cuts without legislative approval. The important point here is that the entire processes are different and thus care must be exercised in analyzing the impact of any one tool.

State Line Item Veto Authority

Forty-one states have line item veto authority of appropriations. In addition, 15 states have item veto authority of selected words while 4 have the ability to change the meaning of words. Some of these powers do, however, have restrictions. For example, in Hawaii the governor may veto judicial and legislative appropriations bills only in their entirety. Six states do not have any form of line item veto. These governors can only veto the entire legislation, not portions of it. About 15 governors can actually both adjust the dollar amount and statutory language in legislation. Line item vetoes can be overridden by super majorities of the legislature, but this seldom happens.

The Evidence on Line Item Veto

There have been several academic studies on the value and impact of the state line item vetoes. One of the more in-depth studies was by Reese and Lauth in Georgia, which covered several decades during which seven governors served prior to the current governor Sonny Perdue. The governors that were interviewed all indicated that the mere threat of the line item veto was important and that it really did not need to be exercised frequently to maintain budget discipline.

There has also been numerous statistical studies that have attempted to quantify the impact. One of these by Holtz-Eakin concluded that it did have an impact on short-run budget decisions, but not on long-run spending. He also indicated that it may be most useful where the governor's political party does not hold a majority in the legislature. Also, the frequency of use was limited during good times but its use increased dramatically during periods of fiscal stress.

The Experience of Two States

To provide a little more realism to this issue, it is important to provide some additional detail on the experience of two states – Missouri and Wisconsin.

Missouri – The history in this state is that most governors have relied heavily on the line item veto and past governors believe that the threat of it is critical in maintaining budget discipline. It is generally used less when state revenue growth is robust and much more when times are difficult from a fiscal standpoint.

Over the last year, Governor Nixon has used the veto 50 times all of which have had budget impacts and totaled about \$105 million on a revenue base of about \$8 billion. In good economic times the line item veto is used more when the governor is actually opposed to the policy that underlies the appropriations. During hard fiscal times it is often used to eliminate low priority items. Many of these are for construction projects that are low priority. Some of the items have been higher education construction. Here the governor is not opposed to its purpose, but it is just a low priority at the time. One of the items that was vetoed was to increase the reimbursement rate for Medicaid health care providers. Here again it is something that the state could not afford.

Wisconsin – An analysis of the state's experience over the last twenty years show substantial use by the various governors. It went from a high of 457 vetoes in 1991 during the economic downturn to a low of 33 at the end of 2007, which was the end of the economic boom period. This is similar to Missouri where the line item veto was used extensively during economic downturns, but far less during economic prosperity. The veto was used against 6 tax increases over this period with some as high as \$271 million in 1993. With respect to how much was saved each year, this varied from \$200 million as a high to as little as \$1-2 million for several years in the middle of the 1990s.

Conclusion

The economic risk of continuing deficits is increasing at an alarming rate. Several international groups have and are studying this issue in order to determine what debit level is too high. Some of these groups, like the European Common Market, have indicated that anything over 60 percent of GDP is increasingly risky. Yet, the U.S. is now approaching that number. Given the risk, it now appears to be time to give the President all the tools available to reduce spending.

Not only is the U.S. debt increasing rapidly, but the number of specific "earmarks" has also been growing very dramatically, particularly in appropriations bills as well as the transportation bills. The line item veto would be a great tool for a President to have to reduce the number of earmarks.

The experience of the states with the line item veto seems to be applicable to the federal government. First, governors believe that it is a very important tool for fiscal discipline. The mere threat of the veto is very powerful, particularly when the number that are overridden is so small. Second, there is evidence in states particularly during periods of fiscal stress that it does in fact save money. This is not a silver bullet, but it is clearly a tool that Congress should provide to the President of the United States, particularly given the size of the outstanding debt and the economic risks associated with the debt.

THE CONCORD COALITION

1011 Arlington Blvd • Suite 300 • Arlington, VA 22209
703-894-6222 / (Fax) 703-894-6231 / concordcoalition.org

Tools to Combat Deficits and Waste: Enhanced Rescission Authority
Senate Homeland Security and Government Affairs Committee
Subcommittee on Federal Financial Management, Government Information, and
International Security

Statement of Robert L. Bixby
Executive Director, The Concord Coalition
December 16, 2009

I. Introduction

Chairman Carper, Senator McCain, and members of the Subcommittee, thank you for inviting me to discuss the role of enhanced rescission in combating budget deficits and waste. Given our nation's unsustainable fiscal outlook and rising public concern about projected debt levels, this is a very relevant and timely discussion.

