

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FREDERICK D. RAINES, DIRECTOR, OFFICE OF
MANAGEMENT AND BUDGET, ET AL., Appellants v.
ROBERT C. BYRD, ET AL.

CASE NO: 96-1671

PLACE: Washington, D.C.

DATE: Tuesday, May 27, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FREDERICK D. RAINES, DIRECTOR, :

4 OFFICE OF MANAGEMENT AND :

5 BUDGET, ET AL., :

6 Appellants :

7 v. : No. 96-1671

8 ROBERT C. BYRD, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, May 27, 1997

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:26 a.m.

15 APPEARANCES:

16 WALTER DELLINGER, ESQ., Acting Solicitor General,

17 Department of Justice, Washington, D.C.; on behalf of
18 the Appellants.

19 ALAN B. MORRISON, ESQ., Washington, D.C.; on behalf of the
20 Appellees.

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1 P R O C E E D I N G S

2 (10:26 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 96-1671, Frederick D. Raines v. Robert C.
5 Byrd, and counsel have been advised, I believe, that you
6 are to have 35 minutes each on a side.

7 General Dellinger.

8 ORAL ARGUMENT OF WALTER DELLINGER, ESQ.

9 ON BEHALF OF THE APPELLANTS

10 GENERAL DELLINGER: Mr. Chief Justice, and may
11 it please the Court:

12 The single most important point I want to make
13 this morning is a point that goes both to standing and the
14 merits, and it is this: the passage of the Line Item Veto
15 Act does not alter the authority or the ability of
16 Congress to require the executive branch to spend
17 appropriated funds. After the act, as before, every
18 legislative option about whether an appropriation should
19 be mandatory or discretionary remains fully available to a
20 simple majority of Congress.

21 When the time comes to vote on an appropriations
22 bill, the legal effect of each option, mandatory,
23 discretionary, linked or unlinked, will be perfectly
24 clear. Every Member's vote will be fully counted. The
25 simple majority of Congress retains full authority to

1 protect any item of spending from presidential
2 cancellation. This point goes to the heart of the
3 appellee's claim of standing.

4 Consider their best shot, I believe is the
5 example with which they -- they feature in the opening of
6 their reply brief, an example where a Member votes for an
7 ABC bill which might lead, they say, to the post hoc
8 creation of an ABC law or an AC law.

9 Suppose, they say, the items A, B, and C are aid
10 to Egypt, to Jordan, and to Israel. A Member of Congress
11 might well wish to vote for the delicate balance embodied
12 in the entire package, but have objections to keeping any
13 of the items if the others were to be stricken. The act
14 converts a vote, they say, for ABC in toto into a vote for
15 a three-item menu from which the President may select any
16 combination that he alone prefers, and the Member is
17 injured at the moment he must cast his vote. This is
18 simply a profound misunderstanding of the nature of the
19 situation.

20 When the time comes for Congress to vote on the
21 omnibus foreign aid bill it can, by simple majority, make
22 any choice it wants about mandating or linking those
23 funds. Congress can say with respect to the appropriation
24 for each country that, quote, no funds under this act may
25 be expended for payments to country A unless funds are

1 provided concurrently to the other two countries, or
2 Congress can vote to mandate all three, using the language
3 it actually sets out in the bill for limited tax benefits
4 by saying something like, section 1021(a) of the
5 Empowerment Control Act shall not apply to provisions I,
6 J, and E of this appropriations act.

7 QUESTION: Well, it could do that all across the
8 board, I suppose, General Dellinger, simply perhaps render
9 the thing kind of a nullity if it incorporated that sort
10 of a provision in every appropriations item.

11 GENERAL DELLINGER: It could, of course, though
12 we doubt that it would. We think that the act has
13 important functions as a background default mode but it
14 is -- would not be at all surprising if particular
15 projects were put forth at an appropriation and also with
16 the notion that section 1021(a) should not apply.

17 QUESTION: Well, of course, the President then
18 could veto such subsequent bill and that would then
19 require a larger vote of Congress to override the veto. I
20 mean, it does put them in a different position to that
21 extent, perhaps.

22 GENERAL DELLINGER: No, I'm not sure that I
23 agree, if I understand your question, Justice O'Connor.
24 The --

25 QUESTION: Well, suppose Congress decides later

1 on that maybe some type of appropriations shouldn't be
2 subject to this line item veto, so they include passage in
3 a subsequent bill saying that the Line Item Veto Act won't
4 apply to a certain type of appropriation. That, of
5 course, has to go to the President for signature, and he
6 then can veto that and that then would require enough
7 votes to override that veto.

8 GENERAL DELLINGER: Yes, that --

9 QUESTION: And to that extent it kind of changes
10 the equation.

11 GENERAL DELLINGER: But in your example Congress
12 passes the requirement that the provision be exempt from
13 this provision only after it has first passed an omnibus
14 appropriations act, but Congress is more likely to choose
15 to do that with an appropriation it cares about in the
16 process of passing the omnibus appropriations act, and
17 that's not, you know, unfamiliar.

18 Congress in the very act that they use as an
19 example provided that the assistance for Israel and Egypt
20 shall be provided with the President's assurance that the
21 level does not cause an adverse impact on the total level
22 of military support, that the sum of \$815 million
23 available only for Egypt with the understanding that Egypt
24 will undertake significant economic reforms, et cetera.

25 That is to say, Congress is quite familiar with

1 that process, so that I think if you looked at this in the
2 context of a real case or controversy after the fact, you
3 might well have seen that Senator Byrd or Senator Moynihan
4 had moved to link the aid to Egypt, Israel, and Jordan,
5 and had that rejected, 53-47, and then moved to make --

6 QUESTION: Well, but in all events, Mr.
7 Dellinger, you are defending the line item veto as it was
8 enacted and as it was intended to work, are you not?

9 GENERAL DELLINGER: That is correct.

10 QUESTION: And it does seem to me that there is
11 some point to the argument that this changes the
12 legislative dynamic. Now, whether or not that is
13 sufficient to create a cause of action or standing is what
14 we're here to decide.

15 GENERAL DELLINGER: Yes. It was intended to and
16 it does change the legislative dynamic, but not in a way
17 that creates a legal injury. Senator --

18 QUESTION: Mr. Solicitor General, your example
19 of the ABC and a small number certainly is easy to
20 understand. They can do that. But isn't it true that it
21 the -- it is anticipated that the budget bill will include
22 maybe hundreds of items, or a very large number, and it's
23 unlikely that you could work out all combinations in
24 advance, so that for example if a Congressman was
25 interested in the Navy Yard in San Diego or something he

1 wouldn't know whether that would survive.

2 GENERAL DELLINGER: No, he wouldn't, but that's
3 only because he will have been unable to convince a
4 majority of his colleagues to make that mandatory.

5 I mean, the critical aspect --

6 QUESTION: Yes, but isn't it true -- isn't it
7 true that the typical bill is anticipated to have a large
8 number of items and that the ABC example is really not
9 very realistic.

