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ENHANCING THE PRESIDENT'S AUTHORITY TO ELIMINATE WASTEFUL SPENDING AND REDUCE THE BUDGET DEFICIT

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 TWELFTH CONGRESS

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CONTENTS

WITNESSES

TUESDAY, MARCH 15, 2011

ALPHABETICAL LIST OF WITNESSES

APPENDIX

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00003 Fmt 5904 Sfmt 5904 P:\DOCS\67117.TXT JOYCE

H605-41331-79W7 with DISTILLER

ENHANCING THE PRESIDENT'S AUTHORITY TO ELIMINATE WASTEFUL SPENDING AND REDUCE THE BUDGET DEFICIT

TUESDAY, MARCH 15, 2011

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 2:30 p.m., in room SD–342, Dirksen Senate Office Building, Hon. Thomas R. Carper, Chairman of the Subcommittee, presiding.

Present: Senators Carper, Levin, Begich, Brown and McCain.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Our hearing will come to order, not that it is in disorder, but our hearing will come to order. Welcome, one and all. Senator McCain and I are delighted that you are here. We will be joined by some of our colleagues. Our caucus lunch is just breaking up. We will be joined by some of our colleagues here in a little bit.

But as we gather here today for this afternoon's hearing, our Nation's debt stands at $14 trillion. Ten years ago on this date, it stood at less than half that amount, $5.7 trillion to be precise. If we remain on our current course, it may double again by the end of this decade.

The debt of our Federal Government held by the public as a percentage of Gross Domestic Product (GDP) has risen to 63 percent. That is up from 33 percent a decade ago. The last time it was this high was at the end of World War II. In fact, the only time it has ever been this high was at the end of that war.

That level of debt was not sustainable then and it is not sustainable today. We need only ask our friends in Greece and in Ireland about that. The Fiscal Commission led by Erskine Bowles, former White House Chief of Staff under Bill Clinton, and by former Senator Alan Simpson, provided us with a roadmap out of this morass. We see at least one person sitting at this table today who worked on that, maybe more than just one. So we thank you for that.

They provided us with a roadmap out of this morass, reducing the cumulative deficits for the Federal Government over the next decade by some $4 trillion. That roadmap offers a balanced ap-

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proach to fixing our long-term fiscal problems, with about a third of the savings coming from new revenues and about two-thirds coming from spending reductions that would touch domestic spending, defense spending, and entitlements.

However, if we really want to dig our way out of this mess, we are going to have to explore a number of innovative ideas and address the problems from all angles. Sometimes when Congress passes appropriations bills, a spending item or two, maybe three, may be included that do not make much sense. And while the majority of lawmakers, along with the Administration, may view those specific items as wasteful and unnecessary, there is no practical mechanism that enables them to single out the egregious items.

Oftentimes, these items are contained in must-pass legislation that we are considering just days or hours before the end of session or the expiration of a continuing resolution (CR). Far too often, we accept a handful of spending items that are truly wasteful as the cost of doing business in just getting bills passed.

A common sense way to prevent this from occurring is to modify the President's ability to get Congress to consider spending cuts. Under current law, the President has the authority to suggest rescissions. The President has had this authority since 1974 with legislation, I think it was called, John, I think it was called the Impoundment Act. It was signed into law by, maybe by former President Nixon.

Any time we send the President a spending bill under current law now, he or she can sign it and then propose that the Congress consider rescinding or either reducing or eliminating certain items, spending items, in that bill. However, Congress has no obligation to vote on these rescissions and, in point of fact, rarely does.

If no action is taken within 45 days, the President releases the funding. The past two Presidential Administrations, I am told, have abandoned usage of this tool due to its ineffectiveness. My staff tells me that not a single rescission has been proposed in the last decade, which is pretty amazing if it is actually true.

Congress did pass legislation in 1996 that aimed to increase the President's rescission powers. It was called the Line Item Veto Act (LIVA). It permanently enabled the President to veto any spending or revenue measures within legislation unless both chambers voted, by a super-majority, to override the President's action.

It did not say the President—it just said the President could veto spending items, line items in spending bills, in appropriations bills, so the President could go into entitlement legislation and veto, line item veto, items there; and also, do the same thing with revenue measures. And that those vetoes, those line item vetoes within discretionary spending, entitlement programs, and in revenues would become law unless two-thirds of the House and two-thirds of the Senate voted to override those cuts.

The Supreme Court unanimously, I think, rejected that change in law, in part, I presume, because they thought it was unconstitutional. If nothing else, I will tell you this, it sure was a major, major shift in the power between the three branches of government.

I talked to one of my colleagues today, Senator McCain, who was here in 1996, and I was trying to convince him to sign as a co-spon-

H605-41331-79W7 with DISTILLER

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sor of our legislation, and I compared our legislation to a 4-year test drive, which really was a statutory line in the veto powers to the President, and I said, "Compare this to what was available in 1996." I said, "In 1996, it was like giving the President a bazooka to keep under his desk." And then my colleague, our colleague, said, "Oh, in 1996 I was no good." I said, "You voted for it."

And so, my hope is that some folks who voted for that who now think it was too extreme will look at what we are trying to do here and say, "This is just about right." The story of the three bears, three little bears, too hot, too cold, just about right? My hope is that a lot of people say, "This might be just about right."

Well, I am not interested in a proposal like that, but I do believe there is a way to enhance the President's existing authority without overstepping constitutional boundaries. Senator McCain and I have introduced legislation to do just that. We did this in the last Congress with Russ Feingold, our former colleague from Wisconsin, but we introduced the Reduce Unnecessary Spending Act that seeks to do just that, and that is to strengthen the President's rescission powers without violating the Constitution.

It does not change—our legislation does not change how the President proposes rescissions, but it does require Congress to actually vote on them in a timely manner. Our bill would provide this authority only through 2015, creating something akin to what I call a 4-year test drive, a 4-year test drive for statutory line item veto powers.

This would allow the Congress to see how well or not the new authority works to determine whether to extend it, amend it, or allow it to expire after 2015. I believe that the 1996 Line Item Veto Act ceded far too much power to the Executive Branch, and it came at the expense of the Legislative Branch. Our proposal would simply update an existing budget process to give the President a targeted, effective tool that he or she can use to single out individual line items in appropriations bills. Our measure is not a bazooka.

By the same token, our measure is not a BB gun. It is not a .22. Some might say it is the McCain-Carper rifle, and that is about where we need to be. Congress would still have a strong voice in the process and we would have to approve the President's proposed rescissions, but the expedited rescission authority would help root out some questionable spending that makes it more difficult to reach our deficit reduction goals.

I am not the only one who thinks this legislation takes the right approach in reducing wasteful spending. Over a third of the Senate has now joined Senator McCain and myself—one of them sitting right here beside me—and a number—actually, we will see who shows up for this hearing, but most of the people, I think, on this Subcommittee, I think a majority of people on this Subcommittee, have now co-sponsored our legislation.

But we have over a third of the Senate joining us as co-sponsors. I think it is a balanced mix of Democrats and Republicans. In addition, the Administration is strongly supportive of the proposal and helped us actually craft the legislation. Sitting here, my colleagues may recall about a week ago, was a woman, a young woman who has been nominated by the President to be our Deputy Office of Management and Budget (OMB) Director. I believe her name is

H605-41331-79W7 with DISTILLER

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Heather Higginbottom. I think that is her name. And she was here and embraced the idea as well, even though she is just a nominee. But the Administration supports it.

Now, I know, as I said earlier, there is not a silver bullet or magic solution, but in order to get our fiscal house in order, it is going to take a combination of approaches and a willingness to put everything on the table, entitlements, revenues, domestic discretionary spending, defense spending as well, and, frankly, a lot of ineffective spending.

I like to say—I mentioned this to some of the folks in the Administration this morning. Everything that I do I know I can do better. I think the same is true of all of us. Part of our challenge is to figure out how do we get, from programs A to Z, how do we get better results for less money. That is it. How do we get better results for less money or how do we get better results for not a whole lot more money.

An expedited rescission authority may prove to be a useful tool in our toolbox at a time when our Nation is rapidly approaching our statutory debt limit. We should seriously consider many ideas and implement common sense changes like the Reduce Unnecessary Spending Act.

And now, I am not sure who I should turn to first, Senator Brown as the Ranking Member of this Subcommittee, or to Senator McCain as the lead sponsor of the bill. Senator Brown, what do you think?

Senator BROWN. I am happy to have Senator McCain go before me.

Senator CARPER. Are you? OK. All right. Fair enough. Senator McCain, you are recognized. Thanks very much.

OPENING STATEMENT OF SENATOR MCCAIN

Senator MCCAIN. Well, thank you, Mr. Chairman. I think you covered the issue very adequately. I want to thank the witnesses and finally, after more than 20 years of fighting this issue, maybe we are going to succeed. I know that Tom Schatz did not have a gray hair on his head when we started this, and I think Maya was without children. Is that right? So anyway, I want to thank the witnesses for—she was in grade school.

So I want to thank the witnesses and thank you, Mr. Chairman, for your, really, determination, strong determination to get this done with me and I am very grateful. Obviously, I think it is a very important time. I thank you, Mr. Chairman.

Senator CARPER. You bet. Happy to be a wing man on this one. If Senator Lieberman, our Chairman of our full Committee were here, he would probably use a biblical injunction here. He would probably say, "We are like Moses standing on the mountain top looking at the promised land. The Children of Israel marched for 40 years until they finally found the promised land." We have been at this, you about 20, me 19 years, and I do not want to go another 20 years. We have to get to the promised land this year, and I think this actually will help us, and frankly, this will help us with more than just this. I think this will be helpful in us putting together a broader compromise on deficit reduction that we desperately need. All right.

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Senator Brown and then we are over here to the former Mayor of Anchorage, Alaska, and now our Senator from Alaska, Mark Begich.

OPENING STATEMENT OF SENATOR BROWN

Senator BROWN. Thank you, Mr. Chairman. Thank you, Senator McCain, for your leadership in this issue. I will make a brief statement and then I will look to Senator Begich and then obviously the witnesses.

As you know, $1.6 trillion is what we face for a deficit for this fiscal year (FY), and it is the highest ever. When I got here it was $11.95 trillion national debt. It is over 14—almost over 14 and continuing to rise, as you can see by the charts here. The level of our spending is just—there is no end in sight, unfortunately, and it is out of control. It is unsustainable. I think we have all agreed on that.

It is interesting, Mr. Chairman. We have had about 55 or 60 hours of hearings—I am sorry—informal meetings, I should say, bipartisan. About 70 percent of Senators are getting together to try to figure out what is real and what is not, what is fact and what is fiction. It is the numbers. Are the numbers real or is it just kind of all made up?

I think we have all agreed collectively that the numbers are real. It is just a question of how we get there. Do we go this way or that way? Do we kind of do a little bit of everything and put everything on the table, as you have indicated? All the leaders and other members are sounding the alarm about the looming fiscal crisis; yet, we have a lot of difficult decisions ahead of us as to how to get a handle on them and how to actually fix and avert a catastrophe.

I feel and I have been public—respectful, but public about the fact that the President put forth a task force to come up with—the Debt Commission. We moved on it. We had a State of the Union speech; yet, we have had no real leadership in moving forward with what to do. It would be nice to know what his priorities are so we can actually move forward on them together, collectively, because right now, people are still hurting. They still want us to solve the problems. They not only want us to deal with the debt and deficit, they just want jobs.

That is it, debt, deficit, taxes, jobs, spending, national security. That is it. While most of these challenges cannot be fixed overnight, as I said, I am hopeful that we will get some leadership on these very important issues so we have an idea of what can ultimately be signed, because there is only one person that can sign on the dotted line and have a bill be in effect and that is the President.

I am hopeful that he will, in fact, move forward and work with us on this issue. So obviously, the current moratorium on earmarks is encouraging. Ever since it happened, the Senator to my right has been the happiest guy in the world. He is a totally different man. And it is up to the Congress to take, obviously, responsibility to control spending more seriously. As I said, "we cannot do it alone."

I am looking forward to continuing on with our efforts on this Subcommittee. I fought to get on this Subcommittee and wanted to do so because of your leadership and because of the issues that we

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are tackling, and obviously the Washington spending culture is real. It is not hard to fix, though, if we just work together to do it.

I am looking forward—for example, I have a Taxpayer Receipt Act, which is a bipartisan bill that I have introduced with Senator Nelson from Florida, also, that I am hoping you will sign onto which basically gives people the knowledge that they need to advocate on their own behalf and on their family's behalf as to where the money is going.

Here we are, we are doing this. Well, why can we not also have a transparent effort to show what is going for defense, what is going for welfare, what is going for this. It will cost hardly any money. It would be something they could just reconfigure their computers to do so.

The McCain-Carper bill demonstrates that common ground does exist for meaningful action and it needs to be taken now. I think we all agree on that. So I am looking forward to hearing the testimony and then working together to solve these problems. Thank you.

Senator CARPER. Thanks very much and thank you for your strong support of this measure and for your work in these other areas as well. Former Mayor of the largest city in Alaska.

Senator BEGICH. Thank you very much.

OPENING STATEMENT OF SENATOR BEGICH

Senator BEGICH. Thank you very much, Mr. Chairman, and first I want to say, for all the reasons that Senator Brown mentioned, I think this Committee has a huge opportunity for oversight and what we can do to help the Federal Government operate in a much better way.

When you first came to me, and I know, Senator McCain, this piece of legislation, Reduce Unnecessary Spending Act, the concept of it with the rescission power for the President, I have to tell you, I am a line item veto guy, so I like this. I know when I was Mayor, I would actually show up at the assembly meetings with a yellow folder that actually had a blank veto message that I would just fill in if I did not like what they were doing.

We had a very strong form of government and it sure did get disciplined to the budget process, to be very frank with you. So when I heard about this legislation, not only last year did I support it, this year I support it. I think it is the right move. I am not a lawyer, but I know a lot of lawyers have views on this, but I think this is the right approach. It does not go to the level I would love, because I know there is a constitutional issue there, but it does do a level of engaging in some constraint by individuals in the way they deal with the budgets here.

The one thing I know in the art of compromise in purveying a piece of legislation, I know this would expire in 2015. I would be one of those that would not want it to expire. It is a power. It does not matter if it is a Democrat or Republican White House, they should have the capacity to do this. So I think the work you are doing on this is very positive. I am supportive of it.

The other thing I would say to Senator Brown, I think your receipt idea, I am more likely going to be signing on because I think

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it is a great idea. We did something very similar in local government where people want to just know if we spend this money in taxes, where does it go? Who gets it?

And when we did that, we had an incredibly positive response also, Senator, as you can imagine, people would call us up and say, Why are we doing that? And we had to justify it. If we could not justify it, out it went. So it is actually a very good idea.

So again, Mr. Chairman, I like this Committee for a lot of the reasons that I have just stated, but also, the oversight capacity of Congress has not been as aggressive as I would have hoped in their last 2 years and this may have a new opportunity for us. So thank you very much for allowing me to be here, but also to our witnesses.

Of course, I am biased. I hope you look fondly on the piece of legislation that we are looking at, but you will have your opinions, I am sure, but I do think it is incredible to let needs be part of this equation in order for us to get some additional discipline to the spending habits of this Congress or any future Congress. I will leave it at that, Mr. Chairman.

Senator CARPER. Thanks very much. Thank you for bringing your previous role as Mayor of a large city and a leader of the Nation's Mayors to these issues. Thank you.

All right. Maya MacGuineas, no stranger to most of us on this side of the dais, but Ms. MacGuineas comes to us from The Committee for a Responsible Federal Budget (CRFB). The Committee for a Responsible Federal Budget is a bipartisan, non-profit organization committed to educating the public about issues that have significant fiscal policy implications.

Ms. MacGuineas is the President, the President of The Committee for a Responsible Federal Budget, and she frequently appears before congressional hearings like this, and the national media, to offer insights on a wide range of budgetary issues and, I think, played a modest, not inconsiderable role in helping to guide the work of the Fiscal Commission led by Erskine Bowles and Alan Simpson. Ms. MacGuineas, we welcome you to the hearing. We look forward to hearing your comments and to help us not just on this issue, but more broadly. You are probably uniquely qualified to do that.

Our next witness is Dr. Virginia McMurtry—did I get that right, McMurtry.

Ms. MCMURTRY. McMurtry.

Senator CARPER. McMurtry, McMurtry.—from the Congressional Research Service (CRS). The Congressional Research Service is the only non-partisan research arm of the Legislative Branch. The Congressional Research Service strives to provide comprehensive legislative research and analysis to Members of Congress and their staff. They are really quite a treasure and we are grateful for all that you do in providing us with guidance and counsel.

Dr. McMurtry is a Specialist in American National Government in the Executive Branch Operations Section of the Congressional Research Service. She has dedicated over 30 years to the organization. She specializes in the Federal budget and the Office of Management and Budget and relations between the President and the Congress. We thank you very much for joining us.

H605-41331-79W7 with DISTILLER

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Also from the congressional Research Service, we will be receiving testimony from Todd—I want to say Tatelman. Is that Tatelman?

Mr. TATELMAN. Yes.

Senator CARPER. Oh, good. Todd, welcome. Todd is a Legislative Attorney in the American Law Division at the Congressional Research Service. He specializes in congressional laws and procedures and constitutional law, administrative law, transportation law, and international law. Thanks so much for being with us today.

Our last witness, certainly not the least, is Tom Schatz. Mr. Schatz, President of Citizens Against Government Waste (CAGW), a non-partisan organization dedicated to eliminating government waste and someone and whose organization we see as a real partner in this effort with us. He has been at Citizens Against Government Waste for almost 25 months. Is that right? Is it 25 months?

Mr. SCHATZ. Years.

Senator CARPER. Twenty-five years, since its inception, almost since your inception. And has testified before Congress on numerous occasions about government waste. Prior to joining Citizens Against Government Waste, Mr. Schatz spent 6 years as the Legislative Director for my old colleague and friend, Congressman Hamilton Fish. Thanks so much for your testimony.

I would just say to each of our witnesses, this will not come as a surprise, but your entire statements will be made part of our record. You are welcome to summarize it as you see fit. I will ask you to stay pretty close to 5 minutes. If you go a little bit beyond that, that is OK. If you go way beyond that, we will have to rein you back in.

Ms. MacGuineas, you are welcome to lead us off. Thank you so much for joining us.

STATEMENT OF MAYA MACGUINEAS, PRESIDENT,[1] THE COMMITTEE FOR A RESPONSIBLE BUDGET

Ms. MACGUINEAS. Thank you, Chairman Carper and Members of the Subcommittee. It is an honor to be joining you today. Senator McCain, since you brought up my son, I will tell you, today is his 7th birthday, so I invited him to come, spend the afternoon with me, come to the hearing, and he, of course, said, "Mom, the budget is so boring. Have you not fixed it yet?" Which is like the attitude I get at home.

Senator MCCAIN. Wise young man.

Senator CARPER. How old is he?

Ms. MACGUINEAS. He just turned seven.

Senator CARPER. Maybe when he is eight.

Ms. MACGUINEAS. Yes, exactly. Future budgeteer.

Clearly, we face a dangerous fiscal situation and deficits and debt are rising as far as we can see. And under reasonable assumptions that we project, that the debt held by the public will be nearly 90 percent of the economy by the end of the decade. Interest obligations will be almost a trillion dollars and they will exceed spending on all domestic discretionary parts of the budget.

[1] The prepared statement of Ms. MacGuineas appears in the appendix on page 46.

H605-41331-79W7 with DISTILLER
VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00012 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

I doubt we would make it to that point. Markets are forward-looking and not only is our debt too high, it is projected to escalate at an increasing pace as the aging of the population and health care costs push up spending and borrowing. At some point, we will be hit by a fiscal crisis as credit markets lose face in the U.S. political system's ability to fix the problem.

Our creditors would either abandon U.S. debt or ask for extraordinarily high interest rates. The economy would take a huge hit and there would be no chance for lawmakers to respond with thoughtful, coherent budget reforms as there is now.

Instead, we would be in triage mode and tax rates would be hiked dramatically, new taxes created, critical investments abandoned, and the social safety net decimated. So the effects on businesses, seniors, and families would be devastating.

The solution is a multi-year, comprehensive fiscal plan that tackles all areas of the budget. The sooner we enact such a plan, the better. We need to reform entitlements, cut spending, raise revenues through fundamental overhaul of the Tax Code. Putting a plan in place would—we can put a plan in place immediately and that would give us even more fiscal space to allow the economy to continue to recover.

In addition to supporting necessary policy reforms, the Committee for a Responsible Federal Budget has long worked to find ways to improve the budget process and institute fiscal rules. That is where expedited rescission authority comes in, and we believe rescission authority can be an effective tool in promoting fiscal discipline.

The Reduce Unnecessary Spending Act allows the President to identify wasteful or unnecessary spending in legislation for cancellation and would create an expedited procedure for approving or rejecting rescissions. It would increase accountability and transparency in the budget process while respecting the responsibilities of both the White House and Congress.

In 1998, the Supreme Court found the Pure Line Item Veto to be unconstitutional because it shifted too much budgeting authority from Congress to the White House. This modified rescissions process both provides the White House with responsibility in ensuring that wasteful measures are not included in new spending bills, but it also retains the final decisionmaking power with Congress in a balanced and bicameral way. So as I think you suggested, Senator Carper, it kind of hits that Goldilocks sweet spot.