I am here representing The Concord Coalition, a nonpartisan grassroots organization advocating generationally responsible fiscal policy. Concord's co-chairs are former senators, Warren B. Rudman (R-NH) and Bob Kerrey (D-NE). They, along with Concord's President former Commerce Secretary Peter G. Peterson and our nationwide membership, have consistently urged Washington policymakers to adopt credible policies for achieving fiscal sustainability.

The Concord Coalition believes that the current budget process suffers from a lack of transparency and accountability. This has contributed to the unsustainable fiscal path we are on and engendered corrosive public cynicism about government finances.

Yet, too few of our elected leaders in Washington are willing to acknowledge the seriousness of the problem and even fewer are willing to put budget process reform on the political agenda. By focusing attention on this critical issue you are setting a very positive example.

In my testimony today, I want to emphasize four key points:

- The public is increasingly frustrated with how federal tax dollars are spent
- Restoring public trust is essential to winning broad support for needed hard choices
- Enhanced rescission can help to restore public trust in the budget process
- Enhanced rescission alone will not have a meaningful affect on the budget deficit

In addition to these points, I will make a few observations on S. 907, *The Budget Enforcement Legislative Tool Act of 2009* and how it might be strengthened.

II. The Fiscal Context

Faced with the sudden return of deep budget deficits and the realization that these deficits are likely to persist without congressional action, there is a growing consensus that specific steps must be taken to stem the tide of red ink. Instead of hoping that deficits go away as the economy grows, the political debate must begin to focus on doing something about them.

The economic and moral case for fiscal policy reform is clear. An unprecedented demographic transformation is taking hold against the backdrop of steadily rising health care costs and steadily falling national savings. This is a dangerous combination for the future health of the economy. The baby boomers' imminent retirement is ushering in a permanent shift to an older population and a permanent rise in the cost of programs such as Social Security, Medicare and Medicaid, which already comprise 41 percent of the federal budget, excluding recent financial bailouts. There is no plan to pay for it all other than running up the national debt.

This has ominous implications for the size of government relative to the nation's Gross Domestic Product (GDP). By the time today's 20-year-olds reach retirement age, the overall cost of government as a share of GDP is on track to reach levels not seen since World War II. But

instead of spending the money on a temporary emergency, we would be spending it on a permanent stream of rising benefit payments and interest on the accumulating debt.

Borrowing our way through the problem is not a viable option because the rising costs of Social Security, Medicare and Medicaid are not simply a temporary blip. A permanently rising debt would eventually result in snowballing interest costs, a falling value for the dollar and, ultimately, a debt burden that would crush the economy.

No one can say when all this might end up in a crisis, nor what a crisis would look like. Indeed, there may be no crisis at all — just a long slow erosion in our nation's standard of living. In either case, it is a dismal prospect and doing nothing now to avoid it would be an act of fiscal and generational irresponsibility.

Getting the deficit under control and stabilizing the debt will require a good deal more than process reform. Economic conditions play both negative and positive roles. But policy makers themselves make the biggest contribution toward fiscal restraint. The most essential ingredient in any budget enforcement mechanism is political will. Budget enforcement measures can help by stiffening political spines. That is why interest in reforming the budget process, particularly provisions that would strengthen budget discipline, is likely to increase as public concern about deficits and debt grows.

III. The Role of Enhanced Rescission in Addressing Fiscal Problems

Under Title X of the Budget Control and Impoundment Act , the President may propose to rescind all or part of any item at any time during the fiscal year. If Congress does not take action on the proposed rescission within 45 days of continuous session, the funds must be released for obligation. Presidents have not made frequent use of this authority and when they have Congress has routinely ignored their rescission requests. The discharge procedure for forcing a floor vote on Presidential rescissions is cumbersome and has never been used. Most Presidential rescission messages have died without a floor vote.

That said, the Concord Coalition believes that giving the President enhanced rescission authority could have a positive impact on the budget process. Strengthening the rescission process would bring greater accountability and transparency to the budget process so that individual items within appropriations bills could be subjected to scrutiny and reconsideration on their own merits. The current rescission process does not make the President or Congress accountable. Congress can ignore the President's rescissions, and the President can blame Congress for ignoring his rescissions. Meanwhile, narrowly targeted items can be slipped into larger bills with no real risk of exposure or scrutiny.

This reform would have a very real cleansing effect on the legislative process and will take a step toward reducing the public cynicism about the budget process. Granting the President enhanced rescission authority would send a signal to the public that politicians in Washington are willing to set aside narrow parochial interests for the common good.