10 GENERAL DELLINGER: That is correct. That is
11 their example, and I do understand that the bill has a
12 large number of items, but a Member who has a very
13 particular interest in preserving the San Diego Shipyard
14 has it within his power to convince a majority of his
15 colleagues by simply adding the phrase that to this item
16 section 1021(a) shall not apply.

17 QUESTION: Yes, but then you might have 300
18 different Congressmen wanting to put that rider on --

19 GENERAL DELLINGER: That is correct.

20 QUESTION: -- that particular item.

21 GENERAL DELLINGER: And what it would take is
22 the political will on the part of Congress to maintain the
23 commitment that the Line Item Veto Act represents the
24 deficit reduction, but the --

25 QUESTION: General Dellinger, it sounds to me

1 from what you've said so far that no one would have
2 standing because no one would be injured, because all
3 choices are always open to Congress.

4 In your brief, you took the position that this
5 is not a whether question but a who and a when question,
6 but now you seem to say, well, there's nothing really
7 that's changed. Congress retains the power to do anything
8 it wants.

9 GENERAL DELLINGER: Justice O'Connor, it is a
10 whether question, and a when question. I'm sorry, I did
11 it again. My --

12 (Laughter.)

13 GENERAL DELLINGER: May I take -- once you get
14 that in your mind, you know, you're lost. May I apologize
15 to Justice O'Connor and Justice Ginsburg, and to Chief
16 Justice Souter.

17 (Laughter.)

18 GENERAL DELLINGER: Justice Ginsburg, it's a
19 particularly good question, too, so I'm -- the -- I hate
20 to attribute it elsewhere.

21 That is not what I am suggesting, because of
22 course there will be standing at the appropriate time by
23 someone who is injured. I'm suggesting that these
24 Senators and Members do not have standing now and never
25 will have standing.

1 QUESTION: But on the --

2 GENERAL DELLINGER: But I'll tell you who would
3 have standing. If Congress passes an appropriation for a
4 hog for every farmer on certain conditions, and the
5 President cancels that item, a farmer who is supposed to
6 get his hog under the appropriation act sues the Secretary
7 of Agriculture and says, I want my hog. This conferral of
8 authority on the President --

9 QUESTION: And isn't --

10 GENERAL DELLINGER: -- of a line item or items
11 is unconstitutional --

12 QUESTION: And isn't his argument that there is
13 a lack of legislative regularity that violates the
14 Constitution? Isn't that what his argument is?

15 GENERAL DELLINGER: I suppose that is his
16 argument.

17 QUESTION: Just as in the Chadha case there was
18 a violation of the Constitution in the way the bill was
19 enacted as to Chadha.

20 Now, if that's so, if there's a violation of the
21 constitutional regularity that is mandated on the
22 Congress, why isn't there an injury now?

23 GENERAL DELLINGER: There's not an injury now
24 because these Members of Congress at this point can vote
25 and persuade their colleagues to vote for any item they

1 wish.

2 The -- Senator Byrd and Senator Moynihan and the
3 others allege that they are presently uncertain about what
4 the consequence of their vote will be, but as I noted at
5 the outset they have in the hands of the majority of their
6 colleagues the key to their own uncertainty by --

7 QUESTION: They don't. How -- are we talking
8 about injury in fact? I mean, injury in fact? A Senator
9 or Congressman is sitting there with a bill that's about
10 this high and says, I don't even -- I've never read this
11 entire thing, frankly, with the budget. I'm relying on
12 other people to tell me everything in it, and I can't
13 figure out every permutation and combination, and if
14 you're telling me I'm supposed to go start having special
15 laws passed as a factual matter I can't do it, and so I'm
16 injured in fact.

17 Now, why isn't that an injury in fact? Maybe
18 there are prudential reasons why in certain circumstances
19 a Congressman or Senator should not be allowed to make
20 such a claim to have standing, but why isn't it an injury
21 in fact?

22 GENERAL DELLINGER: It is not an injury
23 sufficient for Article III purposes. I know that he may
24 be harmed at present, because that uncertainty he shares
25 in common with any Member of Congress who does not know

1 how certain the future is.

2 If you're voting on the Omnibus Crime Control
3 Act, it may be that the death penalty provision or the gun
4 control provision is the sole reason you would vote for
5 such a bill, and yet you do not know at the point you have
6 to vote whether this Court would sustain such a provision.
7 You in that sense have, if you want to call it that, a
8 factual injury which may lead you to seek an advisory
9 opinion.

10 QUESTION: Fine, so why aren't all those things,
11 which are excellent points, excellent reasons as to why
12 prudential rules of standing make it virtually impossible
13 for such a legislator ever to bring such a case, but not
14 constitutional reasons, because there might be, and is in
15 this instance, say the other side, an injury in fact.

16 GENERAL DELLINGER: We believe it is -- we
17 concede and concur that the prudential standing of
18 objections have been set to one side by the act of
19 Congress setting aside Members, but we believe that there
20 is an absence here of an Article III injury because it is
21 fundamentally inconsistent with our separation of powers
22 to assume that a Member of the legislature has an interest
23 in the legislation for which he voted after it is enacted
24 and when it is being implemented.

25 QUESTION: What do you do with Coleman?

1 GENERAL DELLINGER: I think Coleman is both
2 dubious, at best, and distinguishable. That is to say,
3 the conferral of standing upon the legislative Members of
4 the Kansas Senate was on the basis of an allegation that
5 their actual vote was not properly counted in the
6 legislative process itself. They were seeking a mandate
7 to compel a proper record of legislative action.

8 Here, they're -- everything that needs to be
9 known they can find out before they vote, and they're
10 really complaining about the President's hypothetical
11 implementation of an act in the future.

12 QUESTION: I guess I'm not sure why the
13 distinction between the two cases isn't simply one of
14 characterization. Wasn't the -- weren't the Kansas
15 legislators subjected, in effect, to the same portent that
16 the Members of Congress is subjected to, however you may
17 want to describe them?

18 GENERAL DELLINGER: A majority of the Kansas
19 legislature, which is already a difference, 21 of the 40
20 Members, brought that action complaining that 20 of them
21 had voted no, and that their vote had been erroneously
22 recorded as approving the child labor amendment when they
23 had in fact rejected it.

24 Now, there may be other prudential reasons for a
25 court not to get involved in intralegislative battles, but

1 as the executive branch we would not have a concern there,
2 and would recognize that that may be an injury within the
3 executive branch.

4 I do think that the fact that the case was
5 brought in State court, when no one objected to Justice
6 Frankfurter's assertion for four justices in dissent that
7 no one would dispute you could not have brought this in
8 Federal court at that time.

9 QUESTION: No, but even apart from that, I mean,
10 the fact is that on appeal the standing requirement is
11 exactly the same, so the fact that it began in a State
12 court and the fact that no one objected up to a certain
13 point still leaves the jurisdictional necessity to deal
14 with.