By limiting the number of requests per bill, it is also crafted to be effective without being overly demanding or allowing the President to consume the legislative calendar. Currently Congress can too easily ignore the President's rescissions requests. According to the Congressional Budget Office (CBO), only about a third of the Presidential rescissions made from 1976 to 2005 were approved by Congress, and as a result, only about $25 billion over those 30 years have been saved through the Presidential rescission authority.

Giving the President more of a central role could increase accountability and serve as a deterrent to members for adding low priority spending that is likely to be included in a rescissions pack-

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age. Furthermore, the plan would sunset in 2015, which would allow Congress to review its overall effectiveness.

I believe it will be beneficial to broaden the rescissions tool to new mandatory spending as well as tax expenditures. So much of the budget is now run through the Tax Code that these so-called tax expenditures are, in most cases, more like spending than tax cuts. Not applying the same type of oversights to this side of the budget opens up loopholes, and I realize, though, that this may be more challengingly legislatively, but it is an area of the budget that needs to be treated with high levels of scrutiny as well.

Strengthening the current rescissions process could help to build trust with the public for broader and deeper deficit reduction efforts. One of the most common misperceptions about our fiscal problems is that we can solve them by eliminating waste. This is not true. But eliminating waste should, nonetheless, be a given.

It is harder to make an important and legitimate case that fixing our budget will require shared sacrifices from everyone and all parts of the budget when wasteful items are still stuck in spending bills and tax bills with depressing regularity. Bridges to nowhere undermine the important case that Social Security has to be changed, health care costs controlled, outdated programs eliminated, and tax breaks ended.

However, the point cannot be emphasized enough that cutting waste is no substitute for making the difficult choices that are necessary to rein in our deficits and debt. Our situation will require that lawmakers keep every part of the budget open to changes. Passing important budget reforms should build momentum for the effort, not be used as an excuse to delay them.

So, Senators Carper and McCain, I congratulate you on this important bill and your excellent line-up of bipartisan co-sponsors, and I hope we can move quickly forward with this idea. I think just to conclude, I would reinforce the point you made, Chairman Carper, which is we really have to figure out how we are going to get better results for less money in this new time of fiscal constraint. That is one of the things we need to focus on better, oversight, in order for us to spend our dollars more wisely.

So thank you so much for the opportunity to come today.

Senator CARPER. Thanks so much. Thanks not only for being here today and for your testimony today, thank you for fighting this good fight in a very informed, intellectually, bright smart way for years. Thank you.

Ms. MACGUINEAS. Thank you.

Senator CARPER. Dr. Virginia McMurtry, please proceed.

STATEMENT OF VIRGINIA MCMURTRY,[1] PH.D., SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE

Ms. MCMURTRY. Thank you, Chairman Carper.

Senator CARPER. Make sure your microphone is on, please.

Ms. MCMURTRY. I am sorry?

Senator CARPER. Make sure your microphone is on. We do not want to miss a word.

[1] The prepared statement of Ms. McMurtry appears in the appendix on page 51.

H605-41331-79W7 with DISTILLER

Ms. MCMURTRY. OK. I think I have activated it now.

Chairman Carper, Senator Brown, and Members of the Subcommittee, thank you for inviting me to testify today in conjunction with the Subcommittee's consideration of S. 102. You asked that I provide some data regarding the use of rescission authority by Presidents since 1974.

You also requested that I review the use of this existing rescission authority and consider whether expedited rescission authority for the President, as provided in S. 102 and now in H.R. 1043, might facilitate efforts by an Administration to curtail non-essential expenditures by the Federal Government.

As Chairman Carper indicated, the Impoundment Control Act (ICA), enacted as Title X of the Congressional Budget Impoundment Control Act back in 1974, established a new framework for congressional notification and review of rescissions from the President. The 1974 law requires that the President inform Congress of any proposed rescission or permanent withholding of appropriated funds in a special message, and the special message must contain specified information on each of the designated rescission proposals.

With regard to congressional participation, after receiving the rescission proposals from the President, the law provides that the funds must be made available for obligation unless both houses of Congress take action to approve the rescission within 45 days.

Congress may alter the amount proposed for rescission by the President, either increasing or decreasing it, as well as approving the requested rescission in toto. In addition, independent of any specific request from the President, Congress may initiate rescission actions by canceling previously appropriated funds in a subsequent law.

Based on data compiled by the Government Accountability Office (GAO), and I am happy that it is very similar to that cited from the Congressional Budget Office, between fiscal year 1974 and fiscal year 2008, Presidents requested over 1,000 rescissions under the ICA, totaling over $76 billion. Close to 40 percent of the proposals were approved by Congress, with slightly more than a third of the dollar amounts or around $25 billion enacted.

This sum of rescissions requested by the President and subsequently enacted since 1974 exceeded $1 billion in only 4 years. Meanwhile, in this same period, Congress initiated close to 2,000 rescission actions totaling over $197 billion, or nearly eight times the total of the Presidentially requested rescissions, which reflects a trend toward the increasing number of rescissions and rescinded funds originating in Congress.

When reviewing this data on rescission actions since 1974, some have questioned whether Presidents have used the ICA—why Presidents have used the framework so infrequently. A variety of factors may be involved here such as limitations in the ICA framework allowing Congress to ignore rescission messages, to the consternation of the Executive Branch.

At a House Budget Committee hearing last June, Dr. Jeffrey Liebman, testifying for the Office of Management and Budget, made a statement in favor of the expedited rescission bill that was introduced last year, and at this hearing, some members urged

H605-41331-79W7 with DISTILLER

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OMB to submit rescission requests under the existing framework suggesting that it could at least send a useful signal to help build a consensus on the need to reduce spending.

In response to a direct question as to whether the Administration would transmit rescission messages pursuant to the ICA, Dr. Liebman replied, "We are concerned that when one does it now, one does not get an up or down vote, and that basically, it is a fruitless process." That view from OMB last June.

Another consideration in assessing the effectiveness of the ICA since 1974, or the potential impact of expedited rescission authority for the President, is the so-called deterrent effect. Representative Paul Ryan has characterized the threat of inclusion in a Presidential rescission package as, quote, "the power of embarrassment in transparency."

OMB's Acting Deputy Director referred to this potential in a statement last spring and said, "Knowing this expedited rescission procedure exists may also discourage policymakers from enacting such unnecessary spending in the first place."

The scope of the deterrent effect ultimately depends on political calculations by each Member of Congress. If lawmakers decide that a project is of value to their district or State and will be appreciated by their constituents, they arguably will not be deterred by the prospect of a President singling out their project in a rescission bill.

There are other factors that may influence whether a President may make use of rescission authority in the ICA such as collegial solidarity when the Executive and Legislative Branches are controlled by the same political party, or a President's disinclination to cut funding for agencies or departments under his control. Finally, a serious problem associated with rescissions is the challenge of coming up with agreed-upon guidelines on which to base rescission decisions.

In conclusion, the framework established by the ICA in 1974 has provided the opportunity for greater accountability in reporting of rescissions and for increased congressional oversight and control of impoundment actions. Total budgetary savings of $25 billion from Presidential rescission requests approved by Congress since 1974 may appear rather inconsequential, with total Federal outlays and annual budget deficits both in the trillions.

Yet, any budgetary mechanism that helps restrain spending, even in a small way, arguably may prove useful for deficit reduction. It remains an open question whether providing the President with expedited rescission authority would increase the employment or effectiveness of the rescission tool in reducing unnecessary spending.

Senator CARPER. Thanks so much, Dr. McMurtry. And Todd Tatelman is next. Todd, you are up. Thanks for being with us.

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VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00016 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

STATEMENT OF TODD TATELMAN,[1] LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. TATELMAN. Thank you, Mr. Chairman, Senator Brown, and Members of the Subcommittee. Before I start, I would like to take a brief second and recognize the exceptional contributions of one of my colleagues in the American Law Division, Todd Garvey, sitting behind me, who assisted me greatly in preparing today.

Senator CARPER. Would Mr. Garvey raise his hand, please? Thank you. Would you raise the other hand? [Laughter.]

Mr. TATELMAN. His assistance on the written statement was invaluable to the contribution that Congressional Research Service is able to make this afternoon.

Briefly, in the remarks I will prepare here today, or deliver here today, the Subcommittee asked that we discuss the constitutionality and the constitutional basis for the Supreme Court's decision in the Line Item Veto Act case, Clinton versus city of New York. And the Subcommittee also asked that we review S. 102, the Reduce Unnecessary Spending Act of 2011, and discuss its constitutional—any constitutional questions or issues that may arise.

So really briefly, in order to do that, I have to go back over some of the provisions of the Line Item Veto Act of 1996, as it was enacted by Congress. That law applied to any amount of discretionary budget authority, item of new direct spending, or limited tax benefit. It permitted the President, by special message to the Congress, to cancel provisions within 5 days of their passage by the Legislative Branch.

The rescissions or cancellations authorized by the Line Item Veto took effect upon receipt of that special message by either the House or the Senate, whichever received it first. The only way that those cancellations could be overcome was by passage of a disapproval bill by two-thirds vote, which rendered the President's cancellation, quote, null and void.

This law, when it was enacted in 1996, was immediately challenged by several members of the Senate who had voted against it. This first constitutional challenge was what lawyers would call a facial constitutional challenge. Senator Byrd and others who challenged the law claimed that it was unconstitutional basically on its face as written, before any president had ever attempted to exercise the authority.

This case, Raines versus Byrd, made it all the way to the Supreme Court. However, the Supreme Court decided not to rule on the constitutionality of the underlying statute; instead, choosing to discuss the case based on the standing of the various Members of Congress who had brought the suit.

In that decision, however, the Court strongly indicated that in an as-applied challenge, once a President had actually utilized the authority, would, in fact, be something that the Court would be interested in entertaining.

About a year later or so, when President Clinton vetoed three provisions, one in the Balanced Budget Act of 1997, and two in the Taxpayer Relief Act of 1997, another case was brought to the

[1] The prepared statement of Mr. Tatelman appears in the appendix on page 67.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00017 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Court's attention, this one making it all the way to the Supreme Court, by the city of New York and other affected parties who were the subject of those provisions that had been rescinded.

The Supreme Court case, Clinton versus the city of New York, is what we would call an as-applied challenge. It was challenging the constitutionality of the President's actions under the Line Item Veto as it was applied to those budgetary provisions that he canceled.

The Supreme Court, in a six to three decision in Clinton versus city of New York, held the Line Item Veto Act unconstitutional on the grounds that it violated Article I, Section 7 of the Constitution, the bicameralism and presentment clauses.

Essentially, the Court argued that the Line Item Veto Act violated what the Court considered to be, quote, the single, finely wrought, and exhaustively considered procedure, end quote, for adopting laws under the Constitution. Phrased another way, the Court believed that the actions by the President under the Line Item Veto Act of 1996 did not satisfy those parts of the Constitution.

The Court noted the possibility that Presidents had to veto legislation and cited historical examples from Presidents George Washington on forward, which indicated that Presidential vetoes were an all or nothing proposition. In other words, Presidents had to veto entire pieces of legislation or sign them in their entirety into law. The possibility of only vetoing specific sections was something that the Constitution did not contemplate.

The Court further differentiated the line item veto from the traditional veto which is provided for in Article II of the Constitution by noting that the traditional veto takes place before a law is signed by the President. Whereas, the line item veto occurs after the President has signed the bill into law. These combinations of effects led the Court to conclude that the act was unconstitutional.

Turning to S. 102, the Reduce Unnecessary Spending Act of 2011, as has been described by my colleagues on the panel, this does present somewhat of a different situation. Under the S. 102, the President is permitted to submit rescissions from a general version of what is called funding, which is defined as new budget authority and obligation limits except for entitlement funding.

Here requests must be made within 45 calendar days, and the Congress is given the opportunity to vote up or down on whether or not those rescissions are to be accepted. The important part here is, is that unlike the Line Item Veto Act, the rescissions under S. 102 would not take effect until after Congress has approved the President's requests. Under the Line Item Veto Act, the rescissions took place, you will recall, upon receipt of the President's message. So there was no need for Congress to act and, in fact, Congress could only act after the President had already made his decision.

So it seems entirely plausible to argue that S. 102 is differentiable from the Line Item Veto Act which was held unconstitutional by the Court in Clinton, and here one might argue very cogently that S. 102 does not present the same sorts of constitutional concerns that the Line Item Veto Act did.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00018 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Again, I would thank the Chairman and Senator Brown and the Members of the Subcommittee for the opportunity to testify here this afternoon.

Senator CARPER. Mr. Tatelman, thank you. We will close, at least the testimony part, with Tom Schatz. Mr. Schatz, please proceed.

STATEMENT OF THOMAS SCHATZ,[1] PRESIDENT, CITIZENS AGAINST GOVERNMENT WASTE

Mr. SCHATZ. Thank you, Mr. Chairman, and Members of the Subcommittee, and Senator McCain for his many years of support for this legislation. We certainly cannot improve on CRS saying it is constitutional or Maya's expertise as well, but when the, quote-unquote, unconstitutional Line Item Veto was passed in 1995, it passed the House by a voice vote and by 69 to 31 in the Senate. So there was a great deal of support back then, a Republican Congress with a Democratic President. Now we have a split Congress with a Democratic President and it does not really matter who is where. It is something that should be done.

Given our fiscal situation, this is as good a time as any to move forward with this proposal. It will not eliminate the $1.6 trillion deficit or reduce the debt all that much, but it will help identify areas where the President says Congress has gone too far.

While there is currently an earmark moratorium, there are rumblings over in the House about redefining earmarks, coming up with some way to continue to earmark money for either transportation or the Army Corps of Engineers (ACE) or some other areas. While we believe the leadership when they say they will not change the definition, which was proposed by Democrats in 2006 and has been carried forward, they are still getting used to the idea that earmarks are not there. They are still talking about trying to do something that sounds like an earmark.

Whether it is an earmark or a program or any other form of spending that would be subject to the rescission authority, it does restore at least a little bit of balance between the White House and Congress, which many believe was really lost under the Impoundment Act of 1974. In fact, many argue that we are in our situation today because of the way that this legislation was passed and adopted, and that the entire budget process needs to be reformed, as I know many Members of this Subcommittee have proposed over the years.

So while the line item veto did exist, President Clinton used it to cancel $355 million in spending in 1998, .002 percent of that year's budget. It was minuscule, but it made the point that there was some desire to use that particular tool.

We agree that this is a constitutional form of the legislation. The prior law, the current law allows the rescissions to be ignored, nobody is using it, and this would not tilt the power over the Nation's purse strings in favor of the President. It would hold both the Legislative and Executive Branches more accountable for the expenditure of our tax dollars.

The bill would allow the President to only propose cutting discretionary and certain non-entitlement mandatory spending. I agree

[1] The prepared statement of Mr. Schatz appears in the appendix on page 78.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00019 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

with the gentleman from Alaska that we should allow much more to be done, and perhaps this will lay the groundwork for something stronger in the future, but it would be difficult to argue that this should not be done given the situation that we find ourselves in, and we are not just facing our own problems here.

Unfortunately, what has happened in Japan is going to have an impact on our deficit and debt. Some of the money that had previously been lent to the United States will not be there anymore. So it will have an impact on this. We do not know what it is yet, but a lot of things can increase interest rates. Interest on the debt is going to be a massive part of our budget and something that we can only control by controlling how much we spend and the size of the deficit and debt.

Any concern that these rescissions would give the President unlimited power is really unfounded and I am glad to see a bipartisan effort to move this legislation forward. The Government Accountability Office estimated in 1992 that a Presidential line item veto could have cut $70.7 billion in pork barrel spending for fiscal years 1984 through 1989. That is money that would have, during that time, helped to reduce the deficit.

And the expedited rescissions are not the same as a line item veto, but it would serve the same purpose and help restore some control over the budget process. And if earmarks come back, and they might, it would certainly allow the President to weigh parochial expenditures which benefit the few against the common good and the priorities of many. The American people do not like the way business is being done here in Washington. They are seeking changes and this is one change that should be very easy to move forward. Thank you for the opportunity to appear here today.

Senator CARPER. Thanks so much, Tom, for your testimony today. Thanks a lot for all that you and Citizens Against Government Waste have been doing for 25 years.

I noticed as this hearing has gone on and as our witnesses have been testifying, we have been joined by some young people sitting back in the back couple of rows here. You are probably wondering, What is going on here? I will just say to our young guests, Mark Begich, who just walked out of here, is a Senator from Alaska. He is the former Mayor of Anchorage, Alaska. I am a former Governor of Delaware.

Most Governors and a lot of Mayors have what we call line item veto power. That is when they sign a bill into law, a spending bill into law, we can actually go back and see whether certain lines of that particular spending bill they did not like or they thought were inappropriate.

And they can say, I would like to veto that provision or reduce the amount of spending in that provision, and then send it back to the legislative body and say, All right, I think this is a good bill that you sent us, but there is one provision or these couple of provisions make no sense, we ought to not do them, and then the legislative body, in this case the Congress, would have to vote or not.

The President has these kinds of authorities. The President can sign the spending bill into law. The President can pick out from that spending bill that he or she signed into law and send to Senator Brown and me and the rest of the Senate and the House, a

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list of items that he or she thinks are inappropriate, wasteful, if you will.

Under current law, we do not have to vote for those. We can ignore them if we choose to, and for the most part, in the last 30-some years, Congress has chosen to ignore them. And it is almost like they go away, almost like they were written in invisible ink, and the Congress never has to take a stand on the proposed further reductions in spending.

Senator Brown and I, Senator McCain, who is our co-sponsor, leading Republican co-sponsor of this bill, Senator Begich and I think that the Congress should have to vote on the President's proposals, we call them rescissions, reducing, rescinding spending, think that the Congress should have to vote on that. So that is what we are doing here.

We are running a deficit this year of about $1.5 trillion. We need to look at almost every corner of our budget, where we spend money, and try to do something about it. So for those of you who are wondering what is going on here, that is what is going on here. So welcome, we are glad you have joined us. We have a good panel here, so you have their backs. You have their backs. Keep an eye on them. Give them plenty of backup.

Let me come to Ms. MacGuineas, we will just start with you, if I could. Let me just ask really the first question of each of you. What would you change about our proposal? If you could change some portion of our proposal and still believe you could get it enacted, get it through the House and through the Senate and by the President, if you could change something and still think you would have a good shot at getting it enacted, what would you change? Ms. MacGuineas, do you want to lead off with that?

Ms. MACGUINEAS. Sure. Well, I had the answer until you said had to get enacted, because it takes a while to lay a foundation for things. So I think you stick with what you have and I think you probably are going to get this enacted. My fingers are crossed.

What I think we need to push for is expanding this so that it does look at changes in entitlement programs and tax expenditures. And I think that drawing up that legislation is more complicated and I think it is politically more challenging. But particularly focusing on treating tax expenditures more like spending, which is really what they are, I think, holds a lot of promise.

So I would not change a thing about the way the bill is, but I would extend it and expand it as soon as possible to other areas of the budget.

Senator CARPER. All right. Thanks very much. Dr. McMurtry, you always struck me as kind of a legislative strategist. What would you change, if anything, and still be able to get something passed, enacted?

Ms. MCMURTRY. Well, I agree with that.

Senator CARPER. Go ahead and use your microphone, if you will. I know you do not want to.

Ms. MCMURTRY. I agree with that statement——

Senator CARPER. Would you pull the microphone down just a little closer to your mouth, please? Thanks. There you go, perfect.

Ms. MCMURTRY. OK. In terms of getting something passed, probably the existing package is the most practical way to proceed. But

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I think that it would be useful, at least, to reconsider other aspects of what was available under the Line Item Veto Act of 1996. New items of direct spending were available. In other words, the President could not go in and touch an existing entitlement, but if there were a change that would increase the amount of the entitlement, that could come under the authority to send it back to Congress.

Now, clearly, with this framework in S. 102, it would be a different framework from the LIVA in terms of it not being canceled and then Congress having to re-institute it, but—just in terms of Congress taking a second look at it. And the same thing with tax expenditures, or as they were called in 1996, tax benefits that were only useful to under a hundred recipients.

So again, there were problems that were worked on with expansion of the coverage of the expanded rescission authority in 1996. I guess the one other thing that has been mentioned since then—I do not necessarily—I do not have an opinion on it, but that would be to cover tariff benefits. That has been seen in some of the recent bills as well, that the President could single out some of those for reconsideration and send it back.

Senator CARPER. OK, thanks. Mr. Tatelman.

Mr. TATELMAN. Well, Mr. Chairman, as merely a humble attorney and expert in constitutional law, the budget process is far beyond my area of expertise, so I would not have an opinion about what you could change other than to stress that you need to maintain the current structure with respect to requiring that Congress be the actor in order to satisfy the bicameralism and the presentment requirements.

As long as you leave that portion of it alone, on constitutional grounds, you are at least different from the Line Item Veto Act and probably OK with at least to respect to what the Court has said thus far. I will defer to my colleagues on how you fix the policy side on the budget stuff as that is something I do not know nearly enough about or only know enough to be dangerous.

Senator CARPER. OK, good. Thanks. Mr. Schatz, and then I am going to yield to Senator Brown.

Mr. SCHATZ. Looking at the definition of an earmark, it includes appropriations authorizations and tax expenditures or tax—tariffs and taxes, as I understand it, tax expenditures. So I think you have to cover these tax expenditures. They are very targeted. They are objectionable, in many cases.