This reform will not, however, make a significant dent in our deficit. It is not realistic to expect that the looming fiscal crisis can be avoided by trimming everyone's favorite target: waste, fraud and abuse. To be sure, these things exist throughout the federal government, and every effort should be made to reduce them — including enhanced rescission authority. Unfortunately, there is no line-item in the budget labeled "waste, fraud and abuse."

Moreover, defining these terms is often a matter of subjective judgment, particularly among members of Congress who want large amounts of federal money flowing to their districts. What may seem like waste to some — from farm subsidies to transportation projects to community development programs — can seem like vital government services to those who directly benefit from them.

Stories about "bridges to nowhere" and other such earmarked spending justifiably diminishes public confidence in the willingness of Congress to exercise fiscal discipline. But even if all such earmarks were eliminated, it would only save a tiny portion of all federal spending.

According to the Congressional Research Service (CRS), appropriations earmarks totaled roughly \$30 billion in each of Fiscal Years 2008 and 2009. By contrast, total discretionary budget authority in those years was \$1.2 trillion and \$1.5 trillion respectively. All federal spending totaled about \$3 trillion in 2008 and \$3.5 trillion in 2009.

Moreover, enhanced rescission authority would do nothing to address the underlying structural deficit resulting from existing tax and entitlement laws. Discretionary spending growth is a relatively minor part of our overall fiscal problems. The legislative actions which have the greatest impact on the deficit are expansions of entitlement programs or tax cuts that go well beyond the special interest provisions of discretionary spending bills. This does not mean, however, that enhanced rescission would be a waste of time. Its value comes from the transparency and accountability it would bring to the budget process — a value that cannot be measured in dollars alone.

IV. Issues That Often Arise in Enhanced Rescission Proposals

The Budget Enforcement Legislative Tool Act of 2009 (S 907) embodies the approach of legislation passed by the House of Representatives in 1993 and 1994 requiring Congress to vote up or down by majority vote on rescissions submitted by the President. This approach, known as “expedited rescission authority” or “modified line item veto,” has received support from members on both sides of the aisle over the years.

One notable effort in this regard was led by Chairman Carper in the early 1990's, when he was serving in the House of Representatives. The Chairman worked with former Congressmen Dick Arme y, Tim Johnson and others to find a bipartisan agreement on consensus legislation establishing expedited rescission authority. The House of Representatives overwhelmingly approved this consensus language in October of 1992.

The legislation was introduced in the 103rd Congress by former Congressman Charlie Stenholm. The House of Representatives passed a version of this legislation in April of 2003 with several modifications and improvements made in cooperation with Congressman Spratt based on consultations with leaders of the Appropriations Committee, the Clinton administration and other

Members. The House again passed an expedited rescission proposal authored by Congressman Stenholm and former Congressmen Tim Penny and John Kasich in July of 1994.

Enactment of the Line Item Veto in 1996 made expedited rescission a moot issue while it was in effect. Congress rejected proposals to provide expedited rescission authority as a fallback option if full line item veto authority was struck down. There was little interest in the issue immediately following the Supreme Court decision striking down the Line Item Veto law, perhaps because the budget was in surplus by then. However, the proposal has resurfaced in recent years, most notably in 2006 when President Bush made expedited rescission one of his main budget process initiatives.¹

Expedited rescission bills must be carefully crafted to comply with the Constitutional requirements established by the courts in *I.N.S. v. Chada*, 462, U.S. 919 (1983), the case that declared legislative veto provisions unconstitutional. Legislative vetoes allow one or both Houses of Congress (or a Congressional committee) to stop executive actions by passing a resolution that is not presented to the President. The *Chada* case held that legislative vetoes are unconstitutional because they allow Congress to exercise legislative power without complying with Constitutional requirements for bicameral passage of legislation and presentment of legislation to the President for signature or veto.

Unlike the line item veto law struck down by the Supreme Court, expedited rescission meets the *Chada* tests of bicameralism and presentment by requiring that both chambers of Congress pass a motion enacting the rescission and send it to the President for signature or veto, before the funds are rescinded. Expedited rescission does not provide for legislative review of a preceding executive action, but expedited consideration of an executive proposal. Thus, it represents a so-called 'report and wait' provision that the Court approved in *Sibbach v. Wilson and Co.*, 312 U.S. 1 (1941) and reaffirmed in *Chada*.

¹ This struck many observers as odd because it was inconsistent with his actions. As Ed Lorenzen, then Policy Director of The Concord Coalition, stated in testimony before the House Budget Committee, "President Bush has never used his authority under current law to submit rescissions of earmarks or other spending he considers low priority, so it is unclear whether granting him this additional authority would have much of an impact at all."