15 GENERAL DELLINGER: Again, I think that Coleman
16 is dubious and shows --

17 QUESTION: But not for that reason.

18 GENERAL DELLINGER: Not for that -- I think it
19 is dubious to consider that this is a justiciable
20 controversy. I mean, in the wisdom of Article III's
21 having this Court --

22 QUESTION: General Dellinger, did all of the
23 judges weigh in on the standing question with -- some of
24 them didn't discuss it. I --

25 GENERAL DELLINGER: Well, there were -- there

1 was sort of a missing judge on one of the issues, a nine-
2 justice court. They were said to be equally divided on
3 one of the issues, but four justices, including Justice
4 Black, Justice Douglas and Justice Frankfurter, joined a
5 very strong opinion by Justice Frankfurter that made the
6 basic point that it is not for this Court to issue
7 opinions. You know, the --

8 QUESTION: And it was on the way to throwing the
9 case out for want of a -- because it was a political
10 question.

11 GENERAL DELLINGER: That's right, but the Court
12 did resolve important constitutional questions in *Coleman*
13 *v. Miller*, in a case that still isn't ripe to this day,
14 which shows the benefits of adhering to Article III.
15 There still haven't been a --

16 QUESTION: But on the ripeness question the very
17 example that you gave, you said it's a ripeness question.
18 Somebody eventually can sue, but who could sue if the
19 President cancels the aid to, say, Jordan? Who could sue
20 after the fact?

21 GENERAL DELLINGER: Well, there well may not be
22 anyone who could sue but that -- on that particular cases.
23 There will certainly be people who can challenge the
24 validity of giving to the President, delegating to the
25 President the cancellation authority, because the

1 President will no doubt, or some President will promptly
2 cancel items where there are domestic U.S. citizens --

3 QUESTION: Oh, and if there is nobody, I suppose
4 your response would be then there's been nobody harmed,
5 and no harm done.

6 GENERAL DELLINGER: That is absolutely right,
7 and if there's nobody, so be it. This Court does not sit
8 to issue pronouncements about matters of constitutional
9 law.

10 QUESTION: Yes, but I just wanted to make sure
11 that you were acknowledging --

12 GENERAL DELLINGER: That is correct. There
13 could be some cancellations --

14 QUESTION: -- that there would be many cases
15 where no one -- no one would have standing.

16 GENERAL DELLINGER: Yes. Justice Ginsburg,
17 there should be some cancellations for which there would
18 be no one who had standing, but --

19 QUESTION: Do you also agree that ripeness
20 really is not a concern for us at this point? Doesn't the
21 statutory authorization take care of the prudential
22 concern about ripeness?

23 GENERAL DELLINGER: Not in the following sense.
24 I think that there is not a genuine Article III case or
25 controversy at this moment. I think what the --

1 QUESTION: Okay, but that's different from
2 ripeness.

3 GENERAL DELLINGER: But in this sense. I think
4 what the very able attorneys for the Members of Congress
5 have done, they've taken two fundamental jurisdictional
6 flaws, lack of standing and lack of ripeness, and merged
7 them together in an alchemic process that produces the
8 illusion of a case or controversy.

9 I think if we had had an actual cancellation of
10 aid to hog farmers, clearly a hog farmer could sue, but we
11 would not at that point believe that a Member of Congress
12 could come into court and say, this is not, and the
13 President is not implementing this act in a way that I
14 thought so. By moving --

15 QUESTION: But we might have passed a statute
16 that said the Senators from Iowa on hog-farming matters
17 should have only a half-a-vote. Would they have standing
18 to challenge that?

19 GENERAL DELLINGER: I think so. We have no --

20 QUESTION: You don't limit it to salary matters.

21 GENERAL DELLINGER: We take no dispute. That is
22 an internal matter in the legislature, but I think if you
23 actually denied a Member --

24 QUESTION: So I guess the question here is
25 whether there really is that kind of an injury to the

1 legislature, and you're very --

2 GENERAL DELLINGER: That is precisely correct.

3 QUESTION: You forcefully argue no.

4 GENERAL DELLINGER: They state --

5 QUESTION: We don't know at this point whether
6 the President will ever exercise this kind of
7 cancellation. I mean, it's something that could be
8 politically costly to him, just as it's politically costly
9 to Congress to do some of these things.

10 GENERAL DELLINGER: That is correct, Mr. Chief
11 Justice, and the -- it -- I think this would be much
12 clearer to the Court -- I understand this is a prudential
13 point, but the merits and indeed, even the lack of
14 standing of these Member plaintiffs would be much clearer
15 to the Court after the fact.

16 You might well have a case come before you where
17 Senator Moynihan had voted to link all three provisions,
18 or where Senator Byrd had moved to make the Dellinger
19 Center a mandatory item exempted from 1021 on the floor.
20 You would have seen that he'd been able to make that
21 motion, he'd been able to vote on it, and his only problem
22 would have been his inability to persuade a majority of
23 his colleagues to do so.

24 The President's cancellation would come to you
25 informed by the legislative record and all of the

1 determinations that the President would make.

2 QUESTION: Mr. -- General Dellinger, do you
3 think ripeness is a matter just, you know, prudential, or
4 does it have some sort of Article III component?

5 GENERAL DELLINGER: Mr. Chief Justice, I believe
6 it does have an Article III component when there is not
7 yet an actual case or controversy.

8 That is to say, even if a Member was going to
9 have standing after the President cancelled his or her
10 favorite project, Article III standing and an injury -- my
11 project was cancelled -- which we would dispute, they
12 clearly would not have standing now to say that I'm
13 worried that the President may cancel my favorite project,
14 and I'm worried anticipatorily that I will not be able to
15 convince a majority of my colleagues to make an exemption,
16 and you're saying --

17 QUESTION: But the basis for objecting to the
18 cancellation is that there is an irregularity, an
19 unconstitutional regularity in the legislative process.

20 GENERAL DELLINGER: That's what --

21 QUESTION: And Mr. Morrison is going to tell us
22 that exists now.

23 GENERAL DELLINGER: And I would submit to you
24 that to this extent you have to look, you know, to resolve
25 the standing question, Justice Kennedy, that you have to

1 look at least this far at the merits of their allegation.
2 It is impossible to resolve it without looking at it and
3 say no, wait a minute.

4 They vote for any provision they want to. They
5 know exactly what they're voting on. If it's made
6 mandatory, they know that. If it's made discretionary by
7 the effect of the Line Item Veto Act, they know that. The
8 President signs it. It fully complies with the
9 Presentment Clause, and as I take them to concede at page
10 39 of their brief, that the President signs the whole
11 appropriations tax spending bill and the whole bill
12 becomes law the instant the President signs it.

13 QUESTION: So you are saying the dynamic of the
14 legislative process has not changed as of this point?

15 GENERAL DELLINGER: I would not dispute that the
16 dynamic of the legislative process has changed, but that
17 is true whatever the background assumption is. If it's
18 the Empowerment Control --

19 QUESTION: But I thought that was the injury
20 that they're alleging, that they're bringing here.

21 GENERAL DELLINGER: That is not a legal injury.
22 The dynamic has changed because Senator Byrd will tell you
23 he now has to persuade a majority of his colleagues if he
24 wants to make sure that a bill, a provision he wants
25 remains the law, and in case you think that I am imagining

1 Members seeking exemptions for their own pet projects and
2 having the majority vote on it, if you have occasion, look
3 at page 55a of the appendix to the Jurisdictional
4 Statement.