Dr. McMurtry mentioned that under a hundred people could be benefiting. There is a lot more that could be covered. I do not know if that particular provision would increase any opposition, but there might be a way to tie it to the earmark definition to say the President would not even be able to rescind anything that we define as an earmark. So I think that is worth looking at.

Senator CARPER. Good. Thanks very much. I will come back for a second round. Senator Brown, you are on and I am going to slip out. We have some folks, I think, from the Dover Air Force Base, out in the anteroom. I have to go spend a few minutes with them and then I will be back. In the meantime, pass as much legislation as you want to.

Senator BROWN. Well, thank you, Mr. Chairman.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00022 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

In Dr. McMurtry's testimony, she concludes that if you add up all the rescissions since fiscal year 1974, including both Presidential and congressional, that the amounts appear modest compared to the total Federal outlay, topping $3.5 trillion in fiscal year 2008. Dr. McMurtry posed a similar question in her testimony, but I will ask everyone, why have the Presidents employed—why have the Presidents employed the original ICA framework so infrequently, do you think? Do you want to take a shot?

Mr. SCHATZ. Well, I think because of the process that currently exists. They come here, the President might be taking some risk in identifying these proposals, and he knows that nothing will happen. So if you are sending something that is not going to go anywhere, I believe the view is that it is just not worth doing.

In a sense, a better question is, why is it taking Congress so long, since 1996, to come up with something that is getting this kind of support? Because I think that could——

Senator BROWN. Well, I think it is obvious, because right now we have never been in this fiscal mess to the point where we are right now and everything is on the table, and sometimes it takes something like this to push people forward in a bicameral, bipartisan manner, to do just that.

Mr. SCHATZ. Well, it would be better if we were proactive instead of reactive.

Senator BROWN. I do not disagree with that at all. I am up beating that drum regularly. But we are here, fortunately, and I am hopeful that it will continue to move forward. I did not mean to interrupt.

Mr. SCHATZ. No, that is fine. I am just making the point that I think it is something that they viewed as fruitless and therefore did not bother with. There is enough going on with the budget generally that this required an additional amount of work and they, I imagine, did not see it as something that would be helpful to them.

Senator BROWN. Anyone else have any thoughts at all? Maya.

Ms. MACGUINEAS. Sure. I mean, I think basically the point is, they did not do it very much because they thought it was not going to work, and now you have the reverse, assuming you pass this legislation, which means people are going to be less inclined to slip things into bills now because it is not going to work.

It is not going to be as effective as it was before, which actually can serve to magnify the overall effect of this, which is, you will be able to remove unnecessary and wasteful pieces of legislation, but you will also be able to create an effective deterrent, which we have not had before because people know that these will be identified, publicly so. Hopefully there will be some shame factor in it. So I think that the effect can actually be larger just because of that deterrent factor.

Senator BROWN. So I know that President Bush did not use it at all and President Clinton, over 5 years, only used it sparingly, saving about $600 million over a 5-year period. Do you think this is more of a result of the limitations in the original framework or a lack of political will?

Mr. SCHATZ. Again, I think it is the framework. Clearly there was a desire to reduce the deficit all along so it would not grow

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00023 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

quite as large as it is now, and given the current situation, given the new legislation, I would expect that there would be more use of it. The President has said he wants it, and I think more vocally than, I think, has been said recently.

Looking at the way the Congress is concerned about spending, this is something that should move fairly quickly because it is probably one of the least controversial aspects of deciding what to do about the budget.

Senator BROWN. I noticed there seems to be a consensus based, Todd, on your commentary about the constitutionality of it, that it would survive constitutional muster based on the way it is being presented. It seems to be the challenges would be more from the political side of the house, obviously, versus the constitutional. Is that a fair assessment?

Mr. TATELMAN. At least based on what we know the Supreme Court has said so far. I mean, again, we can only use precedent to give us a guideline. In this case, I think, as I testified to and as the written statement indicates, the bill that is currently before the Senate and a companion piece before the House, are distinguishable from what has come before.

But the Court has never actually passed on an expedited rescission procedure like this. There are other—all that we can say is there are certainly other examples of legislative fast-tracking, as it is sometimes referred to, or expedited procedures that are out there. And to my knowledge, Senator, none of them have been held to be unconstitutional. So based on that precedent, I would tend to agree at this point.

Senator BROWN. And, Dr. McMurtry, particularly with the first Bush Administration, you mentioned in your testimony that the use of rescissions became a controversial and highly partisan political issue to the extent not seen since Nixon. Why do you think it was such—and obviously, I was not around here then and I am still somewhat new. Why do you think it was such a contentious issue, and do you think these issues are still relevant today?

Ms. MCMURTRY. Well, I think part of it was——

Senator BROWN. Turn on your microphone again. We are testing you today.

Ms. MCMURTRY. Yes, you are.

I think part of it was the fact that in 1992, it was a Presidential election year and that President Bush wanted to try and establish a record of trying to save Federal moneys. So it began at the beginning of the year, and there were just a series of these rescission requests that were sent to Congress, and eventually, the House and Senate Appropriations Committees came up with an alternate proposal.

I believe the President's total rescission in all the different requests totaled $7 billion, and the congressional plan that got approved was $800 billion—I mean, $8 billion, another billion more. And yet, they had taken things that they considered as examples that the Executive Branch was being wasteful.

I think this whole issue of guidelines or any kind of objective criteria to try and use in determining whether a given expenditure is wasteful or necessary is an issue that may be addressed in time. I know there was discussion at the House Budget Committee hear-

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00024 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

ing in June 2010 in terms of things that the White House considered unnecessary, not necessarily just one member with an earmark, but a contingent of Members of Congress might consider as essential and not unnecessary.

Senator BROWN. And for Ms. MacGuineas and Dr. McMurtry again, a witness in a previous Subcommittee hearing in 2009 commented that expedited rescission authority is sometimes sold as a deficit reduction tool, and if that is how you sell it, it is easy to dismiss it. Would you both agree with that statement?

Ms. MACGUINEAS. I think it is one of the tools in the toolbox that is necessary here. I think in terms of deficit reduction, we obviously are at the point where we are going to need to do as much as possible as quickly as possible, and that is why I emphasize the need for a broad-based, multi-year fiscal plan, and none of us should fool ourselves into thinking that any process changes any fiscal rules are going to make that task accomplished on its own.

That said, there is still a lot of mistrust about how funds are spent, and any steps that we can take quickly that do not divert attention from an overall package of fiscal reforms, but can improve the budget process, can improve the oversight, can improve the transparency, and can improve our ability to generate savings, are very important trust builders with the public.

We are soon going to have to turn to the entire public and say, We need everybody to sacrifice in order to get a fiscal package done. We are going to have to look at entitlements. We are going to have to look at defense. We are going to have to look at domestic discretionary spending, and we are going to have to look at tax reform.

And in order to do that, you need to be able to say to the public, And we are doing everything possible to make sure that your money is well spent. So that is what I look at this as, as a very useful and credible piece of building trust. But what it should not do is stop the momentum for the broader fiscal reforms that we need to turn our attention to as quickly as possible.

Senator BROWN. I am just going to ask one more question and then I will turn it over to Senator Levin. In the earlier testimony you were talking about tax issues also should be looked at as a form of an earmark. I think, Mr. Schatz, you said that. Could you just explain that to me a little bit more? I do not think I have ever heard that because the folks that I work with and speak to, whether they are working down at the local market or they are heads of businesses, they say, "You know what?" It is really the people's money. It is not the government's money. And we give it to the government for a certain type of usage and sometimes we are happy and sometimes we are not. So how do you figure it out as an earmark?

Mr. SCHATZ. Well, it is the definition that was originally passed in House Resolution 6 in 2007. It is in Section 404 and I do not have it memorized, but I know——

Senator BROWN. So you are referring to institutional knowledge?

Mr. SCHATZ. Correct.

Senator BROWN. OK. I was just wondering.

Mr. SCHATZ. Right. The definition of earmark——

Senator BROWN. I have heard that as well.

H605-41331-79W7 with DISTILLER

Mr. SCHATZ [continuing]. Right, that the Senate and the House are using.

Senator BROWN. I thought I was missing something.

Mr. SCHATZ. Oh, no, no. I am all in favor of letting people keep their money.

Senator BROWN. No, no problem. Thank you very much.

Mr. Chairman, I think Senator Levin.

Senator CARPER. Senator Levin, glad to see you. Please jump right in here. Thank you.

Senator LEVIN. One of the things which we have to worry about is giving some people the money which other people should be paying to the Treasury. In other words, if you have a tax expenditure, there are tax loopholes. There are all kinds of tax loopholes in this tax law of ours that gives special benefits to special interest groups that are able to get a tax loophole for themselves. That is called a tax expenditure, like any other.

I do not know whether you want to put your imprimatur on every single one of those loopholes, but I sure would not. It is the people's money, but I sure as heck do not want to provide an incentive to people who move their businesses offshore and create a tax loophole so that the cost of doing that is deductible now, but the income that they make offshore is not taxable until later on.

I consider that to be a tax expenditure that I do not favor, but it is an expenditure. It is something which we ought to get to. And I was kind of interested in, actually, I think it was your testimony, Mr. Tatelman, that we ought to consider including tax expenditures in the rescission power that the President would be given here. Is that true? Was it you who said that?

Mr. TATELMAN. Not me, Mr. Levin.

Senator LEVIN. No, I am sorry. It was Ms. MacGuineas.

Ms. MACGUINEAS. Yes, I did say that. Tax expenditures, I mean, if you look at tax expenditures, where they have grown since 1986 reforms, we now are facing over one trillion dollars in lost revenue to the Federal Government a year because of these tax expenditures. And I think they do not fit the test of good tax policy more often than not.

So when they are created, they do not get the same kind of scrutiny that a normal government program would. They do not receive the same kind of oversight once they are in place. They are generally quite regressive. And they are very poorly targeted. So if you look at one of the best places to start looking at functional budget reforms, it is going to this whole tax expenditure budget, which is basically this trillion-dollar-plus shadow budget.

So I think one of the keys, in thinking about budget process and rules and reforms, is treating that piece of the budget the same way that we do as spending as often as possible.

Senator LEVIN. We sure are not doing it right now——

Ms. MACGUINEAS. No, we are not.

Senator LEVIN [continuing]. As we are looking at discretionary spending cuts. We are not even looking at tax expenditures, which I happen to agree with you, in many cases are inappropriately lost revenue, just as much as some of the expenditures are, but they are not included in this rescission authority. Is that correct?

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00026 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Ms. MACGUINEAS. That is correct and we said that they should be, but we also acknowledge that legislatively it is much more difficult to craft. So we were making the point as well that it is important to go forward with this and try to expand it wherever possible. Tax expenditures present their own problems in all sorts of different budget process reforms. But we always think that they should be included wherever possible. Agreed.

Mr. SCHATZ. Mr. Levin, if I may?

Senator LEVIN. Yes.

Mr. SCHATZ. Because when—the question I was answering was in regard to expanding the definition. What I was talking about is the current definition of an earmark, which includes some of these tax issues and tariff issues, but not all of them.

So I thought that would be a good place to start because people were asking—the Chairman was asking, what else would you include. And while we think this legislation should move quickly and perhaps be expanded later, this was at least something else that could be considered. It would be consistent with what Congress has already agreed to.

Senator LEVIN. Which is that tax expenditures are included in the earmark definition in our rules. Is that correct?

Mr. SCHATZ. Yes, correct.

Senator LEVIN. But all the focus these days is on discretionary spending. It is not on tax expenditures. It is not on revenues. It is just on discretionary spending, even though—what was your number? One point what trillion?

Ms. MACGUINEAS. 1.5 trillion.

Senator LEVIN. Lost in tax expenditures, some of which are just as abusive, as far as I am concerned, even more so than some of the expenditures that are made under the discretionary domestic rubric or any other discretionary rubric, for that matter.

Would you say, Mr. Tatelman, that an enhanced rescission authority would be added power for the Executive Branch?

Mr. TATELMAN. No, I do not know that I would say that it is an added power considering that the President already has the ability, under the Impoundment Control Act, to make the rescissions to Congress, and he already has the constitutional authority to make any—to recommend legislation in almost any form that he wants, that he deems necessary and appropriate. So I do not know that I would consider it an added power. I think that the——

Senator LEVIN. It is enhanced.

Mr. TATELMAN. Yes, I believe that there is a more accurate way of saying it.

Senator LEVIN. Would you say that this enhances the authority of the Executive Branch?

Mr. TATELMAN. No, I do not know that I would say that either.

Senator LEVIN. Like its title says?

Mr. TATELMAN. I think that it enhances the likelihood that the Congress will——

Senator CARPER. Are you suggsting—are you suggesting that there is a problem with truth in advertising here?

Senator LEVIN. No, I would not do that, no.

Senator CARPER. All right.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00027 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Mr. TATELMAN. Senator, I think it would enhance the President's faith in the Legislative Branch to take on his requests. Even if they did not enact them, I think the knowledge that the President would gain—that it would get an up or down vote or get consideration by the Legislative Branch, the argument would be that would spur him to make more requests than Presidents have currently been doing.

Senator LEVIN. I think Senator Brown made reference to the requests for rescissions made by—I assume that was the first President Bush?

Ms. MCMURTRY. Correct. We were talking about 1992, in particular.

Senator LEVIN. 1992. And I noticed that the more recent President Bush did not even ask for rescissions, according to the CRS report. Is that right?

Ms. MCMURTRY. President George W. Bush did not ask for any rescission requests under the framework of the Impoundment Control Act. However, in a rather curious move, there was forwarded to the agencies a package of cancellations, which the President said were distinct from rescissions, and they were simply identifying unspent balances in accounts that had been around for awhile.

But ultimately, there was an exchange between OMB and the Government Accountability Office, which is kind of the policeman for the Impoundment Control Act, to make sure that things are going according to the rules. And GAO said, You may be calling these cancellations, but they amount to rescissions because the agencies were withholding money in anticipation that there were going to be cancellations.

So that is the long way around, but if you consider those cancellations as otherwise named rescission requests, then there have been some in the last decade.

Senator LEVIN. What happened to them? Did President Bush honor the GAO decision?

Ms. MCMURTRY. Right. And OMB issued a clarifying memorandum to the agency saying, Oh, we did not mean that you were to withhold money, no, no, no, they are not rescissions. And so, after that, there was no confusion. After that, in fact, there was not any more mention of cancellations, that I recall.

Senator LEVIN. And were there any requests for rescissions to Congress from President Bush?

Ms. MCMURTRY. No.

Senator LEVIN. According to your chart here, there were none.

Ms. MCMURTRY. No, there were not any under the Impoundment Control Act. I was just saying this little cancellations episode was kind of an interesting footnote.

Senator LEVIN. I think he was the first President on your list here that never requested a rescission from Congress, right?

Ms. MCMURTRY. That is correct. President Obama has also not—did not make any rescissions requests in the first 2 years.

Senator LEVIN. Yes, right. But so far, President Bush is the only one except for President Obama, who is still in his first term——

Ms. MCMURTRY. That is correct.

Senator LEVIN [continuing]. Who has not requested a rescission.

Ms. MCMURTRY. That is correct.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00028 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Senator LEVIN. And Congress, as I understand your numbers, has rescinded more money than all the Presidents put together during the same years as your study; is that correct?

Ms. MCMURTRY. Oh, yes, considerably more. The congressionally initiated rescissions are several times the total of the Presidential requests that were enacted.

Senator LEVIN. My time is up. Thank you.

Senator CARPER. Senator Levin, good questions, very good questions. Senator Begich, please.

Senator BEGICH. Thank you very much. I have just a couple questions, but first, again, I just want to echo my support for the legislation, and actually, your comments on the tax expenditures—I have only been here 2 years, but as I look at all the budgets, that is a significant portion of what we do. Discretionary is like, you know, it is a sliver of everything, and then you add the mandatory and that is another big chunk.

Do you think there is a legal framework that, at some time, we could figure out how to get down that path, I guess is the question? I do not know if you want to—I am not a lawyer, so my view in life is as a former Mayor. With or without this law, if I did not like the program, I think it was wasteful, I probably would not have spent the money and let my assembly fight me. The reality is, executive power is much more stronger than legislative power, at the end of the day, is my own personal view. So I would have a different approach.

But could there be something crafted that could get down this path on tax expenditures?

Ms. MACGUINEAS. Well, I certainly will not weigh in on the legalities of doing that——

Senator BEGICH. OK.

Ms. MACGUINEAS [continuing]. Because I am ill-suited to do that.

Senator BEGICH. That is fair.

Ms. MACGUINEAS. But without question, first off, right now, tax expenditures are one of the most important areas in the budget for the overall need to reform the fiscal situation that we have to look at. If you look at budget concepts, which is something that we have not, as a country, kind of overhauled in decades, but it is basically how we think about a lot of these concepts, tax expenditures are so similar to spending in so many ways, far more than they are tax cuts. And that is probably why they are so popular and so much easier to do legislation, which is a tax cut that also achieves a goal than it is to actually cut spending or to have broad-based tax reductions.

But if we were to reframe these and look at them as spending programs, which in many ways they are——

Senator BEGICH. They are.

Ms. MACGUINEAS [continuing]. They are much more closely related to spending programs, then it is much easier to apply the same levels. In fact, on spending programs as well, we need to increase the levels of oversight, evaluation, rules, kind of capping the growth of things.

When we talk about spending caps, tax expenditures need to be a part of that discussion as well. So I think the objective here is to shine the light on this huge trillion-dollar piece of the budget

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00029 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

that has basically been going under the radar and saying we need to treat it as close to spending as possible, sort of legal challenges aside, and figure out how, in terms of budgeting, to recognize them for what they are, which is really spending through the Tax Code.

Senator BEGICH. Very good. On a separate subject, and this is really—is it Schatz? Is that right?

Mr. SCHATZ. Schatz.

Senator BEGICH. Schatz. If I could ask you this question, there is a piece of legislation that Senator Coburn and I introduced on what we call orphan earmarks, earmarks that are 9 years or older and less than 10 percent of it has been expended and you get a year to figure it out. If not, it is sucked back in or rescinded back in.

Has your organization looked at that and taken any thought on that at this point? The only reason I am taking advantage of this moment is because you happen to be here, I happen to be here, and here we are.

Mr. SCHATZ. Did you or Senator Coburn offer an amendment on this, as I recall——

Senator BEGICH. We had legislation and we tagged it onto the FAA bill on the Full Overall Government——

Mr. SCHATZ. Right. And you got about 30-something votes on that?

Senator BEGICH. No, it actually passed.

Mr. SCHATZ. Oh, it passed?

Senator BEGICH. It was actually—we got it unanimous consent.

Mr. SCHATZ. Oh, then that surprises me.

Senator BEGICH. How is that for——

Mr. SCHATZ. I thought it was interesting that members would even object to turning over earmarks that would never be spent, especially since there is now a moratorium, and obviously it is money that, again, should be easy to get back——

Senator BEGICH. Right.

Mr. SCHATZ [continuing]. Out of the system. And certainly, I would imagine that most taxpayers would be surprised that money sits around for 3, 4, 5, 6, 7, 8, 9 years and never gets spent.

Senator BEGICH. Ten, twenty.

Mr. SCHATZ. Especially under these circumstances, there is a moratorium on earmarks at all being requested or being included in legislation. The President has said he would veto bills with earmarks, so yes, it makes a lot of sense to get this money back. And hopefully, you will find even more than you have already found.

Senator BEGICH. I think so. Well, obviously, as you guys look at legislation, please look at that. I would only say now, Senator Coburn and I disagree on the earmark concept. I am a supporter of earmarks. I think legislative power is—part of what we do is represent our constituency and it does not add, it rearranges the deck of resources, not adds to the requirements of the Federal Government.

But that is another debate at another time. But I think this was the right public policy. As I did as Mayor, we cleared the books many times of stuff that was old, so we thought this was a good approach.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00030 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Let me ask, again in general back on the legislation in front of us, one, it is bipartisan which I think is a huge statement on that. For those that make the claim that this is just kind of a back-door line item veto attempt, even though to be very frank, as I said earlier, I would be all fine with line item because it keeps legislative bodies in check and there is a process to override it, which I can tell you, I only exercised it once when I was Mayor, but when I was on the assembly, we had a Mayor that did about 40 vetoes a year, we averaged about. We overrode probably 85 percent of them. So it is a process.

So how do you, those that are supportive of this type of legislation, how do you respond to that when people say, This is just another line item veto and we will have the same constitutional problems? Anyone want to——

Mr. SCHATZ. Well, I would certainly leave that up to CRS, but I mentioned earlier that the Senate approved the prior version 69 to 31 and the House approved it by voice vote, so they approved something that was much stronger when the deficit was much lower.

I think that this is certainly something that has met all of those constitutional parameters and should be a lot easier to get through this time. But as I said, CRS has said this; a lot of the attorneys outside of Congress have said that. It meets those qualifications now.

Senator BEGICH. Go ahead, Todd.

Mr. TATELMAN. Well, Senator, I mean, I think that one has to distinguish between the strict sort of formalist constitutional debate that was had over the Line Item Veto Act versus one who might take a more sort of practical or political view of the relationship between executive and legislative powers.