Most of the previous expedited rescission proposals granted the President the authority to submit one rescission package per bill for expedited consideration within a limited time after enactment. All of the proposed rescissions for each bill would be bundled into one package for Congressional consideration. This limitation was included to prevent the President from tying up the legislative schedule with dozens of rescission proposals that would receive priority consideration. The President would be free to submit additional rescissions throughout the year as under current law, but they would not be eligible for expedited consideration.

The requirement that all rescissions in each bill be bundled together led to concerns that individual items would not get an up or down vote on its merits but could be eliminated because it was packaged with other less meritorious items. This led to the inclusion of a process to divide up a package of rescissions. The Stenholm-Spratt legislation passed by the House in 1993 allowed 10 Senators or 45 Members of the House of Representatives to demand a separate vote to strike an item from the package. That way, if the President proposed to rescind an item with strong Congressional support in a package with a dozen other lower priority items, Congress would have the option of striking the popular provision from the package and approving the rest of the package instead of being forced to choose between rejecting the entire package or approving the rescission of an item with strong support.

Concerns have also been raised that the President could abuse the authority granted under these proposals. Specifically, it has been suggested that a President could use this authority not to reduce the deficit but to punish his opponents and increase his leverage with Members of Congress. In fact, some have argued that granting the President this authority could just as easily increase spending if the President threatens to veto items unless programs he favors are increased. I believe that these dangers are mitigated by the fact that the President must get a majority of the House and Senate to support his rescissions for them to take effect. He would not be able to impose his legislative priorities but instead would be given an opportunity to have Congress take a second look at narrow items that may well lack majority support but were included in an overall measure that members felt compelled to vote for. The ultimate decision would remain in congressional hands. Moreover, a President who blatantly abused the authority for political purposes would risk political repercussions with the public as well as Congress.

Nonetheless, these are very serious and legitimate concerns and it is impossible to determine whether or not these fears are founded until the President has the authority. Some previous expedited rescission proposals, including S. 907, have addressed the concern by including a provision sunsetting the authority after two years. If a President abused the authority, Congress almost certainly would not approve an extension. This is similar to the approach that Congress took when it granted the executive branch additional authority in the Patriot Act.

V. Two Suggestions for Strengthening S.907

A. Apply rescission authority to targeted tax provisions and mandatory spending

The Concord Coalition strongly supports reinstatement of budget enforcement rules for all tax and spending legislation that would increase the deficit, as well as mechanisms which would force Congress to address existing structural fiscal problems.

The Budget Enforcement Legislative Tool Act of 2009 would not allow the President to propose rescission of targeted tax benefits for expedited consideration in Congress. As a general principle, The Concord Coalition believes that budget enforcement rules should apply equally to taxes and spending. Since spending and tax decisions both have consequences for the budget, there is no good reason to exempt either from budget discipline. It would therefore be very appropriate to extend expedited rescission authority to special interest tax breaks. Special interest provisions in tax bills have as much if not more of an impact on the federal budget than earmarks in appropriations bills. Exempting tax cuts from modified line item veto authority would also encourage an expansion of so-called 'tax entitlements' where benefits are funneled through the tax code rather than by direct spending, a far less efficient approach. In addition to including tax provisions, the authority should also be expanded to include items of mandatory spending increases.

B. Ensure that savings go to deficit reduction

Some prior proposals have linked rescissions to deficit reduction so that any savings achieved would not be available to offset increases in other programs. The Concord Coalition strongly supports the requirement that all savings from enhanced rescission would go to deficit reduction.

This requirement ensures that the authority will be used to improve the overall fiscal condition instead of simply reducing the priorities of Congress in order to fund the President's priorities.

This goal could be implemented by providing for an adjustment of spending allocations under the budget resolution to reflect enacted rescissions and requiring the Director of the Office of Management and Budget (OMB) to adjust any statutory spending limits. Without these provisions the enactment of a rescission package would simply free up additional room within budget allocations and spending limits for other spending.

This language is very useful as far as it goes. However, I would also encourage the Committee to take it a step further and clarify that any savings from rescinding a tax or entitlement provision would not be credited to the paygo scorecard for purposes of Congressional rules or statutory budget enforcement rules. The principal that the purpose of the modified line item veto should be to improve the budget's bottom line and not rearrange budgetary priorities should apply to tax and entitlement legislation as well.

VI. Enhanced rescission as a tool for restoring public trust

The Concord Coalition's experience with the Fiscal Wake-Up Tour, which has now been to 30 states, is that the public is hungry for a nonpartisan dialogue on the fiscal challenge. When presented with the facts, they appreciate that each of the realistic options comes with economic and political consequences that must be carefully weighed, and that there must be tradeoffs. Enhanced rescission authority can help to clarify those trade-offs and better inform the process for resolving them.