5 It's the section of the bill, section 1027, it
6 happens to deal with the limited tax benefit, but they
7 actually set out in the bill the language to be used to
8 exempt targeted tax benefits from the provisions of the
9 act, and that language works perfectly well for any
10 provision.

11 QUESTION: All right, but General, couldn't we
12 recharacterize the provision in this way, not merely in a
13 vague way that the dynamics have changed, which everybody
14 agrees that they have, but by saying that as a result of
15 this bill unless Congress in, let's say, a given
16 appropriations act agrees to exempt every single item in
17 that act from the effect of this statute, which is highly
18 unlikely, then when any given Member votes on a bill with
19 those provisions on it, he does not know in the sense that
20 he has traditionally known, what it is that he is voting
21 on that will, depending on the vote, either become law or
22 not become law.

23 He does not simply have a bill in front of him
24 which is going to be subject to a, in effect an up or down
25 determination, and that's something more than just

1 dynamic, isn't it?

2 GENERAL DELLINGER: Justice Souter, he does
3 indeed know that the bill for which he votes is going to
4 be subject to an up or down determination.

5 QUESTION: But he does not know the combination
6 of provisions which his up or down determination will
7 either, in the old sense, require the President to act on
8 up or down. That's gone.

9 GENERAL DELLINGER: Nor does he know that when
10 he votes on a lump sum appropriations bill. He has
11 exactly the same uncertainty about how the President will
12 do that, and we have had --

13 QUESTION: Well --

14 GENERAL DELLINGER: Now, I think this ignores a
15 200-year tradition in which all three branches have
16 understood that the --

17 QUESTION: Yes, but the lump sum appropriation
18 act simply does not give the President in effect a
19 definitive power to eliminate a spending authority. Under
20 this bill, under the act in question, once the President
21 has acted, he can't unring the bell. Under a lump sum
22 appropriation, he can unring the bell because he can
23 change his mind in midstream.

24 GENERAL DELLINGER: That is not always
25 practically true, though. I will admit the difference.

1 But if you take a bill like the very first defense
2 appropriations act passed in 1789, where Congress said the
3 funds are authorized not to exceed X amount to defray the
4 expenses of the Department of War, when a Member votes for
5 that, he knows he is voting for a bill where the President
6 can choose to build ships or not build ships.

7 In this case, it is true that the bill as it
8 finally passed made the President's decision to cancel
9 irrevocable, and the irony I think of this litigation is
10 that the very steps that Congress took to make sure that
11 the delegation was not excessive, that is to cabin the
12 President's discretion to deal with what Senator Byrd has
13 called the Sword of Damocles problem -- the President can
14 hold out over Members the possibility that he may cancel
15 their project, or that he may, having cancelled it,
16 uncancel it if a Member will be sufficiently favorable to
17 executive branch prerogatives -- these two provisions have
18 the effect of limiting, cabining and guiding the
19 President's discretion by saying you have to make it at
20 the outset of the appropriations period --

21 QUESTION: General Dellinger --

22 GENERAL DELLINGER: -- within 5 days.

23 QUESTION: General Dellinger, I assume that none
24 of these consequences to the legislator, the uncertainty
25 about how to vote, and the alteration of the dynamics and

1 so forth, none of those things really occur if, indeed,
2 the respondents are correct that the exercise of the power
3 given to the President here, the cancellation, would be a
4 violation of the Constitution as constituting an unlawful
5 delegation of legislative power, so really all we're
6 talking about is the uncertainty created by an
7 unconstitutional statute, or an unconstitutional provision
8 in a statute, isn't that right?

9 GENERAL DELLINGER: I think that's right. I
10 think that --

11 QUESTION: Which I assume legislators often
12 face.

13 GENERAL DELLINGER: Exactly, and --

14 QUESTION: They have to decide whether to vote
15 for a statute that has an -- what they believe is an
16 unconstitutional provision in it.

17 GENERAL DELLINGER: The question is, do you have
18 the courage of your constitutional convictions, and if
19 they do, they suffer no injury.

20 That is, if a Member says, I am voting for this
21 appropriations bill. I believe that my -- I believe that
22 the Center for the Study of the Senate will be --
23 authorization for my university will go forward. I
24 believe that the cancellation will be a nullity, and that
25 when the president of my university back home sues for the

1 appropriation it will be speedily forthcoming as this
2 Court will invalidate the cancellation.

3 You can vote on that assumption, or you can vote
4 on the assumption of the presumption --

5 QUESTION: May I ask you, on the question of
6 timing, in my hypothetical example about giving the
7 Senator from Iowa a half-a-vote, would he have to wait
8 until the statute was passed before he'd have standing to
9 challenge that rule, or the -- at least a bill was
10 introduced, or could he just challenge it right away,
11 saying you're diluting my vote?

12 GENERAL DELLINGER: I would assume that --
13 again, this is a matter in which the executive branch has
14 no particular interest. I would assume that he could sue
15 as soon as the rule was passed. I believe that Powell v.
16 McCormack -- that far --

17 QUESTION: So what's the difference here on the
18 question of timing? If this change does change the
19 legislative process in a similar way, and I know you
20 disagree, and I'm not sure it does, why can't they
21 challenge it right away, those who are adversely affected
22 by it?

23 GENERAL DELLINGER: Again, I think the answer is
24 that they have no legal injury because nothing has
25 happened to them --

1 QUESTION: Well, that --

2 GENERAL DELLINGER: -- that has legal
3 consequence. They're complaint --

4 QUESTION: That's irrespective of timing.

5 GENERAL DELLINGER: -- is merely with the
6 majority of their colleagues, but I have to say --

7 QUESTION: General Dellinger, you mentioned the
8 Adam Clayton Powell case. Are you making a distinction
9 based on a person or particular group being targeted for
10 adverse action, as was true there and would be true of the
11 Iowans who were given only half a vote, as opposed to this
12 situation, where they're all treated -- they treat
13 themselves alike? There's no --

14 GENERAL DELLINGER: That is correct. I think
15 that is a valuable decision.

16 Let me say that, you know, my immediate
17 executive branch clients would very much like to see this
18 Court get to the merits and hold that this delegation of
19 authority not to spend money is constitutional.

20 QUESTION: Well, on the merits, may -- since
21 you've had almost no time to address it, may I ask whether
22 you think that this Line Item Veto Act gives any useful
23 guidance or context for the President to exercise his
24 veto?

25 There are three general criteria, but they are

1 so general that they appear to apply across the board to
2 everything, and is that enough for an adequate delegation
3 of Congress' powers?

4 GENERAL DELLINGER: Yes, Justice O'Connor, I
5 think they are fully adequate to supply the intelligible
6 principle.

7 QUESTION: No, aren't they broader than anything
8 we've ever held --

9 GENERAL DELLINGER: No.

10 QUESTION: -- could suffice?

11 GENERAL DELLINGER: I do not think that they are
12 broader than the delegation to the Sentencing Commission
13 to seek fairness and do equity, but moreover --

14 QUESTION: Do you have another example?

15 (Laughter.)