I think if you can confine the constitutional discussion to that sort of formalism that the Court used in-—or the majority of the Court used in the 1997 Line Item Veto decision, I think you will reach the same conclusion that I did, which is that this bill and others like it are, at least, distinguishable and operate differently than the Line Item Veto Act did, and those differences seem to meet the Court's criteria for what would pass constitutional muster.

I think those that are looking at it more from what we would call a functional standpoint or purely the political interplay between the branches might come to the conclusion or might make the argument that suggests that you have sort of shifted some power away from the Legislature toward the Executive and that, in some ways, is either too much or potentially offensive or subject to abuse, whatever line they choose to take.

I mean, it becomes a question of degrees at that point. There is no doubt you are moving some powers, is this too much, too little, or just the right amount, as the Chairman indicated in his opening. I think that is a debatable proposition.

Senator BEGICH. Let me ask you, because my time is up, as an Attorney, what is your confidence level on the way this is drafted now, that it will withstand constitutional challenge?

Mr. TATELMAN. If the constitutional challenge is similar to—in other words, on the similar basis that it was brought in 1997, I

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00031 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

think the likelihood is fairly good that this would withstand constitutional challenge. There are, however, potential other questions that might get raised that the Court did not address because it did not have to in 1997.

Senator BEGICH. Sure.

Mr. TATELMAN. And for those, of course, I do not know what the outcome would be. But I think, again, if we can take it to a similar constitutional challenge on Article I, Section 7 grounds on bicamerals and presentment issues, I think the likelihood is that this would withstand those challenges. Others, I do not know.

Senator BEGICH. Very good. Thank you very much, Mr. Chairman.

Senator CARPER. Good questions. Thank you, Senator, thanks very much.

Let me raise a couple of practical examples, if I could. We are joined by the Chairman of the Armed Services Committee, Senator Levin, who has forgotten more about defense spending that most of us will know. He has led the fight to try to make sure we spend our tax dollars in a more cost-effective way in the way we buy weapons systems.

We have had hearings in this Subcommittee that were—GAO has come and testified that earlier this last decade, our major cost overruns for major weapons system was almost $300 billion per year. One of the weapons systems that we ended up having a debate on—I am sure the Chairman will remember—a year or so ago was the F–22, where the F–22—the Administration was not asking for more F–22s.

As it turns out, the cost of the F–22—Mr. Chairman, do you recall what the cost per item for an F–22 is? It is about $200 million. It is roughly $200 million, I think. And the cost per flight hour for flying an F–22 is about $45,000. I am an old Navy P–3 mission commander. I think the cost per flight hour of a Navy P–3 13-man aircraft, four engines, I think it was about maybe $10,000. F–22 $45,000 per flight hour.

At any given point in time, the mission capable rate for the F–22 was about 55 percent. So that means that if you had a hundred of them, only 55 of them could actually fly the mission. If you look at the work we have done with F–22s in Iraq or Afghanistan, the number of missions they have flown, sorties they have flown in Iraq is zero. The number of missions they have flown in Afghanistan, zero.

And yet, we had a lot of folks who wanted to keep buying them. Really, in a down economy it was almost like a jobs machine. We finally, with the leadership of this man to my left and Senator McCain and this President, we basically pulled the plug on the F–22.

A similar kind of situation with the C–17, although the C–17 cargo aircraft, not a maligned aircraft, actually an aircraft that gives a great mission capable rate, does the job that we need, we just have too many of them. It is made in about 45 States, and while the last President, last Secretary of Defense, current President, current Secretary of Defense said, We have enough C–17s. Thank you. We do not need anymore.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00032 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Why don't we modernize those C–5s that are bigger, carry more, fly further, cost about half as much to modernize. Modernizing two or three C–5s, we can get—they fly twice as far, carry twice as much as a C–17, and it will be good for another 30 or 40 years. So the last President, this President, current Secretary of Defense said, "Why don't we stop buying more C–17s?"

Let me just ask, in those situations, how would a President, exercise his or her discretion under this rescission legislation to be able to stop buying more C–17s, stop buying more F–22s? How might it work? Anyone? Because I thought we had a tough time. I was not killing those programs, but stopping those programs. Had a tough time. How might they have been addressed if the President had this kind of authority and the Congress was required to vote on it? Anybody?

Mr. SCHATZ. Well, the way the legislation reads is the President can only propose changing spending levels, so I do not believe he can eliminate the entire program. But he might be able to say, If you want to spend $20 billion on a particular defense project——

Senator CARPER. Weapons system.

Mr. SCHATZ [continuing]. Weapons system, we can drop it to $15 billion. I believe that is the accurate way of describing the——

Senator CARPER. Or in the case of the F–22 to take it to zero and then the Congress would have to vote, as I understand it. We would have to vote.

Mr. SCHATZ. Right.

Senator CARPER. And we could say yes or no. And if 51 Senators said no, then basically the money is restored. Is not that the way it would work? Yes, I think it is. Everybody seems to say yes.

Mr. SCHATZ. Yes.

Senator CARPER. OK, good. Could we talk a little bit about—and it has been an interesting discussion here, Senator Levin. For the most part, the witnesses have said they think this would be constitutional, what we have proposed would be constitutional. They think it would be helpful. It does not go nearly as far as the 1996 legislation, which I think you, along with Senator Byrd and others, challenged whether it was unconstitutional.

But the witnesses seem to believe it would be constitutional, that it would be helpful. They also said it would be, I think, helpful to see how it works and let us get some experience under our belts and if it makes sense to look at tax expenditures later on or maybe to look at other kinds of spending later on, then maybe we should do that. But first, let us see if we can get this passed, see if it works. I tend to agree with that.

One of the ideas behind this legislation, I think, is to—it deals with mandatory spending, mandatory spending. Can any of our witnesses give us some practical examples of how this legislation might address or affect mandatory spending? Can anybody just think of something, have some good concrete examples that come to mind, anybody?

Ms. MCMURTRY. I think——

Senator CARPER. Go ahead and make sure your—you can just leave that on, if you want.

Ms. MCMURTRY. OK. I think that in the section by section that OMB submitted along with the draft legislation last year, this was

H605-41331-79W7 with DISTILLER
VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00033 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

mentioned in passing, but no examples were given in terms of being non entitlement direct spending, which would be provided in other than appropriations acts. But I have not been able to come up with a particular example. They must exist or OMB would not have used that language.

Senator CARPER. All right. I am going to ask you all to answer that question for the record, if you would, just whenever we send you some questions in writing. Mr. Schatz, you want to say something?

Mr. SCHATZ. I would agree. I cannot think of anything off the top of my head.

Senator CARPER. All right. We would like for you to do that——

Mr. SCHATZ. They have all been in this a long time.

Senator CARPER [continuing]. For the record. The other thing I want to say, I had an interesting conversation with some folks over at the White House this morning and saying to them, We need for the White House, the Executive Branch, to provide stronger leadership on long-term deficit reduction. We do not expect them to be involved up to their eyeballs in this 3-week CR stuff, continuing resolution stuff. But certainly for the continuing resolution for the balance of the fiscal year and then a multi-year deficit reduction plan, we certainly expect them to be fully engaged with us and I think they are going to be.

But one of the things that we talked about today was entitlement spending, and a lot of people say, Well, so much of the budget is really not—is uncontrollable. We actually cannot affect it because it is entitlements that some of the people are entitled to.

But even in an entitlement setting, we had a hearing here last week that Senator Levin and I have talked a little bit about, and the issue was an entitlement program for people that serve on active duty in our armed forces. I popped out here just a minute ago when Senator Levin was coming into the hearing room. I had about six or seven Air Force folks, officers and enlisted, out in the hall from Dover Air Force Base.

We have Dover Air Force Base active duty and reserve folks who participate in a program called Tuition Assistance Payment (TAP). Senator Levin knows a lot about that. But if you happen to be at Dover or anyplace in Michigan or any other active duty base around the country, they can sign up for college credits, college courses, off base at a local college or university, on base where a college or university actually offers the courses on base, or they can sign up for distance learning courses that could be offered by a local college or university, or by a college or university on the other side of the country.

We are just trying to drill down on that program to see if we are getting our money's worth, taxpayer money's worth. A lot of these programs, about 90 percent of the money—and the way it works is, let us say we are all on active duty someplace. We sign up for college courses. The way it works, we have to pass the course, but if we do, we get, for every credit hour, we get $250 reimbursement to us that we pay for out of our pockets.

So for a 3-hour course, you get $750. In the course of a year, I think you can get up to, I want to say, about $2,500 in money back for the courses that our active duty personnel have taken.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00034 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Too many cases and it is not just for-profits. For-profits get the biggest tip for this, but it can be non-profits, public colleges and universities. It can be private colleges and universities. Where a lot of times folks who should not, frankly, are not prepared to take college level courses, are sort of signed up, recruited to be in those programs.

They do not get the kind of support they need in terms of mentoring, tutoring. They basically are set up for failure and they do. It reminds me a little bit of sub prime lending where a lot of people were sucked into buying homes that they could not afford, they did not have the ability to pay for, frankly, to maintain. It is actually very, very similar.

I have said this to Senator Levin and I am going to kind of kick this out to our panel. What I said to Senator Levin, we have our incentives in a number of our entitlement programs that deal with tuition assistance. Really important stuff, tuition assistance, trying to improve the credentials of our workforce, strengthen our workforce in this country.

But incentives are set up not to incentivize colleges and universities, whether they are for-profit, whether they are distance learning, or local. The incentives do not really incentivize those institutions to make sure that people are prepared that are being recruited into those programs, to make sure that they get the—the students get the help they need, and to make sure that we incentivize colleges and universities for quality, not for quantity.

So that is—people say to me, Well, we cannot do anything about those entitlement programs. Yes, we can. We had a hearing here last week where we had—we looked at improper payments. For last year, the Administration says, Improper payments all in, not including Medicare Parts C and D, maybe not including Department of Defense, improper payments, about $125 billion.

We had a guy here from the Department of Justice (DOJ) who said, Well, Eric Holder, the Attorney General, says that fraud on top of that in Medicare alone is anywhere from $30 to $60 billion. I mean, there is a lot out there. To say that we cannot do anything about entitlements to stop improper spending, I just do not agree with it. We have to do it all. We have to do it all.

Do you all just want—it is kind of a brain dump there, but just react to a little bit of what I just said. Thank you.

Mr. SCHATZ. Mr. Chairman, on top of what you have described, I am sure you are well aware of the GAO report on duplication that came out 2 weeks ago, and my understanding is that they will be providing some additional information about the savings that could be achieved, more specific responses on that, and I know that Chairman Issa has looked at this as well, and I would imagine that you will on this side.

Perhaps in some sense, there could be more coordination on those kinds of issues from this Subcommittee and the House Government Oversight and Reform Committee, because so many of these things are fairly obvious and should be addressed on a bicameral basis. Legislation can move a lot more quickly if the two committees had just some larger oversight on these issues like improper payments and the duplication.

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I know that I was pleased to see that the President signed into law the Improper Payments Improvement Act because I remember the first Improper Payments Act simply said to issue a report; nothing happened. It went from $20 billion to $125 billion, and as you mentioned, that does not even include the new prescription drug program where we expect there will be some improper payments.

And that is just a management issue, having been on this Subcommittee for many years and as Chairman Levin knows, not the most exciting thing that gets done around here, but there are literally hundreds of billions of dollars that could be, at least spent more effectively if the management practice is improved.

Senator CARPER. Others, please.

Ms. MACGUINEAS. Sure. I would like to sort of like to take a step back and reinforce what I think you have said.

Senator CARPER. OK.

Ms. MACGUINEAS. And if you think about what is going on right now and the focus on spending cuts and the CR, it is a strange discussion that we are in the middle of, where, at least in my mind, I feel like we are moving too quickly in aggressive spending cuts given where we are in the pace of the recovery, something you could slow down if you put in place a multi-year budget plan that could reassure markets.

We are doing it in too short a timeframe because you want to be thoughtful and have oversight of Federal spending, and we need to expand this whole discussion out to the rest of the budget.

But what is happening and is going to happen is that there is a new focus on spending reductions and that is here to stay. That is going to be part of the fiscal reality that we face, and that is a good thing when it is used in the right way.

And so, I think the spotlight on spending cuts means that we really need to hone in on spending that is unnecessary, on spending that is wasteful, on spending that has the wrong incentives, and on spending that does not work. And that is a lot of what you are talking about here in figuring out different tools to really work on that.

We are going to have to do that all. I cannot not make the point, however, of course, that it is not going to be painless, the overall fiscal situation that we have to contend with, so it is going to require more than that. That is the necessary component of tackling all the things that we have to look at, from Social Security to controlling health care costs to defense spending to new revenues, and that all of that has to be put in a new framework of how we are going to do what we do well, how we are going to do it as part of economic growth, and that these tools are necessary to do government better in a time of kind of real fiscal restraints. But we cannot run away from those issues as well.

Senator CARPER. Thank you. Dr. McMurtry, I am not going to let you out of this one. Any reaction?

Ms. MCMURTRY. Well, I think that since the discretionary piece of the budget is not much over a third at this point, you are going to have to look at other components of the entitlement programs and the revenue side of things to try and get things in balance, ultimately.

H605-41331-79W7 with DISTILLER

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Senator CARPER. All right. Thank you very much. Senator Levin, you have been very patient. Thanks.

Senator LEVIN. [Presiding.] When we say "ultimately," it is the wrong word as far as I am concerned. It is now. It is always ultimately when we look at hard things. It is never now. Let me tell you some of the problems that I have with the bill. I am sorry that Senator Carper has left because I wanted him to hear this, but I will find him at another time to share it with him.

First of all, we talk about wasteful and unnecessary spending. I do not know of anybody who wants to support wasteful and unnecessary spending. I think the vote is a hundred to nothing on that. The problem is that we have a very different view as to what is wasteful and what is unnecessary.

A lot of the differences between Members of Congress and each other, Members of Congress and the President, is over priorities. It is just simply a difference of priorities. It is not wasteful, it is not unnecessary, it is just that something else, in someone's view, is a higher priority than in someone else's view.

We wanted to add more drones and unmanned aerial vehicles a few years back. It was not in the President's budget. We did it anyway. We thought, in the Armed Services Committee, By God, that is a weapon system which is really important and will really give us a capability. We added them. It was not in the President's budget.

I guess if he had one of these rescissions he could have put a rescission package together which included that, and there may have been some things in that package that some people wanted to rescind, other people did not, but it would be an up or down vote, unamendable.

So we favored the unmanned aerial vehicles when the President did not ask for them and could have put the finding for them in a rescission package that we could not amend. Those vehicles have now saved an awful lot of American lives and accomplished an awful lot of missions 5 or 10 years later. We would have seen that gone down the drain because the President had the power to put together a package which is unamendable.

That is not waste. That is priorities. It is one view of what is important. It happens all the time. It is totally legitimate, and if we all agree to what is important and what is not important, you would only need one Member of Congress and one President. So it is a very important, honest difference in many cases that we are talking about here.

I disagree with this President on the second engine, by the way, the so-called second engine on our new fighter plane. I have always favored a second engine because I believe competition will drive the price of that engine down, and if you sole source that engine, you are going to end up with a very expensive engine. It is not wasteful spending.

The President says it is wasteful spending. Secretary Gates says it is wasteful spending. Half of the Senate and less than half of the House say it is wasteful spending. But in my view, it is mighty useful spending. I do not have any back home interest in it. I have wanted competition in that engine. There never has been competition in that engine. Do you believe in competition or not? I do.

H605-41331-79W7 with DISTILLER
VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00037 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Senator LEVIN. So label it wasteful. That is what some of the ads say. About half of the ads that oppose the second engine will say it is wasteful. The ads in favor will say it is not. But just to say we are going after wasteful spending in this kind of a bill is really ignoring, to me, a very important point, which is—I am glad the Chairman is back here now.

These are debates frequently over priorities. If you label something wasteful, everybody is opposed to it and there is not much of an argument. When you say, Well, what are the Congress's priorities or Members of Congress's priorities and how does that differ from the President's priorities, now you are going to get into an honest debate over priorities and who should have the power.

And when you say there is no enhanced authority granted to the President here, I could not disagree with you more. We cannot get something voted on around here without amending it. We cannot get something done around here without being able to table it. But the President, under this bill, would be able to. So it is an enhanced power of the President. It is a serious business.

I do not know whether it is unconstitutional, by the way. I kind of agree with you that it probably is not unconstitutional, probably not, but I would not want to assume it is not since I was one of the plaintiffs going after line item veto, as our Chairman said, with Senator Byrd when he was alive, and bless his memory. Senator Byrd worried about things like this, enhanced power to the Executive Branch.

We just gave the—or tried to give the OMB a whole bunch of power the other day by saying, They could just rescind any unobligated balance. I did not vote for it, but that is what the majority did. OK? That is their right. But to just suggest that such a rescission is not additional power to the President is simply wrong. It clearly is. His OMB, unilaterally, under that authority, can just rescind any unobligated expenditure. That is a huge shift of power to the Executive Branch.

We are supposed to have the power of the purse around here. The President can veto it. He can veto a bill which has items in it he does not like. That is his first shot at rescission, is veto the bill. That is our choice. We are put in that position all the time.

There are things in bills that are comprehensive bills which most of us do not like, there are some things there that most of us do not like. And those who vote for it think the positive outweighs the negative. That is the position we are in, but this gives the President that ability to force an up or down vote, unamendable, cannot be tabled, which is a power we do not even have, I do not think, unless we take it away from ourselves, which we sometimes have. In rare cases, we have taken it away.

So I think we have to look at this for what it is. You may favor it. And by the way, I admire the testimony of those of you who said this is not going to do much in terms of deficit reduction because it will not. And I know a number of you in your testimony or in your answers to questions have said this is not going to do much for deficit reduction.

It is going to do a little in terms of giving the President even more power, and I am leery about giving any executive more power. Now, we have a lot of former Governors and former Mayors

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00038 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

that understand the need for executives to have power. I am an old legislator. I come out of the Legislative Branch of local government. I am not a former Mayor. I am a former City Councilman. So as far as I am concerned, Presidents have plenty of power, if they want to use it.

I am very leery about giving Presidents more power. In any event, that is a long speech. I did say that I had hoped that you would be here because I do have some issues with this bill, particularly the fact that it is—and I guess I am out of time—that it is unamendable and that it cannot be tabled. I think that is giving a real power to the President that we do not even have most of the time. I am leery about giving that kind of power to the President.

I also have, by the way, procedural concerns. The Committee has to act in 3 days? It is a minor point, because I have problems with the whole bill, but to say that the Committee of jurisdiction has 3 days to act on a rescission message and then it is ousted of jurisdiction? Wow. Three days? That is way too short a period of time, but that is not the major issue that I have.

I would suggest to even the people who favor the bill that they should take a look at that provision. I think that after 3 days on the calendar, anybody can force a vote on it. So you may want to look at that just from a practical point of view. But I just think we have to be very careful here. It is enhanced power to the President. I just disagree with you.

Mr. TATELMAN. May I respond for 1 minute there, Senator?

Senator LEVIN. Please. The Chairman would want to give you time and so do I.

Mr. TATELMAN. Senator, actually, I do not think we disagree as much as you think we do, and let me just try to explain why I think that is. When you asked the question about whether or not this was an enhanced power to the President, I was—my response was narrow with respect to the fact that the President merely sends up the bill. Your comment that he sends up the rescission request just like he would make any other recommendations, just like he sends up here a budget or sends up here proposed legislation on education programs or social entitlements or whatever it is that the President thinks is in the best interest of the Nation.

Your comments—and I actually would agree with them with respect to how Congress chooses to receive that message and what it does with that message are not Presidential powers. Those are determinations that Congress itself has made and has the authority to make under Article I, Section 5 in setting its own rules and regulations for procedures.

And, in fact, Senator, I think you do, in fact, have the power to make things unamendable and move them quickly through the committee process. It is much more difficult here on the Senate side of the chamber because of the way the history, practice, and traditions of the Senate have operated, and I know that you are very familiar with those.

On the House side, though, it is much, much easier. Many, many bills on the House side are taken up without the ability to amend on the floor, without the ability for extended debate. The House Rules Committee, which controls procedural elements over there, acts very, very differently than the Senate does.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00039 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

Senator CARPER. [Presiding.] Would you let me? Would you say a majority of the bills that the House takes up are brought to the floor without the opportunity for amendment?

Mr. TATELMAN. In the past. I believe that there are some statistics that would support that claim. I am not 100 percent sure.

Senator CARPER. Brought up on a suspension calendar. Brought up on a suspension calendar when you need a two-thirds vote. If you get a two-thirds vote, that is it. I think they do a lot of business on the suspension calendar over there.

Mr. TATELMAN. I do believe so.

Senator LEVIN. I agree with that. It is too bad that there is only one house that can have extended debate. As far as I am concerned, it is a pity that you cannot offer amendments in the House of Representatives and that both parties have denied other parties the opportunity to amend bills. I am talking about the Senate where this power is—better preserved, folks. It is the only place it exists. It sure does not exist in the House.

I happen to agree with our Chairman. It does not exist in the House. It does exist here. And your point that we can give away that power? Sure, we can. But should we give it away? That is the question. Not whether we have the power to give it up.

Mr. TATELMAN. My point, Senator, was merely that you have not given it to the President. What you have given it is to that particular piece of legislation, if you want to think about it in that sense. The President's power ends, even under this type of a piece of legislation, the President's power ends when he sticks it in an envelope and sends it up Pennsylvania Avenue. His ability to turn it over, it becomes then the Senate's and the House's call.