One consistent finding in our public engagement initiatives is that restoring public confidence in the budget process is essential in gaining the support that will be necessary to make the difficult choices required to address our fiscal challenges. We have found that even after we present information regarding the magnitude of our fiscal challenges and point out that pork barrel spending pales in comparison to the rapid growth in entitlement spending and lagging revenues, audience members still feel strongly about the need to cut wasteful spending.

It is not that they believe that the budget can be balanced by eliminating waste, fraud and abuse. They fully appreciate that addressing our fiscal problems will require tough choices restraining entitlement spending or increasing revenues and they are willing to accept the necessary sacrifices. But before they accept sacrifices in terms of lower entitlement benefits, reduced services or higher taxes they want to be assured that those savings will go toward the greater good of balancing the budget and not diverted to special interest spending or tax items.

In our most recent project, The Fiscal Stewardship Project, community leaders from around the country expressed

- **Disappointment and frustration with Washington**
- **A preference for broad, sweeping reforms rather than piecemeal efforts**
- **A sense of urgency**
- **The essential need for improvements in the health care system**
- **A willingness to consider significant changes in Social Security**
- **Deep concern for future generations**
- **The need to better educate the public**
- **Commitments to future action**

See http://www.concordcoalition.org/files/FAC_ReportFINAL.pdf

They were disappointed that Washington has failed to exercise greater responsibility in handling the nation's finances. They decried a long and continuing pattern of elected and appointed federal officials failing to set meaningful budget priorities, borrowing more than was necessary, and refusing to pursue obviously needed reforms in both the public and private sectors.

The Milwaukee Fiscal Advisory Council, for example, complains of "an overarching failure in the management of the nation's business." It found that the fiscal crisis facing the nation "was not inevitable but rather is the result of the government's failure to take steps that could have ameliorated or avoided it."

Advisory councils also expressed resentment at budget gimmicks, misleading rhetoric and dubious financial projections in Washington that so frequently cloud the public's understanding of the critical choices that are being made – or not made. Elected officials in particular should be working to make government more accountable and transparent, not less so. Otherwise they can hardly expect the public's trust and support when difficult fiscal choices must be made.

Around the country, people complained about the harsh tones and overly partisan rhetoric in Washington, noting that this made it more difficult for political leaders to build consensus and forge the compromises necessary for constructive action.

The proposed modified line item veto and similar proposals would not remotely begin to address the magnitude of our fiscal challenges. Budget enforcement tools such as pay-as-you-go rules for all tax and spending legislation which would increase the deficit would have a much greater impact on fiscal policy. Balancing the budget and establishing a fiscally sustainable course for the future will require Congress and the President to confront tough choices regarding tax and entitlement policy. However, granting the President modified line item veto authority could be a useful tool in improving the accountability of the budget process and achieving greater public confidence in the budget process that will be necessary to make the tough choices on much larger fiscal issues.



**Testimony of Thomas A. Schatz, President
Citizens Against Government Waste**

Before the Senate Homeland Security and Governmental Affairs
Subcommittee on Federal Financial Management, Government Information, Federal
Services, and International Security
Wednesday, December 16, 2009

Mr. Chairman, members of the subcommittee, thank you for the opportunity to testify today. My name is Thomas A. Schatz. I am president of Citizens Against Government Waste (CAGW), a nonprofit organization made up of more than one million members and supporters, dedicated to eliminating waste, fraud and abuse in government. Citizens Against Government Waste has not, at any time, received any federal grant and we do not wish to receive any in the future.

CAGW was created 25 years ago after Peter Grace presented to President Ronald Reagan 2,478 findings and recommendations of the Grace Commission (formally known as the President's Private Sector Survey on Cost Control).

CAGW has been working tirelessly to carry out the Grace Commission's mission to eliminate government waste. Since 1984, the implementation of Grace Commission and other waste-cutting recommendations supported by CAGW has helped save taxpayers \$1.04 trillion. These recommendations provided a blueprint for a more efficient, effective and smaller government. The line-item veto was one of those proposals.

Raiding the federal treasury to "bring home the bacon" is a long-practiced, but not ancient, Washington tradition. Year after year, lawmakers debase the political process by directing chunks of the federal budget back to their home districts and states to promote their own re-elections and reward special interests.

The U.S. Constitution grants to Congress the power to spend. Article I, Section 9, Clause 7 reads, "No money shall be drawn from the Treasury but by consequence of Appropriations made by Law."