16 GENERAL DELLINGER: Well, I understand -- if I
17 could persuade eight justices, that would be enough,
18 but --

19 (Laughter.)

20 GENERAL DELLINGER: But the -- you have to
21 understand that the difference --

22 QUESTION: You've got public convenience and
23 necessity.

24 GENERAL DELLINGER: I'm sorry.

25 QUESTION: You've got public convenience and

1 necessity. That certainly is broad, isn't it?

2 GENERAL DELLINGER: The Federal Communications
3 Commission, thank you, is a very good example, but here
4 you're talking about a matter that is within the
5 President's normal control.

6 The fact that the Court emphasized in Loving
7 administering the budget as administrator-in-chief is the
8 person to whom you're giving this -- this act respects the
9 congressional power of the purse in a very profound way.
10 The Framers did care that Congress control spending, but
11 they cared by setting a maximum. They said in Article I,
12 section 9, that no money should be drawn from the Treasury
13 but in consequence of appropriations made by law, but it
14 does not require express congressional approval to leave
15 money in the Treasury.

16 This is a case where the intelligible principle
17 of saving money is itself so understandable in a country
18 that is spending more money than it is taking in, and
19 where the President is directed through elaborate
20 procedures to explain the basis for his decision, and --

21 QUESTION: But he's given no guidance. You
22 know, anything that isn't spent obviously can reduce the
23 deficit. How does that guide as between A, B, C, and D,
24 or that it be in the national interest?

25 GENERAL DELLINGER: Well, there is a very

1 real --

2 QUESTION: That is such a broad, vague sort of
3 thing.

4 GENERAL DELLINGER: Well, the President may well
5 gain guidance from the particular underlying statute that
6 informs the appropriations -- the National Park Act may
7 give him a sense of where there --

8 QUESTION: Well, what if Congress had gone
9 further and not simply limited this to appropriations, but
10 said under these same three standards the President could
11 cancel any provision of a bill that he didn't like?

12 GENERAL DELLINGER: I think it would be quite
13 different, and you'd have a much more -- a much greater
14 need for a more concrete, intelligible principle if you
15 were affecting private ordering, if you were affecting
16 prior acts, if you were regulating --

17 QUESTION: Well, not prior acts, but just
18 current acts.

19 GENERAL DELLINGER: Even for the future I think
20 the instruction, the intelligible principle is always in
21 context, and here all you're talking about is not spending
22 money.

23 QUESTION: Well, you're not. You're also
24 talking about the tax law, and so assuming everything in
25 your favor up to that point, what do we do about the fact

1 that it says that the President can simply set aside a tax
2 law, any tax law that affects fewer than a certain number
3 of people?

4 I mean, how is there a sufficient intelligible
5 principle for that, and if that's no good, isn't the whole
6 thing no good?

7 GENERAL DELLINGER: Well, to answer the second
8 question first, no. I mean, under the Court's
9 severability standards, that unless it is evident that the
10 legislature would not have acted --

11 QUESTION: Well, you might say, look, tax
12 loopholes basically help richer people. Spending
13 basically helps poorer people, and we don't know if
14 Congress would have passed one without the other.

15 GENERAL DELLINGER: I -- they have not made out
16 that case at all, and I think that the targeted tax
17 benefit part is quite minor. If you look at it carefully,
18 there are very few things that qualify. Tax benefits for
19 three taxpayers is not a limited tax benefit if they're
20 the only ones in the industry, like the automotive
21 industry, and Congress specifically -- and we may never
22 see a limited tax benefit if you look at how easy Congress
23 has made it to list the ones that apply and to which it
24 does not apply.

25 There is always a baseline tax. This is not a

1 matter where the President is going out creating tax
2 liability without an underlying tax law.

3 I'd like to reserve the remainder of my time.

4 QUESTION: Very well, General Dellinger.

5 Mr. Morrison, we'll hear from you.

6 ORAL ARGUMENT OF ALAN B. MORRISON

7 ON BEHALF OF APPELLEES

8 MR. MORRISON: Mr. Chief Justice, and may it
9 please the Court:

10 The Line Item Veto Act of 1996 fundamentally
11 alters the Federal lawmaking process by giving the
12 President the new power of cancellation. This
13 cancellation applies to traditional spending items; to new
14 items of direct spending, such as entitlements, which
15 includes the rights of individuals to food stamps,
16 medicare, State and local governments to contracts -- and
17 of those that are increased; and to limited tax benefits,
18 precisely the kind of private ordering that Solicitor
19 General Dellinger just mentioned.

20 And while I'm on that subject, if I may answer
21 Justice Breyer's inquiry, this was a very important part
22 of the legislation. We have prepared a legislative
23 summary, which was submitted in the District Court. It's
24 part of the joint appendix. At page 82, there is a
25 description of how important it was in summary of the

1 testimony of a number of witnesses who expressed the view
2 that the tax element was an important balance, and that
3 the votes were very close on the substitutes. And we
4 believe it's quite evident in this case that if there had
5 been no tax benefit provision in the bill, there would
6 have been no bill.

7 QUESTION: Mr. Morrison, on the tax benefit
8 part, the legislation instructs the joint committee to
9 flag every one of these limited tax items, where fewer
10 than 100 -- fewer than 10 benefit. Is there anything just
11 in that flagging requirement so that people could know
12 what those tax measures are? Is there anything
13 unconstitutional about that?

14 MR. MORRISON: I do not believe so, because that
15 must be in the text of the Act itself. That is, the joint
16 committee identifies them. They go into the text of the
17 Act. And if they are listed in the text of the Act, then
18 those are the only limited tax benefits.

19 Similarly, if the joint committee says there are
20 no limited tax benefits, then the President may not cancel
21 any. But if the joint committee does not state either
22 way, then the President may use his normal tools of
23 interpretation to decide whether any of the tax benefits
24 conferred come within it.

25 But I do not believe -- and I thought about it

1 long and hard whether that's independently a
2 constitutional defect.

3 QUESTION: Mr. Morrison, before we get too
4 deeply into the merits, can I ask you about the standing
5 --

6 MR. MORRISON: Certainly.

7 QUESTION: -- the standing issue?

8 I cannot think of a case in which an individual
9 Federal officer, in 200 years, has brought suit, claiming
10 a -- a derogation of his powers as a Federal officer. I'm
11 trying to understand how far the principle you're asking
12 us to -- to adopt would go.

13 What about a district court judge, who, in a
14 lawsuit, in order to preserve the school system that --
15 that he's decreed, in order to eliminate segregation,
16 imposes a tax. He is reversed by the court of appeals.
17 The court of appeals says he has no power to impose a tax.
18 The losing party does not appeal. Does the district judge
19 have a cause of action --

20 MR. MORRISON: No, Your Honor.

21 QUESTION: -- against the court of appeals for
22 taking away his power to impose a tax?

23 MR. MORRISON: No, Your Honor.

24 QUESTION: Why not?

25 MR. MORRISON: Because he has not been injured

1 in any ongoing way. His decision has been rejected. And
2 if all we were seeking here was a decision, saying to the
3 court that a matter on which I voted for as a member of
4 Congress -- suppose I voted for a flag -- against the flag
5 burning amendment and it passed. I would not have an
6 opportunity to go to court to object to the substance.