Senator LEVIN. That is excessively——

Mr. TATELMAN. Legalistic?

Senator LEVIN. Excessively legalistic. He has the power to——

Mr. TATELMAN. It is a sickness, being a lawyer, Senator.

Senator LEVIN. Well, I have the same problem.

Senator CARPER. I am not encumbered by a legal education.

Senator LEVIN. The power is to obtain something from Congress. That is the power. If we give it to him, he can obtain something. He can obtain a vote on an item by itself. I cannot. He can. Members of Congress cannot unless we, for some reason or another, through unanimous consent or through filibuster—when I say Members of Congress, by the way, you are correct. I should say members of the Senate.

So we are giving him a power, a power to obtain something very, very important.

Mr. TATELMAN. I understand.

Senator LEVIN. Obtain an up or down vote on an item, separate from everything else, if he chooses to send us a message. That is a very important power. His message cannot be amended and it cannot be tabled. I wish Senator Robert Byrd were here, for a lot of reasons, but the power to amend is an incredibly important power and I will not give it away. Thank you.

Senator CARPER. You bet. Thank you so much for being here with us, Senator.

Senator LEVIN. I thank our witnesses, too.

H605-41331-79W7 with DISTILLER

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Senator CARPER. I want to close out with just another thought. Let me say while Senator Levin is still here, if you think about the legislation that was voted on and approved by, I think, 69 Senators in 1996 that said basically, the President can come in here and line item, if you will, appropriations bills, entitlement spending, revenue legislation, and the only way to undo that is for a two-thirds vote of the House and the Senate, and in a combination, undo that Presidential power.

What a huge shift of power that represented. I would not have favored that, and I described it before you got here as giving the President—like putting a bazooka under the President's desk. I am not interested in giving any President, ours or Republican, a bazooka under their desk.

What I want to do is to provide for a reasonable response when a President says, my hands are tied, I really cannot do more than we have done in terms of deficit reduction, and really to say to the Congress, we all have to share some accountability and responsibility here in getting this job done.

But if all we do is focus on domestic discretionary spending or defense spending, if all we do is focus on entitlement spending, and not also focus on the revenue policy, or tax policy, then think we missed the boat, to some extent.

If you go back and look at the years where we actually had a balanced budget—did we have two or three at the end of the Clinton Administration?

Ms. MACGUINEAS. Three.

Senator CARPER. Three. But I think there was some good work with respect to reining in the growth of spending on the entitlement side and on the domestic and defense spending side. We also, presumably, did some reasonable work. I was not here. I was trying to govern my little State. But I think some work was done on the tax side, too.

But the other big factor then, you may recall, we were in a tech bubble and we just saw an enormous growth of revenues. I do not want another tech bubble, I do not want another housing bubble. We have had bites out of those apples. But we really do need to grow revenues and we need to make sure that the policies that we adopt, whether they are spending or tax policies, actually do promote growth.

And that is something that we are sort of losing sight of. The President has continued to call for the United States on educating, on innovating, on competing with the rest of the world. That is awfully important.

A guy named John Chambers, who was the CEO of Cisco, said the two most important things for us to do to make sure that we are going to grow jobs in this country, or any country, is No. 1, create a world class productive workforce. It cannot be with anybody else. No. 2, world class infrastructure, broadly defined.

And I would add to that maybe a third one, to make sure, particularly on the tax side, that we are actually encouraging investments in research and development that will actually lead to the creation of new technologies, new innovation, new products that we can build, stamp Made in America, and sell them all over the

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world. I think that is critically important that we do, do all three of those.

Senator LEVIN. Can I just add to that in terms of the tax side? That we eliminate those tax loopholes which give incentives to people to move jobs offshore. I have to get that in.

Senator CARPER. Thanks for getting that in.

Let me just—we have had a chance to go at it for awhile and the hour is growing late. I like to sometimes give our panels an opportunity to give like a short benediction, each of you, and then I will maybe close it out with an even shorter benediction.

Ms. MACGUINEAS. Well——

Senator CARPER. Mr. Schatz, why don't you go first and then we will just go from your right to your further right.

Mr. SCHATZ. As we discussed right at the beginning, we hope that this will be the last time of looking at this legislation, other than to improve it in the future. So I hope that this Subcommittee moves it forward quickly, and putting on the hat that is our lobbying arm, we will fully support it and urge Senators to vote for it.

Senator CARPER. Thanks so much. Mr. Tatelman.

Mr. TATELMAN. I would just take the opportunity again to thank the Chairman for his support of the Congressional Research Service and for the opportunity to testify here this afternoon. Thank you very much.

Senator CARPER. We are grateful for the work you do. Thank you. Dr. McMurtry.

Ms. MCMURTRY. I might just add a footnote to what Senator Levin was saying in terms of sometimes having a difference of priorities and not just a difference of something being necessary or unnecessary, essential or un-essential. I do not believe I mentioned it in my earlier remarks, but ultimately, the scope and the impact of the deterrent effect depends on the political calculations of the respective Members of Congress.

If the lawmakers determine that a particular project is of value to their State or district and that their constituents are going to appreciate it, just like the one Member of the Subcommittee stated, not everyone thinks that earmarks are bad, and to the extent that members will stand by their earmarks, so to speak, the deterrent effect, which is incalculable at the moment, we just do not know how that is going to play out with expedited rescission should that be granted.

Senator CARPER. Thank you. I have used this analogy before, I think, in this Subcommittee or in this Committee, and in our experience in Delaware, we had something akin to earmarks. In Delaware, we have three budgets for our State. We have an operating budget, we have a capital budget, and we have something called a grant and aid budget. The Governor proposes an operating budget and proposes a capital budget in our State.

The legislature is really—they are really the people who craft the grant and aid budget. And for the most part, the items that are included in the grant and aid budget are Boys and Girls Clubs, Boy Scouts, Girl Scouts, any number of good organizations who do worthwhile work that would be, frankly, hard for most of us to criticize or question.

H605-41331-79W7 with DISTILLER

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But one of the problems we ran into in the 1990's was, at a time when we were constrained for a while with revenue growth, we saw the operating budget, the capital budget constrained at a time when we actually needed to invest in our infrastructure. But the grant and aid budget continued to grow apace.

And we finally decided, maybe what we should do is just put a cap on the grant and aid budget. I think we capped it at maybe 2 percent of revenues, and that was basically it. It provided pretty good restraint. We still have a grant and aid budget, but it is no longer growing like topsy.

I think on earmarks the argument—I do not know if Senator Levin made it while I was out of the room, but if we have a grant program, we will say it is a transportation program, so we have like $100 in it, and somebody comes along and we have like a dollar's worth—a hundred dollars goes out for earmarks around the country.

That does not mean we spend $101. It means we spend $99-plus for that one. But what I think we may want to consider—we have this moratorium on earmarks. If we ever go back in a future Congress and say we are going to restore earmarks in the appropriations process, maybe we could do this: Put a cap like some percentage of revenues that earmarks cannot exceed.

No. 2, I think we are trying to do this, is to provide a whole lot of transparency. We are all Representatives or Senators and if we have a request for a particular earmark, it has to be very clear who is asking for it, one of us; who will it benefit, make it very clear; and the idea that if it is not in the House or Senate version of a bill, we are not going to sort of air drop it and it is going to appear like magic in a conference committee.

That sort of approach, for me, and maybe it is 1 percent or it has to be less than 1 percent, I do not know, but that kind of approach might, make some sense.

If we were to restore earmarks in that limited way with a lot of transparency, the idea of having the legislation before us, actually signed into law, I think would be helpful in an earmarks restored world, to say, All right, let us make sure that the stuff that some enterprising Senator or Representative has put in a bill, let us just make sure it stands the test of time and a test of further scrutiny, and just say, The Senate and/or the House we would like to give you the opportunity to revisit this one. I think it would be helpful.

Mr. SCHATZ. Not to take away from Maya over there, but it is difficult for me not to say something about earmarks. I would very much enjoy debating everyone who has talked about it today, but that would be a different hearing and I would welcome the opportunity to discuss this in the future.

Senator CARPER. Good, thanks. We may have that opportunity. Thanks. Ms. MacGuineas.

Ms. MACGUINEAS. A couple of quick comments. So I think it is absolutely impossible in this environment to argue against the need for additional transparency and accountability. That has to be worked into the budget process at every single opportunity and every way that we find that we can do it.

In terms of fiscal policy, I completely agree with you and I think, as the focus in this country and the world is turning to fiscal pol-

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icy, we cannot lose that it is all piece of a picture of how to promote economic growth. And that means not just getting the numbers to add up, but doing it in a way that is smart. And that means protecting public investments in a way that we shift our budget, which is now very consumption oriented, to become an investment oriented budget.

I think it also means protecting the safety net so that we do not shred programs that are very important for people who depend on them. And likewise, I think changing our tax system, which is remarkably outdated, into one that is competitive for the century in which we are competing on a global basis, is necessary. And, of course, you cannot run unsustainable levels of debt. But it is not just because those of us who are deficit hawks like getting the numbers to add up. It is because it is how you create a competitive growing economy.

And I do believe that transparency and oversight are a critical part of that, and I think the balance of this bill has it right, because what it basically says is that nothing happens unless Congress affirmatively enacts these changes. But it is an opportunity to go back over bills and give them more scrutiny, all of which is going to increase the faith that what government is doing it is doing well, and that is all a piece of this.

So I really—I applaud you and your colleagues and I hope that we move forward on it.

Senator CARPER. Well, thank you. Thanks for those comments. And really, our thanks to each and every one of you for joining us today, for your preparation, for your testimony, for your responses to our questions, and for your willingness to maybe answer, if a couple of us send follow-up questions in writing, that you are willing to respond to those. Let me just ask, Stefan Wirth, Stefan, how long would these witnesses have, our witnesses have to respond? Is it 2 weeks?

Mr. WIRTH. Two weeks.

Senator CARPER. I think it is 2 weeks, so if you get some questions in writing, if you would respond to those in 2 weeks, that would be great.

The last thing I will say, one of the things that I have sort of become interested in is the last year or two is the grant process, whether we have grants that are distributed to the States, Federal grants distributed to the States on like a formula basis, number of people, number of miles, or whatever, highway, whatever it might be, poverty, or whether the grants should be distributed on a different kind of criteria, and I will use like a transportation grant.

One of the things that seems to make sense, at least to me so that we put more transportation money out on the basis of competition, where the criteria would include, particularly an investment in transportation, that it reduce congestion. Does it reduce pollution? Does it reduce our dependence on foreign oil? Does it enhance public safety? Does it reduce accidents? And that sort of thing.

So that is an approach that I think makes a whole lot of sense. I would like to—and I am still kind of new at considering this broadly, but I think that is an approach that we need to move or migrate toward.

H605-41331-79W7 with DISTILLER

VerDate Nov 24 2008 11:57 Jan 18, 2012 Jkt 067117 PO 00000 Frm 00044 Fmt 6633 Sfmt 6633 P:\DOCS\67117.TXT JOYCE

People say to me, Why do you—even today at the train station in Wilmington waiting for the train and it pulled in right on time—some folks said to me, It has to be tough working down there in the Senate these days. It must be kind of miserable. And I said, Actually, I am encouraged by what we are doing in these big deficits in a struggle to get an economy moving. I think we are.

But I am actually encouraged that we are seeing a little bit of a restoration of bipartisan spirit in the Senate, which is good. We have passed the FAA reauthorization bill. It took us years to get that done and we have done that, I think, in a responsible way. We have just passed, in the last week or two, patent reform to help us on the innovation side of our economy.

We are working this week on, I think, some very thoughtful legislation that encourages investments in R&D, particularly for smaller businesses. And we are seeing some pretty good bipartisan cooperation. So I am encouraged by that.

The other thing is I am encouraged that my colleagues, Democrat and Republican, House and Senate, and the Administration are beginning to think, a good part of this budget, the way we spend money, it is not sacrosanct. And we just really do need to drill down and to see the ways we can get better results for less money across the board, or better results for not much more money. That is very encouraging.

What we are doing here today is looking for one more tool to get better results for less money or maybe better results for not a whole lot more money. We really do appreciate your testimony in helping us to realize that goal.

With that having been said, this hearing is concluded and we look forward to seeing and working with you again. Thanks so much.

[Whereupon, at 4:29 p.m., the subcommittee was adjourned.]

H605-41331-79W7 with DISTILLER

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APPENDIX

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FOR RELEASE: March 15, 2011
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COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

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

HEARING: "Enhancing the President's Authority to Eliminate Wasteful Spending and Reduce the Budget Deficit"

WASHINGTON – Today, Sen. Tom Carper (D-Del.), Chairman of the Senate Subcommittee on Federal Financial management, convened the hearing, "Enhancing the President's Authority to Eliminate Wasteful Spending and Reduce the Budget Deficit."

For more information on the hearing or to watch a webcast of the hearing, please click HERE.

A copy of Sen. Carper's remarks, as prepared for delivery, follows:

"As we gather here today for this afternoon's hearing, our nation's debt stands at $14.1 trillion. Ten years ago on this date, it stood at less than half that amount -- $5.7 trillion. If we remain on our current course, it may double again by the end of this decade.

"The debt of our federal government held by the public as a percentage of GDP has risen to 63 percent – up from 33 percent a decade ago. The last time it was this high was at the end of WWII. In fact, the only time it has ever been this high was at the end of that war. That level of debt was not sustainable then, and it is not sustainable today. Just ask our friends in Ireland and in Greece.

"The fiscal commission, led by Erskine Bowles and former Senator Alan Simpson, provided us with a roadmap out of this morass, reducing the cumulative deficits of our federal government over the next decade by some $4 trillion. It offers a balanced approach to fixing our long-term fiscal problems, with about a third of the savings coming from new revenue and about two thirds coming from spending reductions.

"However, if we really want to dig our way out of this mess, we're going to need to explore innovative ideas and address the problem from all angles.

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"Sometimes, when Congress passes appropriations bills, a spending item or two may be included that doesn't make much sense. While the majority of lawmakers, along with the Administration, may view those specific items as wasteful and unnecessary, there is no practical mechanism that enables them to single out the egregious items.

"Oftentimes, these items are contained in must-pass legislation that we are considering just days – or hours – before the end of session or the expiration of a continuing resolution. Far too often, we accept a handful of spending items that are truly wasteful as the cost of doing business and getting bills passed.

"A common sense way to prevent this from occurring is to modify the President's ability to get Congress to consider spending cuts. Under current law, the President has the authority to suggest rescissions. Any time we send the President a spending bill, he or she can sign it and then propose that Congress consider rescinding – either reducing, or eliminating – certain spending items in that bill.

"However, Congress has no obligation to vote on these rescissions and rarely does. If no action is taken within 45 days, the President releases the funding. The past two Presidential administrations have abandoned usage of this tool due to its ineffectiveness. Not a single rescission has been proposed in the last decade.

"Congress did pass legislation in 1996 that aimed to increase the President's rescission power – the Line Item Veto Act. It permanently enabled the President to veto any spending or revenue measures within legislation unless both chambers voted with a supermajority to override the President's action. It dramatically shifted power to the executive branch. As a result, the Supreme Court swiftly declared it unconstitutional.

"I'm not interested in a proposal like that, but I do believe there's a way to enhance the President's existing authority without overstepping any constitutional boundaries. Senator McCain and I have introduced legislation – the Reduce Unnecessary Spending Act – that seeks to do just that.

"It doesn't change how the President proposes rescissions, but it does require Congress to actually vote on them in a timely manner. Our bill would provide this authority only through 2015, creating something akin to a four-year test drive. This approach would allow Congress to see how well – or not – the new authority works and determine whether to extend it, amend it or allow it to expire after 2015.

"I believe that the 1996 Line Item Veto Act ceded far too much power to the executive branch, and it came at the expense of Congress. Our proposal would simply update an existing budget process to give the President a targeted, effective tool he or she can use to single out individual line items in appropriations bills. Congress would still have a strong voice in the process and would have to approve the President's rescissions, but the expedited rescissions authority would help root out questionable spending that makes it more difficult to reach our deficit reduction goals.

"I'm not the only one who thinks that this legislation takes the right approach in reducing wasteful spending. Over a third of the Senate has joined Senator McCain and me in cosponsoring this legislation – a balanced mix of Democrats and Republicans. In addition,

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the Administration is strongly supportive of the proposal and helped us craft the legislation.

"Now, I know this is not a silver bullet or a magic solution to our fiscal problems. In order to get our fiscal house in order, it's going to take a combination of approaches and a willingness to put everything on the table – entitlements, revenues, domestic discretionary spending and defense spending.

"But an expedited rescissions authority may well prove to be a useful tool in our toolbox. At a time where our nation is rapidly approaching the statutory debt limit, we should seriously consider many ideas and implement common sense changes – like the Reduce Unnecessary Spending Act."

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Hearing before the Senate Subcommittee on Federal Financial Management, Government Information, Federal Services and International Security

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

Tuesday, March 15, 2011

Testimony of Maya MacGuineas
Committee for a Responsible Federal Budget at
The New America Foundation

Good afternoon Chairman Carper, Senator Brown, Members of the Subcommittee, thank you for inviting me here today to discuss the Reduce Unnecessary Spending Act, which would give expedited rescission authority to the President. It is an honor to have the opportunity to testify.

I am Maya MacGuineas, president of the bipartisan Committee for a Responsible Federal Budget (CRFB), whose board consists of many past directors of the Congressional Budget Office and the Office of Management and Budget, and past Chairs of the Federal Reserve Board and of the House and Senate Budget Committees. I am also the director of the Fiscal Policy Program at the New America Foundation, as well as a member of the Peterson-Pew Commission on Budget Reform, which recently released two reports—*Red Ink Rising* and *Getting Back in the Black*, which focus on the need to adopt multi-year budgetary targets and automatic triggers to help improve the budget process, and which we believe can be a helpful part of fixing our budgetary challenges. We are very interested in and supportive of efforts to improve the budget process and related rules in manners that would improve our nation's fiscal outcomes.

Clearly, we face a dangerous fiscal situation. Deficits and debt are rising as far as the eye can see. Under reasonable assumptions, we project that debt held by the public will be nearly 90 percent of the economy by the end of this decade, exceed the size of our economy in the next decade, and continue to grow at an out-of-control rate. At the end of this decade, interest obligations will be nearly $1 trillion dollars and exceed spending on all domestic discretionary spending.

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I doubt we would make it to that point. Historically, our debt has on average been below 40 percent of GDP, and while that may seem like a pipedream now, that is where we should try to be again. Economic growth is likely hampered when total debt levels surpass 90 percent of GDP—and we are already there. Markets are forward looking, and not only is our debt too high, it is projected to escalate at an increasing pace as the aging of the population and health care costs push up spending and borrowing.

On its current course, over the coming decades, federal debt will explode to levels that we have not seen in other countries, let alone the United States. Clearly, no country could sustain debt levels at such heights. Our budget and economy would be overwhelmed by the commitments made in the largest entitlement programs and by interest obligations on that enormous debt.

However, we would undoubtedly be hit by a fiscal crisis long before this ever happened as credit markets lose faith in the U.S. political system's ability to fix the problem. Our creditors would either abandon U.S. debt or ask for extraordinarily high interest rates on it. The economy would take a huge hit, and there would be no chance for lawmakers to respond with thoughtful coherent budget reforms—as there is now. Instead we would be in triage mode; tax rates would be hiked dramatically, new taxes created, critical investments abandoned, and the social safety net decimated. The effects on business, seniors, and families would be catastrophic.

The solution is a multi-year, comprehensive fiscal plan that tackles each area of the budget. The sooner we enact such a plan, the better. There is no excuse—other than a political unwillingness to tackle the tough issues—to delay putting in place a plan. We need to reform entitlements, cut spending, and raise revenues through a fundamental overhaul of the tax code. Putting a plan in place to do so immediately would even give us more fiscal space for the economic recovery to continue to take hold.

In addition to supporting necessary policy reforms, CRFB has long worked to find ways to improve the budget process and institute supportive fiscal rules. Reforming the budget process to make it easier to root out waste alone won't solve our problems, but it is extremely important that at a time when fiscal issues have come to the forefront of the national agenda that lawmakers take every step possible to ensure that spending is effective and well-targeted.

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That is where expedited recession authority comes in. We believe rescission authority can be an effective tool in promoting fiscal discipline. Going all the way back to 2000, CRFB touted enhanced rescission as one of many possible budget reforms in the paper "Federal Budget Process: Recommendations for Reform." More recently, the Peterson-Pew Commission's *Getting Back in the Black* report recommended giving the President increased rescission powers to help enforce deficit reduction targets. While it will not generate savings anywhere near what we need in order to deal with the nation's fiscal imbalances, it can play an important role in earning public trust for broader deficit reduction.

The Reduce Unnecessary Spending Act allows the President to identify wasteful or unnecessary spending in legislation for cancellation. It would create an expedited procedure for approving or rejecting rescissions proposed by the President. It would thus increase accountability and transparency in the budget process while respecting the responsibilities of both the White House and Congress.