It would be hard to imagine a more convoluted, inaccurate, and self-serving interpretation of the Constitution and U.S. history. The Founding Fathers deemed that Congress could only spend money in pursuant to those powers specifically enumerated in the Constitution. The 10th Amendment leaves all other responsibilities to the states.

1301 Pennsylvania Avenue, N.W.
Suite 1075
Washington, D.C. 20004
202-467-5300

For much of the nation's history, constitutional objections from members of Congress, the president, and state legislatures were effective in limiting parochial spending.

The First Congress rejected a bill to loan money to a glass manufacturer after several members challenged the constitutionality of the proposal. In a debate during the Second Congress over a bill to pay a bounty to New England cod fisherman, Rep. Hugh Williamson of South Carolina argued that it was unconstitutional "to gratify one part of the Union by oppressing the other . . . destroy this barrier; - and it is not a few fishermen that will enter, but all manner of persons; people of every trade and occupation may enter in at the breach, until they have eaten up the bread of our children."¹

Thomas Jefferson made a similar prediction in a letter to James Madison dated March 6, 1796, challenging Madison's proposition for improvements to roads used in a system of national mail delivery. Jefferson wrote:

Have you considered all the consequences of your proposition respecting post roads? I view it as a source of boundless patronage to the executive, jobbing to members of Congress & their friends, and a bottomless abyss of public money. You will begin by only appropriating the surplus of the post office revenues; but the other revenues will soon be called into their aid, and it will be a scene of eternal scramble among the members, who can get the most money wasted in their State; and they will always get most who are meanest.²

In 1817, President Madison vetoed a public works bill that would have paid for the construction of roads and canals. To Madison, the "father of the Constitution," the clause "to provide for common defense and general welfare" did not grant Congress additional powers not enumerated in Article I, Section 8.³

Alexander Hamilton interpreted the general welfare clause more broadly as a separate grant of power. Yet even he believed that it was limited to matters of national importance and did not cover spending of a local or regional benefit.⁴

In 1822, President James Monroe argued that federal money should be limited "to great national works only, since if it were unlimited it would be liable to abuse and might be productive of evil."⁵

1 John C. Eastman, "Eating Up the Bread of Our Children," The Claremont Institute, February 7, 2006, <<http://www.claremont.org/projects/jurisprudence/060206eastman.htm>>.

2 "Thomas Jefferson to James Madison, March 6, 1796," The Thomas Jefferson Papers, The Library of Congress American Memory, <[http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field\(DOCID+@lit\(tj080100\)\)>](http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field(DOCID+@lit(tj080100))>).

3 "Veto of federal public works bill," Constitution Society, <http://www.constitution.org/jm/18170303_veto.htm>.

4 Eastman, "Eating Up the Bread of Our Children."

5 Ken Silverstein, "The Great American Pork Barrel," *Harper's Magazine*, July 1, 2005.

In 1825, the South Carolina legislature passed a resolution which condemned “the taxing of the citizens in one state ‘to make roads and canals for the citizens of another state.’” Virginia and Georgia adopted similar resolutions in 1827.⁶

In the late 1800s, Grover Cleveland became known as the “king of the veto” for rejecting hundreds of congressional spending bills during his two terms as President. He often wrote: “I can find no warrant for such an appropriation in the Constitution.”⁷

The term “pork-barreling” was coined in the late 19th century to compare the rush toward a pile of tax dollars to the way slaves would crowd around barrels of salted pork at meal times.

Even as federal power vastly expanded during the twentieth century, Congress did not earmark extensively until the 1980s. Instead, Congress would fund general grant programs and let federal and state agencies select individual recipients through a competitive process or formula. The House and Senate Appropriations Committees named specific projects only when they had been vetted and approved by authorizing committees. Members of Congress with local concerns would lobby the president and federal agencies for consideration. The process was aimed at preventing abuse and allocating resources on the basis of merit and need.

Today, Appropriations Committee members arbitrarily pick winners and losers by earmarking funds for specific recipients. Rank and file members, backed by an army of lobbyists, bypass authorizing committees and lobby appropriators directly for pet projects.

Washington insiders have espoused this “power of the purse” to validate Congress’s mushrooming appetite for pork. Since 1991, CAGW’s annual *Pig Book* has identified 100,849 examples of egregious pork-barrel spending, which has cost taxpayers \$290 billion. Examples from the 2009 *Congressional Pig Book* include:

- \$465 million for the Joint Strike Fighter alternate engine
- \$9.5 million for Corridor H
- \$9.4 million for 14 projects for bike paths and trails
- \$4.5 million in wood utilization research in 10 states by 19 senators and 10 representatives
- \$2 million for the Pat Roberts Intelligence Scholars Program

⁶ Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876*, November 2002, University Press of Kansas, p. 93.