7 What our clients are objecting to here is that
8 the Act fundamentally changes the process by which laws
9 will be made in the future, and that these members are
10 among the 535 people in the United States who make the
11 laws.

12 QUESTION: But that's irrelevant unless they
13 have a personal interest in the power that they exercise.

14 MR. MORRISON: Well, that depends on the --

15 QUESTION: And you -- and you say that the
16 district judge does not.

17 MR. MORRISON: That depends on the meaning of
18 the word "personal interest" in your hypothetical. I
19 believe that the Constitution gives members of Congress
20 the right to vote. And that, to that extent, it is as
21 much a personal interest here as was Adam Clayton's Powell
22 interest personal when he was deprived a seat in Congress.

23 QUESTION: All of the things that the
24 Constitution gives a right to are not necessarily
25 enforceable in court. The Constitution also gives members

1 of Congress the right to be admitted to Congress if
2 they're qualified. But it's very clear that we don't pass
3 upon that.

4 MR. MORRISON: That's because -- it's not
5 because of standing, Your Honor. It's because it's
6 textually committed to another branch. Those are two
7 different questions.

8 Part of what Your Honor was suggesting about the
9 Federal officer has to do with an underlying theme in the
10 Solicitor General's position, which is separation of
11 powers. That it's somehow inappropriate for legislators
12 to be coming into court, both for reasons of the court's
13 usurping the business of the political branches and,
14 second, because of a fear of some floodgates.

15 We have a different situation here than in
16 almost any case that the congressional standing has come
17 up in before. And that is the situation where we have an
18 express judicial review provision put in by the Congress,
19 signed into law by the President. So the prudential
20 considerations are such that where we ought to be
21 concerned about separation of powers, we can say to
22 ourselves that the political branches have said that this
23 is an appropriate use of the judicial forum.

24 QUESTION: But stand -- standing is -- is an
25 Article III proposition, too.

1 MR. MORRISON: It certainly is, Your Honor, and
2 I agree. But to the extent that there are prudential
3 separation of powers considerations, as Justice Scalia
4 suggested, I'm suggesting that one of the elements of the
5 judicial review provision is that it limits both the
6 possibility of unjust usurpation and excess use of the
7 courts.

8 QUESTION: Do you agree that rightness is a
9 factor that goes into the Article III calculus?

10 MR. MORRISON: I do. But I would say, Your
11 Honor, that this case is as ripe as a case like Buckley
12 against Valeo, in which there was a very comparable
13 judicial review provision to the one here. And the
14 challenge was a separation of powers challenge to the
15 composition of the Federal Election Commission. The
16 people who were bringing that challenge were candidates or
17 voters.

18 Although the Commission had done a few things,
19 it had done nothing to which any of them objected --
20 rather like the fact that the President hasn't cancelled
21 anything here. The court said, we will reach that
22 constitutional issue because the Congress has told us we
23 may do it and should do it. And I think --

24 QUESTION: Mr. Morrison, can I try a few other
25 examples? I don't understand the -- the scope of the

1 principle you're arguing from.

2 What about a bill that is originated in the
3 Senate, which -- which an individual member of the House
4 believes is a tax measure.

5 MR. MORRISON: Such as Moore.

6 QUESTION: And, therefore, violates the
7 origination clause. Does that individual member of the
8 House have a right to come to this Court immediately,
9 saying I've been deprived of my power to vote on the
10 original measure?

11 MR. MORRISON: I think that is a more difficult
12 case. I would say the answer is probably not. But it's
13 clearly distinguishable from this case for two reasons.
14 The first reason is that we have the judicial review
15 statute. I believe that there is a significant
16 consideration of separation of powers that ought to
17 caution the courts before taking them up.

18 QUESTION: Yes. My -- my question is as a
19 constitutional matter. So that -- that -- that
20 distinction is irrelevant. My question is
21 constitutionally, can -- can the individual member of the
22 House sue?

23 MR. MORRISON: I -- I believe --

24 QUESTION: Article III.

25 MR. MORRISON: I believe that -- that the

1 injure -- that the person may have suffered an injury.

2 But I do believe that there are some separation of powers
3 elements in Article III that there may not be a case or
4 controversy in that -- in that regard.

5 QUESTION: What about the President is about to
6 enter into an executive agreement with a foreign country
7 regarding the Panama Canal, regarding NATO, regarding
8 whatever, and an individual member of the Senate believes
9 that this is in fact a matter that should be subject to
10 treaty, and therefore, that he has been deprived of his
11 right to vote on the conclusion of that treaty; does that
12 matter come before us?

13 MR. MORRISON: Well, as far as a standing
14 question is concerned, when this Court had before it the
15 Goldwater case, which is the converse of that, the Court
16 declined to reach the merits, but no member of this Court
17 said that there was a lack of standing for Senator
18 Goldwater, although that issue had been specifically
19 passed upon by the court of appeals in a divided opinion.

20 QUESTION: That was a summary disposition.

21 MR. MORRISON: It was, Your Honor. I simply
22 observe that, and Your Honor is quite correct, and I don't
23 want to make too much of it.

24 But insofar as standing is concerned, if we are
25 talking about the injury component of standing, I believe

1 in all of those cases, as in this one, the members have
2 been injured. Whether there are other reasons why they
3 should not be entitled to come to court is a different
4 question.

5 In this case, the --

6 QUESTION: So I have to think of something else
7 other than standing to -- to prevent these matters from
8 being brought immediately into the Court?

9 MR. MORRISON: I think you do. And I think you
10 may. And I think you have them in the Constitution.

11 QUESTION: No, no. You mean -- when you say no,
12 you mean you have to think of something else other than
13 constitutional standing; there could be prudential
14 standing? Is that --

15 MR. MORRISON: Yes. Yes, Your Honor. Yes, Your
16 Honor.

17 QUESTION: But not here, because Congress can
18 always wipe that out by providing that the -- providing a
19 right to sue.

20 MR. MORRISON: And I think it's particularly
21 important that they provided the right to sue in the bill
22 itself. This is not a general standing provision,
23 allowing members to go to court any time they want. This
24 is --

25 QUESTION: Well, what -- what about the

1 situation of a bill passed by Congress that we would all
2 agree is an improper delegation of legislative authority
3 to the executive branch. Has a member of Congress been
4 injured by that improper delegation? Can they come sue?

5 MR. MORRISON: In my view, that member has been
6 injured in a constitutional sense, but I do not believe
7 that you have to agree with me on that proposition to find
8 standing here. Because what we have here --

9 QUESTION: Yes, but we're trying to explore with
10 you how far your theory would take you.

11 MR. MORRISON: Yes. And -- and I think --

12 QUESTION: So they would have been able to come
13 in, in Mistretta, for example?

14 MR. MORRISON: That's right.

15 QUESTION: Have standing?

16 MR. MORRISON: Because it's after the fact.
17 What we are talking about here is a continuous, ongoing
18 change in the dynamic of the lawmaking process. That
19 members now have to consider a whole different range of
20 options and opinions and things that they had -- did not
21 have to consider before.