In 1998, the Supreme Court found the pure line-item veto to be unconstitutional because it shifted too much budgeting authority from the Congress to the White House. This modified expedited rescission process would send the President's cuts as a rescissions package for the Senate and the House to consider with an up-or-down vote. Congress would change its rules to use fast-track procedures. This structure both provides the White House with responsibility in ensuring that wasteful measures aren't included in new spending bills, but it also retains the final decision-making power with Congress in a balanced and bicameral manner. By limiting the number of requests per bill, it is also crafted to be effective without being overly demanding or allowing the President to consume the legislative calendar.

Currently, Congress can too easily ignore a President's request and not bring a package of rescissions to a vote. According to the Congressional Budget Office (CBO), only about one-third of the Presidential rescissions made from 1976-2005 were approved by Congress. As a result, only about $25 billion over those thirty years has been saved through the Presidential rescission authority (significantly more savings came from Congressionally-initiated rescissions.)

Giving the President a more central role could increase accountability and serve as a deterrent to Members for adding low-priority spending that is likely to be included in a

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Presidential rescissions package. Furthermore, the plan to sunset the new rescission process at the end of 2015 would allow Congress to review its overall effectiveness.

It would be beneficial to broaden the rescission tool to mandatory spending—including existing entitlement spending—as well as tax expenditures. So much of the budget is now run through the tax code, and these so-called tax expenditures are in most cases more like spending than tax cuts. Not applying the same types of oversights to this side of the budget opens up huge loopholes. I realize this may be more challenging legislatively, but it is worth pursuing. We need to do more to equalize the treatment of appropriated spending, direct spending, and tax-spending.

Strengthening the current rescission process would help build trust with the public for broader and deeper deficit reduction efforts. One of the most common misperceptions about our fiscal problems is that they can be solved by eliminating waste. This is not true – but eliminating waste still should be a given. It is harder to make the important and legitimate case that fixing our budget will require shared sacrifice from everyone and all parts of the budget when wasteful items are still stuck in spending and tax bills with depressing regularity. Bridges to nowhere undermine the important case that Social Security has to be changed, healthcare costs controlled, outdated programs eliminated, and tax breaks ended.

Congress has already taken a meaningful step on this front: the House and the Senate Appropriations Committee have instituted a moratorium on earmarks for this Congress. Giving the President a more credible way of rooting out wasteful spending in legislation will help that effort and give the public more reason to go along with the necessary fiscal consolidation that hopefully comes to pass in the coming years.

However, the point cannot be emphasized enough that cutting waste is no substitute for making the difficult choices that are necessary to rein in our deficits and debt. Even the *maximum potential* for savings with this enhanced rescission authority is a drop in the bucket compared to our projected deficits. Our situation will require that lawmakers keep every part of the budget open to changes. Passing important budget reforms should build momentum for the efforts, not be used as an excuse to delay them.

Senators Carper and McCain, I congratulate you on this important bill and your excellent line-up of bipartisan co-sponsors, and I hope we can quickly move forward on this idea. I

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am pleased to see that Congressman Van Hollen and a number of bipartisan co-sponsors just offered this in the House.

Again thank you again for inviting me here today, and a special thank you to Adam Rosenberg, an incredibly talented researcher at the Committee for a Responsible Federal Budget, who contributed tremendously to this testimony today.

I look forward to our discussion.

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

Hearing
March 15, 2011

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

Statement of Virginia A. McMurtry
Specialist in American National Government
Congressional Research Service

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

My name is Virginia McMurtry, and I am a Specialist in American National Government in the Government and Finance Division of the Congressional Research Service at the Library of Congress. Thank you for inviting me to testify today in conjunction with the subcommittee's consideration of S.102. Specifically, you asked that I provide data regarding the use of rescission authority by Presidents since 1974, including the number of rescissions requested, their amounts, and the number and amounts of those rescissions subsequently approved by Congress. You also requested that I offer an assessment of the comparative effectiveness of previous administrations in using existing rescission authority to eliminate spending they viewed as unnecessary, and of whether expedited rescission authority for the President (as provided in S. 102), would facilitate efforts by an administration to curtail nonessential expenditures by the federal government.

The term "impoundment" refers to executive actions to withhold or delay the spending of funds provided in law. The term "rescission" denotes one type of impoundment, that involving permanent cancellation of the funds. While instances of presidential impoundment date back to the early 19th century, Presidents usually sought accommodation rather than confrontation with Congress.[1] This changed during the Nixon

[1] For a history of presidential impoundment before 1974, see Louis Fisher, *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975), pp. 147-201; and Ralph S. Abscal and John R. Kramer, "Presidential Impoundment Part I: Historical Genesis and Constitutional Framework," *Georgetown Law Journal*, vol. 62 (July 1974), pp. 1549-1618.

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Administration (1969-1974), when impoundment of funds developed into a major interbranch conflict, eventually requiring judicial involvement.[2]

The Impoundment Control Act (ICA), enacted as Title X of the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344, 88 Stat. 332) established a new framework for congressional notification and review of rescissions requested by a President. The 1974 law requires the President to inform Congress of any proposed rescissions in a special message, containing specified information on each envisioned rescission. With regard to congressional participation, after receiving rescission proposals from the President, the ICA provides that the funds must be made available for obligation unless both houses of Congress take action to approve a rescission request included in the message received from the President within 45 days of "continuous session"; days in which either chamber is in recess for more than three days are not counted.[3]

Congress may alter the amount proposed for rescission by the President, either increasing or decreasing it, as well as approving the requested rescission in toto. In addition, independent of a specific request from the President, Congress may initiate rescission actions, by cancelling previously appropriated funds in a subsequent law. In the first few years following enactment of the 1974 law, Congress approved presidential requests in a number of separate rescission bills. Subsequently, Congress has tended to act upon rescission messages from the President in supplemental and regular appropriations measures, rather than in individual rescission bills

Rescission Activity Since 1974

The Impoundment Control Act has been in effect for more than 35 years. **Table 1** provides data on rescissions from FY1974 through FY2008, as compiled by the Government Accountability Office (GAO).[4] Data in **Table 2** reflect the outcome of rescission requests of the Presidents since 1974, providing percentages of their respective requests approved by Congress, both in relation to total dollars requested for rescission and to the number of separate proposals, by year and by Administration.

With regard to aggregate figures, from FY1974 through FY2008, Presidents requested 1,178 rescissions under the ICA, totaling somewhat over $76 billion. Close to 40% of the proposals were approved by Congress, with slightly more than a third of the total dollar amount of presidential rescission requests ($25 billion) enacted by Congress. The sum of rescissions requested by the President and subsequently enacted since 1974 exceeded $1 billion in only four years (FY1981, FY1982, FY1992 and FY1994). Meanwhile, from FY1974 to FY2009, Congress initiated 1,880 rescission actions totaling over $197 billion, nearly eight times the total of presidentially requested rescissions subsequently enacted, reflecting a trend toward the increasing number of rescissions and amounts of rescinded funds originating in Congress.

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[2] In contrast to previous impoundment actions, President Nixon impounded larger amounts of funds, ignored explicit expressions of intent by Congress that funds be spent, tried to terminate entire programs rather than just selected projects, systematically attempted to withhold funds from programs not included in the President's budget, and asserted formal constitutional power to impound. See James P. Pfiffner, *The President, the Budget, and Congress: Impoundment and the 1974 Budget Act* (Boulder, CO: Westview Press, 1979), pp. 40-44.

[3] The continuity of a congressional session is considered broken by an adjournment of the Congress sine die, and by the days on which either chamber is in adjournment for more than three days to a date certain (ICA, section 1011(5)). In practice, this usually means that funds proposed for rescission not approved by Congress must be made available for obligation after about 60 calendar days, although the period can extend to 75 days or longer.

[4] U.S. Government Accountability Office, *Updated Rescission Statistics, Fiscal Years 1974-2008*, B-310950.2, March 12, 2009, http://www.gao.gov/decisions/appro/310950z.htm.

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Table 1. Rescissions of Appropriated Funds, FY1974-FY2008

Fiscal Year	Number Proposed by the President	Total Amount Proposed by President for Rescission	Number Approved by Congress	Total Amount of Presidential Requests Approved by Congress	Number Initiated by Congress	Total Amount of Rescissions Initiated by Congress
1974	2	$495,635,000	0	$0	3	$1,400,412,000
1975	87	$2,722,000,000	38	$386,295,370	1	$4,999,704
1976	50	$3,582,000,000	7	$148,331,000	0	$0
1977	20	$1,926,930,000	9	$813,690,000	3	$172,722,943
1978	12	$1,290,100,000	5	$518,655,000	4	$67,164,000
1979	11	$908,700,000	9	$723,609,000	1	$47,500,000
1980	59	$1,618,100,000	34	$777,696,446	33	$3,238,206,100
1981	133	$15,361,900,000	101	$10,880,935,550	43	$3,736,490,600
1982	32	$7,907,400,000	5	$4,365,486,000	5	$48,432,,000
1983	21	$1,569,000,000	0	$0	11	$310,605,000
1984	9	$636,400,000	3	$55,375,000	7	$2,188,689,000
1985	245	$1,856,087,000	98	$173,699,000	12	$5,458,621,000
1986	83	$10,126,900,000	4	$143,210,000	7	$5,409,410,000
1987	73	$5,835,800,000	2	$36,000,000	52	$12,359,390,875
1988	0	$0	0	$0	61	$3,888,663,000
1989	6	$143,100,000	1	$2,053,000	11	$325,913,000
1990	11	$554,258,000	0	$0	71	$2,304,986,000
1991	30	$4,859,251,000	8	$286,419,000	26	$1,420,467,000
1992	128	$7,879,473,690	26	$2,067,546,000	131	$22,526,953,054
1993	7	$356,000,000	4	$206,250,000	74	$2,205,336,643
1994	65	$3,172,180,000	45	$1,293,478,548	81	$2,374,416,284
1995	29	$1,199,824,000	25	$845,388,805	248	$18,868,380,121
1996	24	$1,425,900,000	8	$963,400,000	104	$4,974,852,131
1997	10	$407,111,000	6	$285,111,000	96	$7,381,253,000
1998	25	$25,260,000	21	$17,276,000	43	$4,180,814,234
1999	3	$35,040,000	2	$16,800,000	105	$5,081,426,930
2000	3	$128,000,000	0	$0	61	$3,757,774,500
2001	0	$0	0	$0	67	$5,148,137,497
2002	0	$0	0	$0	76	$4,621,092,342
2003	0	$0	0	$0	47	$3,123,436,524
2004	0	$0	0	$0	49	$10,515,464,056
2005	0	$0	0	$0	77	$6,351,133,468
2006	0	$0	0	$0	89	$33,361,184,156
2007	0	$0	0	$0	56	$8,035,711,005

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Fiscal Year	Number Proposed by the President	Total Amount Proposed by President for Rescission	Number Approved by Congress	Total Amount of Presidential Requests Approved by Congress	Number Initiated by Congress	Total Amount of Rescissions Initiated by Congress
2008	0	$0	0	$0	126	$12,201,184,028
Total 1974-2008	1,178	$76,022,349,690	461	$25,006,704,719	1,880	$197,091,221,995
Average per FY	34	$2,172,067,134	14	$78,145,922	54	$5,611,177,771

Source: Government Accountability Office, *Updated Rescission Statistics, Fiscal Years 1974-2008*, GAO Report B-310950.2, March 12, 2009.

Ford and Carter Administration (1974-1981)

In the early months under the new framework, the number of presidentially proposed rescissions increased. In particular, President Ford attempted to rescind funding that Congress had added to the President's budget, mainly involving domestic social programs, but the effort met with limited success. As characterized by Louis Fisher, "Instead of performing as a restriction on Presidential power, it [the new law] was interpreted by the [Ford] Administration as a new source of authority for withholding funds.... Rescission proposals came up by the bushel; wholesale they were rejected."[5] As indicated in **Table 2**, some 34% of President Ford's rescission proposals were agreed to by Congress. In terms of the percentage of the total dollar amount requested during the Administration and approved by Congress, President Ford had less overall success (16%) than any of his successors who made use of the ICA framework.

Table 2. Rescissions Requested by the President and Approved by Congress, 1974-2008

Fiscal Year/ Administration	Number of Rescissions Requested by President	Total Dollar Amount of Rescissions Requested by the President	Percent of President's Proposals Accepted by Congress	Percent of Total $ Amount Requested Approved by Congress
1974	2	$495,635,000	0%	0%
1975	87	$2,722,000,000	44%	14%
1976	50	$3,582,000,000	14%	4.1%
1977	20	$1,926,930,000	45%	42%
1978	12	$1,290,100,000	42%	40%
1979	11	$908,700,000	82%	80%
1980	59	$1,618,100,000	58%	48%
1981	133	$15,361,900,000	76%	71%
1982	32	$7,907,400,000	16%	55%

[5] Fisher, *Presidential Spending Power*, pp. 200-201.

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Fiscal Year/ Administration	Number of Rescissions Requested by President	Total Dollar Amount of Rescissions Requested by the President	Percent of President's Proposals Accepted by Congress	Percent of Total $ Amount Requested Approved by Congress
1983	21	$1,569,000,000	0	0
1984	9	$636,400,000	33%	9%
1985	245	$1,856,087,000	40%	19%
1986	83	$10,126,900,000	5%	1%
1987	73	$5,835,800,000	3%	1%
1988	0	$0	0	0
1989	6	$143,100,000	17%	1%
1990	11	$554,258,000	0	0
1991	30	$4,859,251,000	27%	6%
1992	128	$7,879,473,690	20%	26%
1993	7	$356,000,000	57%	58%
1994	65	$3,172,180,000	69%	41%
1995	29	$1,199,824,000	86%	71%
1996	24	$1,425,900,000	33%	68%
1997	10	$407,111,000	60%	70%
1998	25	$25,260,000	67%	48%
1999	3	$35,040,000	68%	48%
2000	3	$128,000,000	0	0
2001	0	$0	0	0
2002	0	$0	0	0
2003	0	$0	0	0
2004	0	$0	0	0
2005	0	$0	0	0
2006	0	$0	0	0
2007	0	$0	0	0
2008	0	$0	0	0
Ford (FY1974-FY1977)	152	$7,935,013,000	34%	16%
Carter (FY1977-FY1981)	122	$5,750,816,000	56%	44%
Reagan (FY1981-FY1989)	602	$43,436,587,000	36%	36%
G.H.W. Bush (FY1989-FY1993)	169	$13,292,982,690	20%	18%
Clinton (FY1993-FY2001)	166	$6,749,315,000	67%	54%

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Fiscal Year/ Administration	Number of Rescissions Requested by President	Total Dollar Amount of Rescissions Requested by the President	Percent of President's Proposals Accepted by Congress	Percent of Total $ Amount Requested Approved by Congress
G.W. Bush (FY2001-FY2009)	0	$0	0	0

Source: Compiled from GAO data.

In contrast to the record in the Ford Administration, President Carter requested far fewer rescissions, but enjoyed much greater success in gaining congressional approval. During the Carter Administration, the same political party (Democrats) controlled both Houses of Congress along with the White House. It has been suggested that given the common party identity, President Carter was "reluctant to propose rescissions, and Congress [was] reluctant to disapprove those proposed." Some 90% of the rescissions proposed by President Carter involved defense programs, including the cancellation of the B-1 bomber.[6] The other President since 1974 who enjoyed a Congressional majority of his party in both chambers during at least half of the Administration was President George W. Bush, who submitted no proposed rescissions.

Reagan Administration (1981-1989)

The decline in rescission requests during the Carter Administration proved only temporary. During his first year in office President Ronald Reagan submitted more rescission proposals (133) than had President Carter during his entire Administration. The largest number of rescission requests in any year (245 in 1985) occurred during the Reagan Administration, as did the greatest amount in terms of total dollars involved (more than $15 billion in 1981). Somewhat coincidentally, President Reagan saw the same percentage acceptance overall of his rescission proposals as the total dollar value—36% (see **Table 2**). While President Reagan's rescission requests focused almost exclusively on domestic programs, most of the Reagan proposals reflected program cuts rather than targeted terminations via rescissions as during the Nixon Administration.

The aggregate percentage approval figure of slightly over 36% for the Reagan Administration's requests masks substantial differences from year to year, however. As one assessment concluded,

> Although President Reagan was, nevertheless, reasonably successful in using this [rescission] device in fiscal years 1981-1982, obtaining congressional approval for almost 70 percent of the dollar value of his requested rescissions, the tool was essentially useless to the president in fiscal years 1983-87, when Congress approved less than 2 percent of the value of his rescission requests.[7]

The absence of any rescission requests in FY1988, for the first time since enactment of the ICA, reflected a special situation. In November 1987 a compromise agreement was announced, resulting from the "Budget Summit" between the White House and Congress. The summit deal specified two-year limits on discretionary spending for domestic programs, international affairs, and defense. Provisions of the agreement were implemented as a part of an omnibus appropriations measure (P.L. 100-202, 101 Stat.1329-1) and a reconciliation bill (P.L. 100-203, 101 Stat. 1330). Apparently, President Reagan decided not to submit formal rescission requests for fiscal 1988, which might have been perceived in

[6] Allen Schick, *Congress and Money* (Washington: Urban Institute Press, 1980), pp. 405-406.

[7] Rudolph G. Penner and Alan J. Abramson, *Broken Purse Strings* (Washington: Urban Institute Press, 1988), p. 120

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Congress as violating the spirit if not the letter of the agreement. He did, however, send a message to Congress identifying "wasteful items earmarked in the FY1988 full-year continuing resolution," with a transmittal letter stating the following:

> Accordingly, I am informally asking that the Congress review these projects, appropriations, and other provisions line by line and either rescind or repeal them as soon as possible. I reserve the option of transmitting at a later date either formal rescission proposals or language that would make the funds available for more worthwhile purposes, for any or all of these items.[8]

As indicated in the message, out of $1.064 trillion in outlays for FY1988, he would have eliminated $336.1 million in appropriations, $403.1 million in programs repealed or amended, and $801 million in loan assets sales, for a total of $1.540 billion.[9]

President Reagan refrained from using the rescission mechanism only temporarily. Before he left office, in January of 1989, the President transmitted a package of six new rescission proposals affecting FY1989.[10]

Administration of George H.W. Bush (1989-1993)

Table 2 shows that President George H. W. Bush had approval rates for rescission requests below those for President Reagan, with 18% of the total dollars requested approved, and of 20% of the total proposals accepted. During the presidential election year of 1992, however, the use of rescissions became a controversial and highly partisan political issue to an extent not seen since the conflicts of the Nixon Administration.

During the first four months of calendar year 1992, President Bush requested 128 rescissions, totaling almost $7.9 billion, while reportedly attempting to portray the majority party in Congress (Democrat) as more interested in securing domestic "pork" projects for their constituents than in reducing the budget deficit. Over $7 billion of these proposed rescissions affected the Defense Department, mainly for weapons programs that the Administration wanted to terminate or items that Congress added to earlier defense budgets. Many of the nondefense rescissions were for relatively small earmarked projects, added by Congress.

In response to the four packages of rescissions requested by President Bush in 1992, the House and Senate Appropriations Committees devised their own alternative packages. A conference version with an $8.2 billion package of rescissions was signed into law on June 4, 1992 (P.L. 102-298). Although the conference agreement contained over $7 billion in defense funds, only about $1.7 billion of that total came from programs that the Administration had wanted to rescind. Altogether, the law approved less than $2.1 billion of the rescissions requested by President Bush, but added more than $6 billion in congressionally initiated cuts.[11]

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[8] U.S. President, *Message Transmitting a Request to Consider the Rescission or Repeal of Spending Projects that were Included in the 1988 Continuing Resolution (P.L. 100-202)*, March 14, 1988, H. Doc. 100-174, 100th Cong. 2nd sess. (Washington. GPO, 1988), p. 1.

[9] H. Doc. No. 100-174, 100th Cong., 2d Sess. (1988).

[10] U.S. President, *Message Transmitting Six New Rescission Proposals Affecting Programs in the Departments of Housing and Urban Development, Interior, Justice, and Labor, Pursuant to 2 U.S.C. 683(a)(1)*, Jan. 19, 1989, H. Doc. 101-20, 101st Cong., 1st sess. (Washington: GPO, 1989).

[11] See U.S. Congress, *Rescinding Certain Budget Authority, and for other purposes*, conference report to accompany H.R. 4990, 102nd Cong., 2nd sess., H.Rept. 102-530 (Washington: GPO, 1992).

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During Senate floor debate on its substitute rescission package in 1992, the late Senator Robert Byrd, Chairman of the Appropriations Committee, referred to the President's recent reference to the "wasteful spending" of Congress, and stated the following:

> So to hear the Chief Executive speak on that occasion, to the effect that only Congress is guilty of wasteful spending—and the President singled out some examples of what he considered to be wasteful spending, and the Senate has gone along with some of them, but the President did not say anything about wasteful spending in the executive branch. Let me bring a few examples of wasteful spending to the attention of my colleagues, and to the attention of the American people.[12]

Senator Byrd then proceeded to describe examples of what he termed "wasteful executive branch spending" included in the Senate substitute, such as a grant from the National Science Foundation to study sexual aggregation of fish in Nicaragua, or from NIH to study the incidence of dental fear in the population.[13]

Clinton Administration (1993-2001)

As indicated in **Table 2**, President Bill Clinton ranked at the top of the list of Presidents since 1974 with respect to the percentage of rescission proposals accepted (67%) and percentage of the total dollar amounts requested that were approved by Congress (54%). During his first two years (1993-1994) the Democratic Party controlled both houses of Congress as well as the White House, while in the remainder of his term, Republicans controlled the House and Senate. Yet President Clinton achieved his greatest success rate with rescissions, with respect to percentage of total dollar amount requested that was ultimately rescinded, in FY1995, when Congress was controlled by the opposition party.