⁷ Walter E. Williams, “How Did We Get Here?”

<<http://www.gmu.edu/departments/economics/wew/articles/fee/here.html>>.

- \$1.9 million for the Pleasure Beach water taxi service project
- \$1.8 million in swine odor and manure management research in Ames, Iowa
- \$951,500 for downtown Detroit energy efficient street lamps
- \$900,000 for the Adler Planetarium and Astronomy Museum in Chicago
- \$413,000 for tri-state joint peanut research
- \$200,000 for a tattoo removal program
- \$143,000 for the Las Vegas Museum of Natural History
- \$47,575 for the Harlem United wind power project

For a brief period, the American people had hope that budget reform would reduce the assault on their wallets. In 1995, Congress passed the line-item veto by a voice vote in the House and a 69-31 vote in the Senate. This law was enacted after several previous failed efforts to pass such legislation.

Unfortunately, this new veto privilege was used sparingly by President Bill Clinton to cancel a mere \$355 million in fiscal year 1998 pork-barrel spending, less than .002 percent of that year's budget. Although the amount of waste that was removed was miniscule, members of Congress who had previously lauded the passage of the line-item veto began to question its legitimacy. This was clear evidence that even though the overall amount of money saved was relatively small, eliminating more waste would have had a substantial effect on the spending culture.

However, the Supreme Court took the line-item veto power away from the president in mid-1998, ruling the law unconstitutional.

The need still exists for a constitutional version of the presidential line-item veto because Congress has confronted the president repeatedly with hastily-crafted, 11th-hour omnibus bills that cover all or substantial portions of federal spending for the year. This practice inhibits the exercise of the veto, which under such circumstances would have the effect of closing down the federal government.

A constitutional line-item veto, or expedited rescission authority, would enhance the president's role in the budget process. It would not tilt the power over the nation's purse strings in favor of the president. Instead, it would restore the balance that has been eroded by Congress's budget rules that favor spending and pork, and would hold both the legislative and executive branches more accountable for the expenditure of tax dollars. While some have questioned whether expedited rescissions at the federal level would threaten the separation of powers, experience with such authority at the state level indicates that would not be the outcome.

Expedited rescissions are necessary because under current law, the president's rescission proposals can easily be ignored. This luxury afforded Congress by the Budget and Impoundment Control Act of 1974 shifted the balance of power over spending, and that balance needs to be restored. Many have argued that the explosion of federal spending that has occurred over the past three decades is a result of the tilting of the balance of power toward Congress under the 1974 Act. It is an affront to common sense that while the president now can propose to rescind any portion of an appropriations bill, Congress is not required to vote on his rescission package. If Congress chooses to ignore the president's request, it expires after 45 days. The spending proposals stand as law.

Senator Tom Carper (D-Del.) has introduced S. 907, the Budget Enforcement Legislative Tool Act of 2009. This legislation would establish limited executive rescission authority that will help rein in federal spending, minimize the number of pork-barrel earmarks, and begin to reduce the nation's ever-growing debt.

S. 907 fully satisfies the constitutional criteria that were cited as the reasons for striking down the 1996 Line Item Veto Act. The bill would allow the president three days after signing an appropriations act to submit a list of proposed rescissions. To ensure that the executive branch is not given legislative powers, the president's rescission authority will be limited; he may not propose to reduce an authorized program's budget by more than 25 percent of the amount appropriated. However, unauthorized programs can be zeroed out. The president's list of proposed rescissions will be voted on in both houses within 10 days of the introduction of the bill encompassing the proposed rescissions. Amendments will be prohibited in both chambers to ensure a swift and clean process.

Under S. 907, the president will also be able to propose the elimination of earmarks, but cannot propose cuts to authorized earmarks that exceed 25 percent of the amount appropriated. While this is a good first step toward the elimination of pork, CAGW believes that a 25 percent threshold is far too low given the explosion of earmarking in recent years.

In fact, Senators John McCain (R-Ariz.) and Russ Feingold (D-Wisc.) have proposed S. 524, the Congressional Accountability and Line-Item Veto Act of 2009, which calls for expedited rescission authority that allows the president to repeal any congressional earmarks or to cancel any limited tariff benefits or targeted tax benefits. CAGW believes this is another practical way to achieve the total elimination of pork-barrel earmarks.

The Constitution does not give Congress a blank check to spend tax dollars on anything it wants in whatever way it wants. Spending \$500,000 on the Sparta Teapot Museum, for example, is not an appropriate exercise of Congress's power of the purse. Nor would the Founding Fathers have approved of legislators using federal tax dollars to reward special interests that donate to their re-election campaigns.