22 QUESTION: But there is a concern that if this
23 Court is routinely invited to be the referee for
24 legislative matters that the legislators themselves will
25 not take the constitutional positions that they ought to

1 take within their own branch of the government. And that
2 is part of the standing rules -- of the standing rules
3 that inform separation of powers.

4 MR. MORRISON: I think that is correct, Your
5 Honor. And if it were the ordinary kind of case, where
6 someone was complaining about the result of a law rather
7 than the result of the -- the impact on the continuing
8 operation on the constitutional right to vote, that only
9 535 members have, we would have a different situation.

10 QUESTION: Well, why is it only a law that can
11 be challenged that way? Why not the leadership's putting
12 together of a bill that contains an unconstitutional
13 provision? And the member of Congress says, I don't know
14 how to vote on this bill because one of the provisions, in
15 my view, is unconstitutional, and I don't know whether I
16 am voting for all of it without that provision or all of
17 it including that provision. I am in legislative doubt,
18 just as you claim your clients are here. And therefore, I
19 ought to have a right to come into court immediately to
20 determine whether that provision is constitutional.

21 MR. MORRISON: This is not a case involving
22 injury based on legislative doubt. This is a case
23 involving a situation in which members of Congress now
24 have a new mountain to climb. In the --

25 QUESTION: Oh, but I disagree. It is based on

1 legislative doubt.

2 MR. MORRISON: Well, they are certainly --

3 QUESTION: There is no mountain, if you are
4 correct, that this provision is unconstitutional.

5 MR. MORRISON: Except insofar as they have to
6 deal --

7 QUESTION: If this provision is
8 unconstitutional, the -- the congressman can vote for
9 whatever he likes, because he knows that the President's
10 cancellation will be ineffective.

11 MR. MORRISON: Except that he has to deal with
12 and negotiate with all the remaining members of his or her
13 body.

14 QUESTION: Because of constitutional doubt.
15 What the case boils down to is constitutional doubt.

16 MR. MORRISON: Well, the other people may have
17 no constitutional doubt. In terms of injury --

18 QUESTION: Well, help me, Mr. Morrison, I'm --
19 I'm a little puzzled and I want to be sure I understand.
20 I didn't understand the doubt to be doubt as to the
21 constitutionality of the statute, but rather doubt as to
22 what the President might do with the particular mix that
23 comes to him.

24 MR. MORRISON: That is correct.

25 QUESTION: So I don't understand the

1 constitutional doubt argument.

2 QUESTION: But he can't do anything with that
3 mix if the cancellation provision is unconstitutional. If
4 you are right that it's an unconstitutional delegation,
5 there is no problem whatever. The whole thing boils down
6 to the constitutional doubt of whether the cancellation
7 provision is valid.

8 MR. MORRISON: It can also affect bills that the
9 President may choose, for whatever reason, not to exercise
10 his power of cancellation over.

11 QUESTION: No, but -- but isn't Justice Scalia
12 correct in the way he states your position? I -- I want
13 to understand this. Isn't it your position and your
14 client's position that there is now a cloud, a sword of
15 Damocles, hanging over the legislation, that the dynamic
16 is altered because of this constitutional --
17 constitutionally questionable procedure, and that is what
18 gives them the standing now to come in?

19 MR. MORRISON: Yes. And -- and in addition to
20 the dynamic, every time they cast a vote, the meaning and
21 effect of that vote is changed. It is no longer simply
22 the vote that they had in the past, knowing that if they
23 voted for a bill, it would be the law or not the law, but
24 only in that forum.

25 QUESTION: Do I understand you --

1 QUESTION: But the rejoinder to that is that
2 that's not a problem if it's unconstitutional.

3 MR. MORRISON: That is -- that is correct if
4 it's -- in -- only -- but only if in fact the
5 constitutionality is determined on the very first bill
6 that comes up there. Because --

7 QUESTION: Well -- go ahead.

8 MR. MORRISON: -- if -- if -- if a bill passes
9 and the President doesn't challenge it, people will have
10 taken steps along the way and done different things that
11 may -- that may not show up.

12 May I give an example, if I may? One of the
13 features of this bill that makes it so significant to
14 change the dynamic is that the President's power of
15 cancellation extends not simply to items on the face of
16 the statute, but everything in the legislative history
17 that can be separately identified or specified. So that
18 members now must, in addition to negotiating over the
19 terms of the bill, they must now go and read the
20 legislative history and figure out --

21 QUESTION: I didn't realize that. That -- this
22 puts it all in a different light for me.

23 (Laughter.)

24 QUESTION: Mr. Morrison, how does that differ
25 from suppose Congress had said, instead of having this

1 fancy arrangement, the expenditures in all the categories
2 that it designated, that expenditures of that nature must
3 be covered -- must be enrolled as a separate bill; would
4 there be any problem with that? And wouldn't that cause
5 the same difficulty?

6 MR. MORRISON: Let me be very clear about the
7 concept of separate enrollment, because I do not believe
8 the Solicitor General's brief is as clear as it might be
9 on this. There are two concepts of separate enrollment.
10 One item, one bill passed through both houses of Congress
11 as separate items, and then signed by the President. That
12 concept would be perfectly constitutional.

13 The concept of separate enrollment as it passed
14 the Senate -- and this is explained in -- in our joint --
15 in the joint appendix -- was a different concept. The
16 bill would be agreed upon by the committee, the conference
17 committee. It would then be sent back to the enrollment
18 clerks in each house -- in the House. And they would then
19 go through and separate out each item in both the text and
20 the legislative history.

21 Those separate items would then come forward.
22 And Senator Byrd and others estimated there would be
23 something like 2,000 of them in -- in these -- in most of
24 these appropriations bills. They would then come back to
25 the floor, and they would be voted on, en masse, not

1 separately, as Article I, Section 7 says.

2 They would then be voted on, en masse. Only at
3 that point would the respective officers in the House and
4 Senate have to sign each of them. And the President could
5 then sign and veto each.

6 In our view, that is just as unconstitutional
7 as this bill. And, indeed, Mr. Dellinger testified before
8 the Senate he believed that that was unconstitutional as
9 well. Because the bill that has passed the Congress is
10 not what is being presented to the President. It is a
11 violation of the Presentment Clause.

12 So, if I may, to answer your question that way,
13 a true separate enrollment is of course constitutional.
14 But the concept that passed the Senate was not true
15 separate enrollment, but it was pass it as a group and
16 then sign it separately.

17 QUESTION: What about something more modest,
18 like no riders on appropriation bills?

19 MR. MORRISON: I'm sorry? I want to be sure I
20 understand the question.

21 QUESTION: Could -- would there be any problem
22 about that being constitutional for -- for Congress to
23 restrain itself by doing, either through rules or perhaps
24 a statute, saying that there can be no riders attached to
25 an appropriation bill?

1 MR. MORRISON: I don't know how that could be
2 enforced. But -- and without having thought about it
3 more, I -- I think it would probably be -- what would
4 concern me was that somehow you're restricting the rights
5 of members -- members to -- to put in the bills what --
6 what they choose.