As reflected in a column on the left side of **Table 2**, President Clinton submitted relatively fewer rescission requests per year than was the average for all Presidents under the ICA, except for President George W. Bush who submitted none. In seven of his eight years in office, the number of rescissions requested by President Clinton was below the 1974-2008 average of 34 per year. Further, the ranking of the Administrations by average number of rescissions requested per year (to adjust for terms ranging from roughly two and a half to eight years), places President Clinton (annual average of 21 rescissions) only above George W. Bush (with zero). President Reagan not only submitted the most rescissions in toto (604), but was also number one with respect to a yearly average (76 rescission requests), followed by President Ford (61), President George H. W. Bush (42), and President Carter (31).

Rescission Actions under the Line Item Veto Act of 1996

The Line Item Veto Act (LIVA) of 1996 (P.L. 104-130, 110 Stat. 1200), in effect for less than 18 months before being overturned by the Supreme Court, amended the ICA to give the President "enhanced rescission authority," thereby changing the burden of action between the branches.[14] Under enhanced rescission, spending reductions identified in special presidential messages remained permanently cancelled unless Congress enacted a disapproval bill. Should the President veto that disapproval bill, a two-thirds majority in both chambers would have been needed to override the veto and restore the funding. Specifically, the LIVA granted the President authority to cancel certain items in entitlement

[12] Sen. Robert Byrd, "Rescission of Certain Budget Authority," remarks in the Senate, *Congressional Record*, vol. 138, May 5, 1992, p. 10143.

[13] Ibid.

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measures and in narrowly applicable tax breaks, as well as to rescind amounts of discretionary spending found in appropriations measures. The act provided 30 days for congressional consideration of disapproval bills to reverse the cancellations. Since the President would presumably have vetoed any disapproval bill, a 2/3 majority in both the House and Senate ultimately would have been necessary to override and disapprove of cancellations. The law became effective on January 1, 1997, but was subsequently overturned by the Supreme Court on June 25, 1998.[15]

All together, during the 18 months that the LIVA was in effect, President Clinton issued 11 special messages containing 82 cancellations.[16] The 38 cancellations in the Military Construction Appropriations bill, however, were rejected with the congressional override of the presidential veto of the bill disapproving the cancellations.[17] The cancellation of the provision in the Treasury bill providing for an open season for federal employees to switch pension plans was held impermissible under the law, and a District Court judge ordered its reinstatement early in 1998.[18] So slightly more than half of the original cancellations (43 of 82) remained in effect when the Supreme Court overturned the LIVA in June 1998.

According to figures provided by the Congressional Budget Office (CBO), President Clinton's cancellations under the LIVA amounted to about $355 million out of a total budget of $1.7 trillion (less than 0.02%). Of this total, about $30 million came from the 39 cancellations overturned, leaving a net budgetary effect for FY1998 of $325 million. CBO estimated total savings over a five-year period from the cancellations in FY1998 funding as less that $600 million.[19]

Table 3 presents data for FY1998 both from rescission requests under the Impoundment Control Act and from cancellation actions under the Line Item Veto Act. The figures are not entirely comparable, since cancellations under the LIVA included not only actions affecting items in appropriations acts, but also items of new direct spending and targeted tax benefit provisions. The combined totals are of course larger than those for the ICA or LIVA alone.

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[15] *Clinton* v. *City of New York*. 524 U.S. 417 (1998). The decision is available online at http://supct.law.cornell.edu/supct/html/97-1374.ZS.html

[16] For information on the respective messages and cancellations, see National Archives and Records Administration, "History of Line Item Veto Notices," http://www.access.gpo.gov/nara/nara004.html.

[17] On November 13, 1997, the President vetoed H.R. 2631, the first disapproval bill to reach his desk under the provisions of the 1996 law. The House voted to override on Feb. 5, 1998 (347-69), and the Senate did likewise on Feb. 25, 1998 (78-20); so the disapproval bill was enacted over the President's veto (P.L. 105-159).

[18] U.S. District Court for the District of Columbia, Order by Judge Thomas Hogan regarding Civil Action No 97-2399, Jan. 6, 1998. Judge Hogan's order found that the President lacked authority under the LIVA to make this cancellation, and so it was "invalid and without legal force and effect."

[19] Congressional Budget Office, "The Line Item Veto Act After One Year," CBO Memorandum, April 1998, pp. 12-13. Had the 39 cancellations that were no longer in force as of April 1998 been included, CBO estimated the total five-year savings as just under $1 billion.

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Table 3. Rescission Requests and Cancellation Actions by the President and Approval by Congress, FY1998

Authority for Rescission/ Cancellation	Number of Rescissions/ Cancellations	Total Dollar Amounts of President's Requests/ Cancellations	Total Dollar Amounts of President's Proposals Accepted by Congress	Percent of President's Proposals Accepted by Congress	Percent of Total $ Amount Requested Approved by Congress
Impoundment Control Act	25	$25,260,000	$17,276,000	67%	48%
Line Item Veto Act of 1996	82	$355,000,000	$325,000,000	52%	92%
TOTAL	107	$380,260,000	$342,276,000	60%	90%

Source: Government Accountability Office, 2005; Congressional Budget Office, 1998.

Nonetheless, if the bottom line totals in **Table 3** were substituted for the ICA-only data for FY1998 in **Table 1** and **Table 2** the most notable feature, arguably, would be that the larger combined totals only marginally affect the broader picture of the data over the three decades. The number of rescissions and cancellations, total dollar amounts from the President, and total dollar amounts accepted by Congress would not come close to constituting the highest during the period. The percentage of the President's proposals accepted by Congress actually drops slightly when the LIVA cancellations are included (from 67% to 60%). Only the percentage of the combined total dollar amount called for by the President and accepted by Congress would set a new high of 90%, as compared with 80% for President Carter in FY1979, the prior record. With respect to comparing figures across administrations (see bottom of **Table 2**), the addition of the LIVA data would leave the percentage of President Clinton's proposals accepted by Congress unchanged, but increase the percentage of total dollar amount requested and approved by Congress to 56%.

From FY1974 to FY2009, rescissions proposed by the Administrations under the ICA totaled a little over $76 billion, and Congress approved some $25 billion, or 33% of the amounts requested. During the same period rescission actions initiated by Congress amounted to nearly $197.1 billion, over eight times the total dollar amount of presidentially requested rescissions enacted. Whether considering rescissions requested by the President, presidential rescission proposals enacted by Congress, rescissions initiated directly in Congress, or the sum total of all rescissions enacted from FY1974 to FY2009, the amounts appear modest compared with total federal outlays topping $3.5 trillion in FY2008.[20]

Rescissions Since 2001

In the last decade, Congress received no rescission requests submitted by a President pursuant to the ICA, but discussion regarding the President's impoundment authority continues.

[20] Congressional Budget Office, *The Budget and Economic Outlook: An Update*, Washington, DC, August 2010, p. 4, http://www.cbo.gov/ftpdocs/117xx/doc11705/08-18-Update.pdf

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George W. Bush Administration

As noted previously, President Bush submitted no formal rescission requests under the ICA during his Administration. Some controversy occurred, however, regarding presidential statements calling for "cancellation" of certain funds.

On October 28, 2005, President Bush forwarded to Congress a package of $2.3 billion in rescissions. As explained in an OMB press release, "Unused balances in 55 Federal programs would be rescinded in keeping with the President's pledge to reduce unnecessary spending elsewhere in the budget as hurricane recovery efforts continue."[21] In a press briefing, OMB Director Joshua Bolten further explained:

> The unobligated balances that I referred to are—is money that has not been spent in programs which—into accounts into which it as appropriated. We have stepped in, and where the program was either a low priority, or where we believe it's clear that the amount of money in that account is not necessary to fulfill the purpose of the program, we've gone in and proposed to take that money out and use it as savings to the federal treasury.[22]

According to OMB staff, the October package constituted a proposal for cancellations, not rescission requests under the ICA, and agencies were told not to withhold funds in anticipation of an impending rescission. The Comptroller General, however, deemed it necessary to contact each agency affected by the President's proposal, since GAO has responsibility under the ICA to monitor possible impoundments of budget authority. In a letter to then OMB Director Bolten, the Comptroller General "identified 12 instances where agencies withheld budget authority from obligation in direct response to the October 28 proposal totaling over $470 million," with an attachment table detailing each case in point. In what arguably amounted to an indirect admonishment of OMB, the letter closed with this advice:

> In the future, when the President chooses to propose cancellations of budget authority rather than rescissions of budget authority pursuant to the procedures specified in the Impoundment Control Act, your office should ensure that agencies appreciate the distinction and do not withhold budget authority from obligation in anticipation of a possible rescission. Agencies that withhold budget authority in this manner violate the Impoundment Control Act.[23]

In an apparent effort to avoid any further confusion, an OMB memorandum went out to all federal agencies the following month, emphasizing the important distinction between proposed cancellations such as those contained in the October 2005 message and rescission requests presented in special messages from the President pursuant to the ICA. In contrast to the ICA procedures, the 2005 cancellations "are proposals subject to the normal legislative process" and should not be withheld "pending congressional action on the President's proposed legislation."[24]

It is somewhat unclear as to why there were no formal rescissions proposed pursuant to the ICA during the George W. Bush Administration. Some have conjectured that this reflected deference to his Republican colleagues in Congress. The Republican Party, controlled both the House and the Senate from

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[21] OMB, "President Bush Requests Rescission and Reallocation Packages," Oct. 28, 2005. Available electronically at http://www.whitehouse.gov/omb/pubpress/2005/factsheet_rescission.pdf.

[22] White House, "Press Briefing by Conference Call with OMB Director Joshua Bolten," Oct 28, 2005.

[23] GAO, Comptroller General, "Impoundments Resulting from the President's Proposed Rescissions of October 28, 2005," B-307122, Mar. 2. 2006, p. 2.

[24] OMB, Memorandum M-06-10, "Reminder: Treatment of the Cancellation Proposals in the President's FY2007 Budget," Apr. 7, 2006.

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2001-2006 (107th through 109th Congresses). The use of the "cancellations" instead of ICA rescission proposals did occur during the time that the Republicans were in control of Congress. One explanation proffered for the dearth of vetoes exercised by George W. Bush might arguably be applicable to the absence of rescission proposals. As related in a news story from 2006, "One-party control of both sides of Pennsylvania [Avenue] has never ensured a veto-free Presidency; Democrat Franklin D. Roosevelt vetoed 635 bills enacted by Democratic Congresses. But unlike Roosevelt and the fractious Democrats of his era, Bush and the Republican leaders in Congress for the most part agree...." The writer went on to quote Vin Weber, then a lobbyist and former GOP House member, stating "This was the first time Republicans had full control since the '50s; we wanted to show we could work together as a governing majority....Coming this far without a veto [read rescission request], that's a sign of the party's cohesion and the president's strength."[25]

Developments During the Obama Administration

President Obama, akin to his predecessor, submitted no rescission proposals in the 111th Congress. On May 24, 2010, however, the President transmitted an Administration draft bill providing for expedited rescission procedures in Congress, called the Reduce Unnecessary Spending Act of 2010. On May 28, 2010, the Administration proposal was introduced as H.R. 5454 by Representative Spratt. On June 9, 2010, Senator Feingold, along with eight original cosponsors (Senator Carper and Senator McCain included), introduced S. 3474; the bill contained two changes from the Administration draft. S. 3474 would reduce the timeframe between enactment of a law and submission of a rescission message from within 45 days of congressional session after the enactment date of the funding to 45 calendar days. The other change would require that any amounts rescinded be devoted to deficit reduction (or increasing a budget surplus).

On June 17, 2010, the House Budget Committee held a hearing focused explicitly on the "Administration's Expedited Rescission Proposal." The sole witness was the Dr. Jeffrey Liebman, then serving as Acting Deputy Director of the Office of Management and Budget (OMB).

At the June hearing, some Members urged OMB to submit rescission requests under the existing framework in the Impoundment Control Act, suggesting that it could at least send a "useful signal" and help to build consensus on the need to reduce spending. Initially, Dr. Liebman replied that OMB decided instead to focus energy on the spending cuts and terminations that were included as a separate volume in the President's FY2011 budget submission and on advancing the expedited rescission proposal. In response to a direct question as to whether the Administration would transmit rescission messages pursuant to the ICA, proposing spending to be eliminated from FY2011 appropriations once enacted, Dr. Liebman implied that OMB viewed submission of rescission requests under current procedures as an ineffectual endeavor, noting

> We've [OMB] already indicated which programs we want eliminated from the budget [in a special volume included with the President's Budget Submission for FY2011]. In terms of whether we would make a formal rescission request under the existing rescission authority, we are concerned that when one does that, one doesn't get an up-or-down vote. And that basically that it's a fruitless process. So we want to work at any point in time in whatever the best way is to accomplish the terminations and reductions that we've proposed.[26]

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[25] Michael Grunwald, "Why Bush Has Trouble Just Saying No," *Washington Post*, February 26, 2006, http://www.npr.org/templates/story/story.php?storyId=6933766&ft=1&f=1001.

[26] "Rep. John Spratt Jr. Holds a Hearing on the Administration's Expedited Rescission Proposal." *Political Transcript Wire*, June 18, 2010

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The Member responded that he was asking whether OMB might submit some rescission proposals in FY2011 anyway, and stated "Because I think highlighting the spending is often times as powerful as actually the legislative act itself."[27]

The impact of earmark disclosure arguably has similarities to increased attention to particular provisions in appropriation measures included as part of a package of rescissions subject to expedited procedures in Congress. Both the House and the Senate established new earmark transparency procedures in 2007.[28] An analysis of data in the requisite earmark disclosure lists, typically included in the explanatory statement from a conference committee, found that in the 12 regular appropriations, the "number and value of Member-only earmarks decreased since FY2008, from 11,117 earmarks worth $12.5 billion in FY2008, to 9,281 earmarks worth $10.2 billion in FY2010, down 17% by number and 19% by value."[29]

On January 25, 2011, Senator McCain, along with Senator Carper and 21 other original cosponsors, introduced S. 102, the Reduce Unnecessary Spending Act of 2011, which is identical to S.3474 from the 111th Congress. The 112th Congress measure would amend the ICA of 1974 to provide an expedited process for consideration of certain rescission requests from the President. Within 45 days after signing a bill into law, the President would be able to submit a package of rescissions for reducing or eliminating discretionary appropriations or non-entitlement mandatory spending contained in the bill as enacted. Such proposed rescissions from the President would be considered as a group and would be subject to expedited procedures in Congress, designed to make an up-or-down vote on the package more likely.

Some Concluding Thoughts

When reviewing data on rescission actions since 1974, one may ponder the dearth of rescission proposals that have been transmitted to Congress by the executive branch. Why have Presidents employed the ICA framework so infrequently? A variety of factors may be involved here, such as limitations in the ICA framework allowing Congress to ignore rescission messages to the consternation of the executive branch. There are also factors such as collegial solidarity when the executive and legislative branches are controlled by the same political party, or a President's disinclination to cut funding for agencies or departments under his control. Other possibilities include the incalculability of the deterrent effect, and the challenge of coming up with agreed upon objective criteria on which to base rescission decisions.

Advocates of changing the ICA framework to make it easier for the President's rescission proposals to prevail, or at least to receive an up-or-down vote in Congress, sometimes point to limitations in the current process as contributing to the low number of rescissions in the last 35 years.[30] Under the ICA, there is no requirement that Congress consider a President's rescission requests. Funds proposed for

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[27] Ibid.

[28] The spending earmark definitions in House Rule XXI, clause 9, and Senate Rule XLIV are identical, except the identification of earmark requesters. A spending earmark is a provision in legislation or report language that meets specific criteria. First, the provision or language is primarily included at the request of a Member. Second, the provision or language provides, authorizes, or recommends a specific amount of spending authority for certain purposes to an entity, or to a specific state, locality, or congressional district. The purposes are a contract, grant, loan, loan guarantee, loan authority, or other expenditure. Finally, any of the above spending set asides that are selected through a statutory or administrative formula-driven or competitive-award process are excluded. Derived from CRS Report RL34462, *House and Senate Procedural Rules Concerning Earmark Disclosure*, by Sandy Streeter, p. 2.

[29] CRS Report R40976, *Earmarks Disclosed by Congress: FY2008-FY2010 Regular Appropriations Bills*, by Carol Hardy Vincent and Jim Monke.

[30] For example, see the testimony from OMB at the House Budget Committee hearing in June 2010 on the Administration's expedited rescission proposal, already cited.

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rescission by the President in a special message must be made available for obligation unless Congress acts to approve the President's requested rescission(s) within 45 days of continuous session. The ICA, moreover, allows the President to request rescissions only of discretionary spending, a portion of the budget which accounts for 38% of annual outlays, while 62% of outlays are mandatory spending (controlled by law other than appropriations acts, including net interest).

The record of cancellations during the brief period that the 1996 LIVA was in effect arguably serves to discount such criticisms of the current ICA process. As discussed above, the LIVA reversed the burden of action regarding rescission proposals; cancellations proposed by the President became permanent unless disapproved by Congress (ultimately requiring rejection by a 2/3 majority in both chambers to override a presidential veto of a disapproval bill). During this period the President also had authority to cancel new items of direct (mandatory) spending and certain targeted tax benefits as well as items of discretionary spending. Yet all of the cancellations made by President Clinton in FY1998 (including those overturned) totaled some $355 million, with a projected five-year savings just under $1 billion. When the cancellations disapproved by Congress are excluded, the estimated amount to be saved over five years was less than $600 million. The brief experience in the Clinton Administration does not necessarily reflect how expedited rescission authority might be exercised by other Presidents in other circumstances. The limited use of the LIVA, however, seems consistent with the infrequency with which the rescission framework provided in the ICA has been used.

This observation is consistent with another consideration in assessing the effectiveness of the ICA since 1974 or the potential force of expedited rescission authority for the President [illegible] the so-called deterrent effect. OMB's Acting Deputy Director, Jeffrey Liebman, referred to this potential effect in his statements at a Senate hearing in May and at the House hearing in June, 2010: "Knowing this [expedited rescission] procedure exists may also discourage policymakers from enacting such [unnecessary] spending in the first place."[31] At the House Budget Committee hearing, Representative Etheridge agreed with Dr. Liebman that "we're all concerned about wasteful tack-ons," but then asked, "But how would you envision the administration working with Congress before they issue a rescission package?" Dr. Liebman suggested that the "sense of saving" would occur more through the deterrent effect than through the approval of rescission packages from the President, noting

> ...If this [expedited rescission] provision works like it should, its biggest impact will not be in passing rescission packages, but I think it will be in preventing wasteful spending from being added on in the first place. It will be enough of a deterrent that in the lead-up to passing bills, one will be able to avoid getting those tack-ons added.[32]

The scope of the deterrent effect ultimately depends on political calculations by each Member of Congress. If lawmakers decide that a project is of value to their district or state and will be appreciated by their constituents, they arguably will not be deterred by the prospect of a President singling out their project in a rescission bill. From this perspective the President's action may serve to highlight their efforts to provide assistance to their district or state.

The issue of establishing objective criteria to be used by the executive branch in reviewing enacted appropriations measures for items to be included in a rescission package was discussed at some length during the 2010 hearing by the House Budget Committee on the Administration's expedited rescission proposal. Attention focused on the meaning of "unnecessary spending," which was not defined or

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[31] Statement of Jeffrey B. Liebman before the House Budget Committee, June 17, 2010, http://budget.house.gov/hearings/2010/06.17.2010_Liebman_Testimony.pdf.

[32] "Rep. John Spratt Jr. Holds a Hearing on the Administration's Expedited Rescission Proposal," *Political Transcript Wire*, June 18, 2010.

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mentioned in the Administration bill aside from the title. Some Members objected to the possible implication that somehow the executive branch knows how to spend federal monies better than does Congress, so that earmarks found in the President's budget are "necessary" whereas congressional earmarks are "unnecessary." At one point in such an exchange, Dr. Liebman stated: "Let me be clear. This [expedited rescission bill] is not meant to go after every earmark. It's meant to go against low-value spending. And one would have to evaluate each proposal on its merits." Cosponsors of the Administration bill, as well as those uncommitted, pressed for some statutory guidelines to reduce the current subjectivity of "unnecessary." Representative Minnick, who has served as sponsor or cosponsor of various expedited rescission measures and attended the hearing as a guest, provided this commentary:

> What the executive branch or the particular occupant of the executive branch in the White House may deem unnecessary may be deemed quite warranted here or to the sponsors of that particular spending. So it is a matter of viewpoint.... There have to be some guidelines... After all, when a spending item gets into a bill, in most cases it's had some review process, some thought has gone into it, and it has stakeholders. It has, you know, advocates. And so I do think there has to be some kind of definition of what we mean by unnecessary spending or low-value spending, and what those guidelines would be.[33]

The OMB spokesman acknowledged the Members' concern and promised to consider possible remedies.