Pork projects are usually slipped into large spending bills without debate, competition, or input from the relevant executive agencies. The provisions are often not subject to a separate vote in the House or the Senate and frequently appear in legislation only hours before Congress votes on appropriations bills. Furthermore, pork projects are not subject to performance standards. Until recently, there was no disclosure requirement for a project's recipient or its sponsor in Congress.

Even with such requirements, \$6.4 billion, or 57 percent of the cost of earmarks in the fiscal year 2006 Defense Appropriations Act were anonymous. That included \$465 million for an alternate engine the Joint Strike Fighter. There is no economic or military justification for spending billions of taxpayer dollars on an alternate engine that will not save money or improve U.S. defense capabilities. The Pentagon has proposed canceling the alternate engine project each year since 2006, only to have Congress add more than \$1 billion in funding back to subsequent defense appropriations bills.

CAGW's preliminary analysis of the Senate version of the fiscal year 2010 Department of Defense Appropriations Act indicates that there are 809 projects worth a total of \$9.3 billion. In addition to funding an alternate engine for the Joint Strike Fighter, the Defense Appropriations Act includes a \$2.5 billion anonymous earmark for 10 additional C-17 aircraft. Sen. John McCain (R-Ariz.) offered an amendment to strike the amounts available for procurement of C-17 aircraft in excess of the amount requested in the President's fiscal year 2010 budget. Despite its merits, Senator McCain's amendment was rejected 34-64. If the President had expedited rescission authority, the House would have to vote on the program, and a second vote in the Senate may have had a different outcome. At the very least, there would have been more opportunity for taxpayers to provide input into whether the program should be continued.

Congress has always found a way to break its own budget rules, making it easier to add unrelated projects to spending bills. In 2007, Congress packed its emergency supplemental legislation with non-emergency pork, such as \$100 million for citrus growers in the House version of the bill.

Rather than sending the President a clean supplemental bill to ensure that the troops had sufficient funding to fulfill their mission, Congress included \$20 million for cricket eradication and \$95 million for dairy farmers, among other questionable expenditures. The House, meanwhile, demanded \$74 million for peanut storage, \$25 million for spinach growers and \$6.4 million for additional congressional salaries and expenses before members agreed to fund body armor. This practice of horse-trading has contributed to the exploding national debt and growing apathy toward funding wasteful and unnecessary programs at the expense of worthy projects.

Earmarking is devoid of oversight, discipline, and accountability. The pork label is not a subjective judgment of a project's merit. Rather, it refers to lapses in the procedures erected by Congress to review and consider the wise expenditure of taxpayer dollars.

Concern that expedited rescissions would give the president unlimited power is unfounded. The fear that the president could use this authority to expand his power exponentially and upset the checks and balances between the branches is addressed by mandating a vote in both houses on the president's proposed rescissions. The president will be unable to reduce an authorized program's budget by more than 25 percent, thereby limiting executive authority to alter the budget priorities set by Congress in its spending decisions.

For decades, the opportunities for purging wasteful government programs and reducing the size of government have been scarce. Expedited rescissions can provide opportunities for Congress and the president to work closely for a smaller, more efficient and less costly government.

The Government Accountability Office, Congress's own investigative agency, estimated in 1992 that a presidential line-item veto could have cut \$70.7 billion in pork-barrel spending from fiscal years 1984 through 1989. That's \$70.7 billion in unnecessary spending taken out of the hands of the private sector.

Expedited rescissions would serve the same purpose as a line-item veto, and would help restore control over the budget process. This, in turn, would promote fiscal soundness, efficient government, and policies favorable to continued economic growth. Expedited rescissions, over time, would reduce the inclusion of unauthorized, non-competitive projects in appropriations bills and require increased cooperation between Congress and the executive branch in determining which programs truly need to be funded with the taxpayers' money.

CAGW realizes that while pork-barrel spending is a serious problem, it affects a relatively small portion of the budget, and more needs to be done to limit the growth of entitlements and other government expenditures in order to bring the budget back into balance. However, that does not mean that expedited rescission authority, which receives a great deal of attention because it is tied to some of the most egregious examples of wasteful spending, should be delayed until other budget problems are addressed or solved.

Mr. Chairman, expedited rescissions would allow the president to weigh parochial expenditures which benefit the few against the common good and the priorities of the many. The American people know the way business is done in Washington, and they are seeking changes.

Successive presidents have asked Congress to provide them with the line-item veto. Congress must show that it is serious about controlling spending by passing legislation giving the president expedited rescission authority. The time is now to pass this constitutional line-item veto.

This concludes my testimony. I will be glad to answer any questions.

-7-