The enactment of a disapproval bill in 1997 pursuant to the LIVA of 1996, by overriding President Clinton's veto by a two-thirds majority in both chambers, showed that controversy may arise even when specified criteria are purportedly used in reviewing appropriations measures for possible rescission proposals. President Clinton sought to cancel 38 projects in the military construction bill, estimating that this would save $290 million over a five-year period. He identified three criteria that guided the selections:

1. the Defense Department concluded that the projects were not a priority at the time;
2. the projects did not make an immediate contribution to the housing, education, recreation, child care, health, or religious life of the military service; and
3. they would not have been built in FY1998 in any event.[34]

These justifications came under substantial criticism. Disapproval resolutions were introduced in both chambers. The Senate Appropriations Committee held hearings and took testimony from the Air Force, the Navy, and the Army. The military witnesses told the committee that the canceled projects were mission-essential and could be commenced in 1998.[35] On October 30, 1997, the Senate vote on S. 1292, to disapprove the cancellations, was 69-30. On November 8, 1997, the House voted 352 to 64 for its disapproval resolution, H.R. 2631, which then passed the Senate by unanimous consent the following day. President Clinton vetoed the resolution, but a strong bipartisan majority overrode him by the necessary two-thirds margin. The vote was 78 to 20 in the Senate and 347 to 69 in the House.[36]

The framework established by the ICA in 1974 has provided the opportunity for greater accountability in reporting of rescissions and for increased congressional oversight and control of impoundment actions. Total budgetary savings of $25 billion from presidential rescission requests approved by Congress since 1974 may appear rather inconsequential with total federal outlays and annual budget deficits both in the

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[33] Ibid.

[34] See *Weekly Compilation of Presidential Documents*, vol. 33, (Washington: GPO, 1997), pp. 1501-02.

[35] Sen. Ted Stevens, "S. 1292, Disapproval Legislation," Senate Debate , *Congressional Record*, vol. 143, part 15 (October 7, 1997), pp. 22133-22134.

[36] P.L. 105-159, 112 Stat. 19, February 25, 1998.

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trillions. Yet any budgetary mechanism that helps restrain spending, even in a small way, may prove useful for deficit reduction. It remains an open question whether providing the President with expedited rescission authority would increase the employment or effectiveness of the rescission tool in reducing unnecessary spending.

This concludes my prepared statement. I would be happy to respond to questions.

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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

March 15, 2011

On

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

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

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

Line Item Veto Act of 1996

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

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

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

Supreme Court Decisions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Expedited Rescission Authority

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

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

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

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

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

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

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

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

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

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

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

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

Other Potential Constitutional Issues

Expedited Procedures

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

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

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

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

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

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

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

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

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

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

Potential Impoundment Issue

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

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

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

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

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

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

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

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

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

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

[68] *Id.* at § 1023(a).

[69] *Id.* at § 1025(c)(3).

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

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

Conclusion

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

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

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

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

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

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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
Tuesday, March 15, 2011

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 27 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.

I have testified several times in support of a constitutional line-item veto, and CAGW maintains that granting expedited rescissions authority to the President is essential to establish fiscal discipline in Washington.

Congress has been consistently guilty of appropriating tens of billions of dollars for projects that are not competitively awarded, authorized, or subject to congressional hearings or debate. As the nation rapidly approaches its critical $14.294 trillion statutory debt limit, continuing to pour money into wasteful, unnecessary and duplicative programs without proper scrutiny or oversight is not only inefficient, it is fiscally irresponsible and an affront to taxpayers and future generations who will ultimately bear the burden of our massive financial obligations.

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For a brief period, the American people had hope that reform would reduce this assault on their wallets. In 1995, Congress passed the line-item veto law by a voice vote in the House and an overwhelming 69-31 vote in the Senate.

On January 1, 1997, the line-item veto law took effect. This law was enacted after decades of attempts to provide this power to the president. But this new veto privilege was used sparingly (some would say very selectively) 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. The Supreme Court ultimately ruled the 1996 Line Item Veto Act unconstitutional in mid-1998.

Nevertheless, the need for a constitutional version of the presidential line-item veto still exists. Congress has repeatedly confronted the president with hastily-crafted, 11th-hour omnibus bills that cover all or substantial portions of federal spending for the year. If the president exercises his current, broad veto power on such legislation it could force a shutdown of the federal government.

A constitutional line-item veto authority is also necessary because, under current law, the president's rescission proposals can easily be ignored. While the President 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 and the spending proposals stand as law. 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 shifting of the balance of power toward Congress under the 1974 Act.

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.

Senators Tom Carper (D-Del.) and John McCain (R-Ariz.) have introduced S. 102, the Reduce Unnecessary Spending Act of 2011. This important legislation would establish limited executive rescission authority that would help rein in federal spending, minimize pork-barrel projects, and begin to reduce the nation's ever-growing debt.

S. 102 fully satisfies the constitutional criteria that were cited as the reasons for striking down the 1996 Line Item Veto Act. First, the rescissions message must be sent to Congress within 45 days of the president signing the targeted spending bill. Second,

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the message may only propose cutting discretionary spending and certain non-entitlement mandatory spending. Finally, the president may only propose changing spending levels; if he attempts to change the law, any member of Congress can raise a point of order against the package and, if sustained, the package will lose its guarantee of a vote in Congress.

If these conditions are met, the rescissions package will receive a vote within 10 days and will require a majority in both chambers in order to become law. Amendments will be prohibited in both chambers to ensure a swift and clean process. Any funds that are rescinded will go toward reducing the deficit.

Unlike the 1996 Line Item Veto Act, this bill contains a sunset provision that will allow this new rescission authority to expire at the end of 2015. Such a provision will permit Congress to "test-drive" this new executive power and help mitigate the misuse or abuse of expanded authorities.

Rescissions messages are usually deemed dead on arrival, as Congress is rarely compelled to vote on these packages. As a result, both the Bush and Obama administrations virtually abandoned the rescissions process. But the Constitution does not give Congress a blank check to spend tax dollars on anything it wants in whatever way it wants, and there is no shortage of items to cut from the nation's massive, ballooning budget. CAGW's *2010 Prime Cuts* recommends 763 wasteful, duplicative and unnecessary spending items for reduction and termination that would save taxpayers $350 billion in the first year and $2.2 trillion over five years. Passage of S. 102 would not only allow the president to propose important spending cuts, but would also provide incentives for him to do so by forcing Congress to seriously consider and vote on the rescissions package.

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.

Raiding the federal treasury to "bring home the bacon" was, until very recently, a common practice. Since 1991, CAGW's annual *Congressional Pig Book* has identified 109,978 examples of egregious pork-barrel spending, which has cost taxpayers $306 billion. While the House and Senate have adopted an earmark moratorium for the 112th

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Congress, earmarks are not yet extinct. Granting the president expedited rescissions authority would not only help trim excess government fat, but also give the president a tool to reduce the size and scope of earmarks should they return.

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.

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 discretionary spending is a serious problem, 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 would only tackle discretionary and non-entitlement spending, should be delayed until other budget problems are addressed or solved.

Mr. Chairman, S. 102 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.

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Maya MacGuineas Response to Senator Carper's Question

Question: The Reduce Unnecessary Spending Act would expedite rescissions requests that dealt with discretionary spending and certain non-entitlement mandatory spending. Could you please identify a handful of examples of non-entitlement mandatory spending? In what ways could the proposed legislation affect or address mandatory spending?

The Congressional Budget Office defines an entitlement as "A legal obligation of the federal government to make payments to a person, group of people, business, unit of government, or similar entity that meets the eligibility criteria set in law and for which the budget authority is not provided in advance in an appropriation act." In the Reduce Unnecessary Spending Act (S. 102), entitlement law is defined as "the statutory mandate or requirement of the United States to incur a financial obligation unless that obligation is explicitly conditioned on the appropriation in subsequent legislation of sufficient funds for that purpose, and the Supplemental Nutrition Assistance Program."

Based on the CBO definition and the definition of "entitlement law" provided in the bill, we have come up with a few examples of non-entitlement mandatory spending. Some of these are financial in nature, such as the Troubled Asset Relief Program (TARP) and support for Fannie Mae and Freddie Mac. Temporary Assistance for Needy Families (TANF) and other mandatory block grants to states, such as the Child Care and Development Block Grant, can also be considered non-entitlement mandatory spending, since neither states nor the federal government are legally obligated to provide benefits to all eligible applicants. Acceptance into these programs is not a given even if eligibility requirements are met since the number of beneficiaries is limited by available resources.

In terms of how expedited rescission authority would affect mandatory spending, the effect would likely be small. Since a large portion of mandatory spending involves entitlement programs—including Social Security, Medicare, and Medicaid—expedited rescission authority would not apply to a significant amount of mandatory spending. Applying rescission to block granted programs, however, would be unconventional, since states decide how to spend the money; if the President applied rescission authority to block grants, it would be more equivalent to cutting spending after-the-fact than rescinding wasteful or inefficient spending. The President could certainly use rescission authority to rescind unused funding from the block grants, however.

In short, rescission authority could be used on non-entitlement mandatory spending, but if its purview was broadened to include all mandatory spending it would be more effective. Either way, though, scrutinizing mandatory spending for budgetary savings on a broader scale would require tough choices that would move beyond rescission authority.

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MEMORANDUM September 22, 2011

To: Senator Tom Carper
Attention: Deirdre Armstrong

From: Virginia A. McMurtry
Specialist in American National Government
Government and Finance Division
Congressional Research Service
202-707-8678

Subject: **Answering Post–Hearing Questions for the Record**

"Enhancing the President's Authority to

Eliminate Wasteful Spending and Reduce Budget Deficits"

(March 15, 2011)

Post–Hearing Questions for the Record

Responses from Virginia A. McMurtry, CRS

1. The Reduce Unnecessary Spending Act would expedite rescissions requests that dealt with discretionary spending and certain non-entitlement mandatory spending. Could you please identify a handful of examples of non-entitlement mandatory spending? In what ways could the proposed legislation affect or address mandatory spending?

Federal spending may be divided into three categories: discretionary spending, mandatory spending and net interest. Discretionary spending is provided and controlled via the annual appropriations process, while mandatory spending is controlled by laws other than appropriations acts. Net interest payments are automatically authorized and hence sometimes reported as a third grouping.[1]

Mandatory spending is mainly derived from entitlement authority provided for federal benefits programs such as Social Security and Medicare.[2] Some non-entitlement mandatory spending, however, exists. The

[1] For further discussion of the categories, see CRS Report RL33074, *Mandatory Spending Since 1962*, by D. Andrew Austin and Mindy R. Levit.

[2] Entitlement authority means "(A) the authority to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriations Acts, to any person or government if, under the provision of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law; and (B) the food stamp program." (2 U.S.C. § 622(9))

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Office of Management and Budget (OMB), in discussing the Administration's expedited rescission proposal (reflected in S. 102) notes:

> In almost every case, "non-entitlement mandatory funding" exists where an agency has the authority to spend the proceeds of fees or other offsetting collections to run the agency. The spending in question is generally indistinguishable from other funding for administering the government that is typically provided through discretionary appropriations.[3]

In short, an agency has statutory authority to use the proceeds of offsetting collections derived from nonfederal sources to fund agency spending. The offsetting collections are credited to expenditure or funds accounts and are generally available for obligation without further legislative action.

Offsetting collections comprise one type of non-entitlement "spending authority," provided in laws other than appropriations acts, obligating the federal government to make subsequent payments. Types of spending authority include contract authority, authority to borrow, use of monetary credits or bartering,[4] and authority to make other payments not provided for in advance by appropriations acts (such as but not limited to offsetting collections).[5] A single account may receive spending authority from more than one of these sources.

According to a compilation by the Government Accountability Office (GAO), in 1996 304 budget accounts had authority to use offsetting collections from nonfederal sources.[6] Upon examination, however, most of these provide discretionary rather than mandatory spending authority, according to OMB.[7] It proved very difficult to find examples of offsetting collection accounts tagged as mandatory by OMB in budget appendices, even though apparently controlled by authorizing laws rather than annual appropriations acts. Five examples of such accounts follow, including titles and identification codes, brief descriptions, and new spending authority from offsetting collections available in FY2010.[8]

- Department of Defense, *Pentagon Reservation Maintenance Revolving Fund*, 97-4950-0-4-051, established by the 1991 National Defense Authorization Act (10 U.S.C. 2674). The Secretary of Defense establishes rates and collects charges for space and services provided an organization or entity using any facility or land on the Pentagon Reservation located in Arlington, VA. Monies deposited in the fund remain available, without fiscal year limitation, for real property management, operation, protection, construction, repair, and related activities. For FY2010, offsetting collections provided $771,000,000 in new spending authority.

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[3] U.S. Office of Management and Budget, *Fiscal Year 2012 Analytical Perspectives: Budget of the U.S. Government* (Washington: GPO, 2011), p. 156.

[4] Formally termed the authority to forgo collection of proprietary offsetting receipts, whereby agencies may make purchases by giving the seller some kind of credits in lieu of issuing a check. Subsequently, the holder of the credits may apply them to reduce an amount owed the government for other transactions.

[5] U.S. General Accounting Office, *Budget Issues: Inventory of Accounts with Spending Authority and Permanent Appropriations, 1996*, GAO/AIMD-96-79, 1996, p. 1, http://www.gao.gov/archive/1996/ai96079.pdf.

[6] Ibid., p. 7.

[7] In the Appendix volume included in the President's annual budget submission, OMB records budgetary resources available in the account as mandatory or discretionary. Very few of the accounts with spending authority from offsetting collections are labeled as "mandatory." The examples included above were identified from the 1996 GAO study, and then cross-referenced to the FY2012 Budget Appendix to confirm designation of their mandatory status by OMB.

[8] Figures represent actual data for FY2010 and come from U.S. Office of Management and Budget, *Fiscal Year 2012 Appendix. Budget of the U.S Government* (Washington: GPO, 2011).

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- Department of Health and Human Services, *Food and Drug Administration Revolving Fund for Certification and Other Services,* 75-4309-0-3-554 (21 U.S.C. 346a, 356, 357, 376). The FDA certifies color additives for use in food, drugs, and cosmetics, and lists color additives for these and also for medical devices. Fees paid by the affected industries completely finance these services. New spending authority from offsetting collections for this public enterprise fund totaled $8,000,000 in FY2010.
- Department of the Interior, *Helium Fund,* 14-4053-0-3-306 (50 U.S.C. 167d (b), (f)). The Helium Act Amendments of 1960 (50 U.S.C. 167) authorized the Secretary of Commerce to sell helium for commercial uses. Funds received are credited to this public enterprise fund and finance the production, conservation, sale, and distribution of helium necessary for essential government activities. In FY2010, new spending authority from offsetting collections provided $176,000,000.[9]
- Department of the Treasury, *Comptroller of the Currency Assessment Funds,* 20-8413-0-8-373 (12 U.S.C. 481). This revolving trust fund, dating back to 1864, receives monies derived from assessments on national banks. The account also garners interest on investments in U.S. government securities, but receives no appropriated funds. In FY2010, new spending authority from offsetting collections totaled $794,000,000.
- Other Independent Agencies, *National Credit Union Administration Operating Fund,* 25-4056-0-3-371 (12 U.S.C. 1755). The National Credit Union Administration (NCUA) through this operating fund carries out activities prescribed by the Federal Credit Union Act of 1934, as amended, such as chartering new credit unions and performing safety and soundness examinations. Offsetting collections are derived from fees paid by all federally chartered credit unions, resulting in a self-supporting system and totaling $190,000,000 in FY2010.

With respect to ways in which the proposed legislation could affect or address mandatory spending, the following observation may prove of interest. First, S. 102 references section 3 of the Congressional Budget Act for definition of key terms, such as "new budget authority," which means "the authority provided by Federal law to incur financial obligations," and includes provisions of law that make funds available for obligation and expenditure such as appropriations and proceeds of offsetting receipts and collections, as well as borrowing authority and contract authority.[10] The proposal specifically refers to non-entitlement mandatory spending, so authority provided elsewhere than in appropriations acts could potentially be included in a rescission package subject to the expedited procedures. This would allow for broader coverage than that found in some other bills introduced previously, which would have provided expedited rescission authority for the President, but confined it to discretionary spending in appropriations laws.[11]

On the other hand, a further limitation, as noted already, stems from the very small universe of accounts funded by offsetting collections that are designated by OMB as mandatory non-entitlements. Examples of spending authority from offsetting collections designated by OMB as discretionary are much more common.[12] According to GAO, in FY1994, $124 billion coming from nonfederal sources as offsetting

[9] The Helium Privatization Act of 1996 (P.L. 104-273) provides for the eventual movement of the program and its functions to the private sector.

[10] P.L. 103-344, 88 Stat. 297. "Definitions" section codified at 2 U.S.C. § 622.

[11] See CRS Report R41373, *Expedited Rescission Bills in the 111th and 112th Congresses: Comparisons and Issues,* by Virginia A. McMurtry.

[12] See GAO Report AIMD-96-79 for listing of accounts, by agency, authorized to receive offsetting collections. GAO identified (continued...)

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collections were credited to appropriation or fund accounts. One might care to reassess whether S. 102 could arguably cover accounts funded by offsetting collections, but characterized by OMB as providing discretionary rather than mandatory spending authority. Inclusion of a definition of "non-entitlement mandatory spending" in the bill language might serve to clarify this matter.

A final factor to mention is that statutory language providing spending authority for offsetting collections often is not limited to a single year or two, but rather remains available indefinitely, in contrast to the many accounts funded through annual appropriations. Language in S. 102 stipulates that if the President wishes to request rescissions under the expedited procedures, the package must be sent to Congress within 45 calendar days following enactment. Given this timing, the opportunities for a President to propose rescissions from such a budget account would tend to come up relatively infrequently compared to accounts funded by annual appropriations.

(...continued)

304 accounts in 1996 with authority for offsetting collections, compared with 263 accounts so authorized in 1987 (p. 7).

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Post-Hearing Questions for the Record
Submitted to Tom Schatz, Citizens Against Government Waste
From Senator Tom Carper

"Enhancing the President's Authority to
Eliminate Wasteful Spending and Reduce the Budget Deficit"
(March 15, 2011)

1. The Reduce Unnecessary Spending Act would expedite rescissions requests that dealt with discretionary spending and certain non-entitlement mandatory spending. Could you please identify a handful of examples of non-entitlement mandatory spending? In what ways could the proposed legislation affect or address mandatory spending?

According to a June 2011 Congressional Research Service (CRS) report, mandatory spending in fiscal year 2010 accounted for more than half of total federal spending and more than one-eighth of the gross domestic product. Social Security, Medicare and the federal share of Medicaid made up more than 43 percent of federal spending. Non-entitlement mandatory spending programs, including Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), unemployment insurance, some veterans' benefits, federal employee retirement and disability, Supplemental Nutrition Assistance Program (SNAP), and the earned income tax credit (EITC), also contribute to the nation's growing liabilities.

CRS also noted that the Forest Service makes payments to states that are mandatory, but are not entitlements. Some agencies also have the authority to sign contracts or create obligations in other ways, which become part of mandatory spending unless limited by the Budget Enforcement Act (BEA) of 1990 or other budget legislation. Salaries of members of Congress, the President, and federal judges are also considered non-entitlement mandatory spending.

S. 102, the Reduce Unnecessary Spending Act, specifies that the president's rescissions message can only propose cutting discretionary spending and certain non-entitlement mandatory spending. Changes to entitlement spending or revenues are not allowed. The president's rescissions package will be subject to a vote within 10 days and will require a majority in both chambers in order to become law. Amendments will be prohibited in both chambers to ensure a swift and clean process. Any funds that are rescinded will go toward reducing the deficit.

Excluding entitlements, S. 102 would grant the president the authority to propose rescissions to everything from wasteful earmarks, like those cited in Citizens Against Government Waste's (CAGW) annual *Pig Book*; to duplicative government discretionary programs, including those cited by the Government Accountability Office in its March 2011 report; to non-entitlement mandatory spending as cited by CRS. There is certainly no shortage of places to cut federal spending; CAGW's *2011 Prime Cuts* report has 691 recommendations that would save taxpayers $391.9 billion in the first year and $1.8 trillion over five years.

CAGW has always been an advocate of making responsible and broad-based spending cuts; no program or agency should be off the table when it comes to making critical spending reductions and balancing the nation's budget, including mandatory expenditures. With a national debt that

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tops $14.4 trillion, Congress and the president should be given the tools to effectively propose and rescind any and all wasteful, unnecessary and duplicative government spending throughout the entire federal budget.

According to the Congressional Budget Office, mandatory spending will account for three out of every five dollars of federal spending by the end of the next decade. While the Reduce Unnecessary Spending Act would help to address the growth in non-entitlement mandatory expenditures, the legislation would prohibit making reductions to the nation's growing entitlement programs. This limitation is, in part, meant to ensure that S. 102 fully satisfies the constitutional criteria that were cited as the reasons for striking down the 1996 Line Item Veto Act. The president may only propose changing spending levels; if he attempts to change the law, any member of Congress can raise a point of order against the package and, if sustained, the package will lose its guarantee of a vote in Congress.

CAGW has long recognized that reforming Medicare, Medicaid and Social Security will be a critical part of gaining control of runaway expenditures, as these entitlements comprise the majority of mandatory federal spending. Nevertheless, passage of S. 102 would allow Congress and the president to trim discretionary and non-entitlement mandatory spending, which would be an important first step toward balancing the budget, reducing the deficit, and putting the country back on the path toward fiscal sanity.

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