7 QUESTION: Mr. Morrison, let's go back for a
8 minute to Justice Scalia's question about there being no
9 injury here if in fact the -- that would really do away
10 with all of our declaratory judgment jurisprudence, would
11 it not, to accept that, if you -- you can't bring a
12 declaratory judgment, because if the statute you're
13 attacking is unconstitutional, they can't do anything to
14 you anyway?

15 MR. MORRISON: I had not thought of that, but it
16 certainly seems that it would -- would put a big dent in
17 it, Mr. Chief Justice.

18 QUESTION: May -- may I go back to another
19 point?

20 QUESTION: But that -- that would depend, would
21 it not, upon whether the assertion of standing, whether
22 the personal injury you're alleging, is nothing more than
23 your not knowing how to vote because of doubt, because of
24 constitutional doubt?

25 MR. MORRISON: That is not our injury, with all

1 due respect, Justice Scalia. Our injury is not that we
2 can't -- don't know how to vote because of doubt. It is
3 because the statute has created a different process in the
4 legislation -- legislature now. That members now have a
5 small mountain to climb every time they want to take out
6 one of these provisions. They've got to --

7 QUESTION: And -- and isn't that going to be
8 true, going back to an answer -- an earlier answer to a
9 question -- that's going to be true even if the very first
10 instance is challenged and nothing else happens in
11 Congress until that challenge is decided. Because as I
12 understand your position, if half the Congress is
13 convinced that the statute is un -- or not quite half --
14 is convinced that it's unconstitutional and the rest are
15 convinced that it is constitutional, nobody is in any
16 doubt. But the process is still going to be affected,
17 depending on one's opinion on constitutionality.

18 And as I understand it, that's enough for your
19 position on injury; am I right?

20 MR. MORRISON: Well, it is constitutionality
21 plus -- plus the fact that -- that both the constitutional
22 uncertainty and the fact that people will of course
23 disagree substantively about provisions, and the
24 combination of the two will work together to change the
25 process.

1 QUESTION: So it's uncertainty, not doubt?

2 MR. MORRISON: Well --

3 (Laughter.)

4 QUESTION: No, but I mean I think that's a valid
5 distinction.

6 MR. MORRISON: I think that that is correct,
7 Justice --

8 QUESTION: Well, why doesn't that apply to a
9 bill, just a bill that's before Congress, as I asked
10 before, which has in it a provision that 49 percent of
11 Congress think is unconstitutional and 51 percent think is
12 constitutional? Doesn't that uncertainty, doubt, whatever
13 you want to call it, doesn't that affect the legislative
14 process? And shouldn't they all be able to come here and
15 get us to resolve that uncertainty so they could get about
16 the business of legislating?

17 MR. MORRISON: That, of course, in the isolated
18 bill context, is different from this, because we have an
19 identifiable act, the Line Item Veto Act, which has
20 already gone into effect and law. In the hypothetical
21 that Your Honor is --

22 QUESTION: Well, the bill is an identifiable
23 act, too.

24 MR. MORRISON: But it hasn't gone --

25 QUESTION: It's just an act of -- of one house

1 of Congress instead of both.

2 MR. MORRISON: It is not a law, nor is it a rule
3 of Congress. It has no prospective effect. It is simply
4 part of the debate about the merits of that particular
5 law. We are talking about an extrinsic circumstance, the
6 passage of a statute, the Line Item Veto Act, which casts
7 a pallor over the -- the statute that come before the
8 Congress in their appropriations capacity and causes
9 members to act differently from the way they did --

10 QUESTION: Mr. Morrison --

11 QUESTION: Okay, the answer to my question is,
12 if it were determined in -- if it were determined in the
13 -- the -- the first instance before any other legislation
14 was considered, that wouldn't give standing. If we could
15 assume that was going to happen, there wouldn't be
16 standing. There's got to be the assumption that in fact
17 there will be an ongoing process of at least more than one
18 bill which this -- it affects?

19 MR. MORRISON: Yes. For instance, now, the
20 supplemental appropriations bills are being considered by
21 Congress. There may or may not be a cancellation with
22 respect to them. But the pallor of the Act is hanging
23 over them as they -- members have to decide what to put
24 in, what to take out, how to proceed with this bill,
25 whether or not there is ever going --

1 QUESTION: But, so far, they're injured only by
2 their own colleagues. The President has done absolutely
3 nothing. A majority of the colleagues of the plaintiffs
4 have decided that this law is constitutional and sound
5 policy. Isn't -- I know that the standing is a specialty
6 for lawyers, but practically it is the majority of the
7 members of Congress that have caused this injury, and not
8 the President.

9 MR. MORRISON: If this were a case in which the
10 President of the United States said, I don't know why you
11 gave me this power; I'm not going to use it, we would be
12 in a different situation with respect to prudential
13 aspects of rightness. The President made clear when he
14 sent his witnesses to testify that he wanted this bill.

15 QUESTION: But I'm not talking about prudential;
16 I'm talking about the reality of who has caused the
17 injury. If there is an injury, it hasn't been caused by
18 the President. It has been caused by the members of the
19 House and Senate.

20 MR. MORRISON: Well, I -- I do believe that
21 the -- that the concern we have is over the threat of --
22 of the exercise of the veto, not simply the -- the
23 actuality of the veto.

24 QUESTION: Well, and isn't also the answer that
25 the President signed the Line Item Veto Act, and that is

1 now a law that regulates the legislative process?

2 MR. MORRISON: It -- it certainly does. But, in
3 addition, the defendants we have here -- Defendant Raines,
4 is of course the President's chief advisor on the -- on
5 budgetary matters, and Defendant Rubin is -- is the tax
6 matters. And that surely they will participate with the
7 President in -- in the -- in the process by which
8 decisions are made or threatened to be made on -- on the
9 line item veto.

10 QUESTION: Well, Mr. Morrison, your theory of
11 standing would seem to come into play even if the Senate
12 or the House changed their rules of operation to cut off
13 debate or anything else. It changes the dynamics of the
14 operation of the House --

15 MR. MORRISON: In terms of --

16 QUESTION: -- or the Senate.

17 MR. MORRISON: In terms of constitutional
18 injury, I would agree with Your Honor. But there are
19 other elements of Article III case or controversy, such --
20 the prudential elements --

21 QUESTION: Well, suppose Congress passes a law
22 and says, well, you can sue on it immediately, just like
23 here, but, nevertheless, we're going to change our rules.
24 And you -- we're going to cut off debate after 5 minutes
25 and whatever it is. In your view, they'd be able to file

1 suit in court, because the dynamics are changed?

2 MR. MORRISON: They might be able to, Your
3 Honor. The -- the possibility exists. Surely, Adam
4 Clayton Powell's exclusion from the House of
5 Representatives was not simply about money.

6 QUESTION: Well, but a total exclusion of a
7 member, that deprives him of the emoluments of the
8 office -- can't get paid, can't take a seat -- that may
9 well be different.

10 MR. MORRISON: I don't believe that -- the
11 Powell case would have come out differently if the House
12 of Representatives had continued to pay him his salary
13 during the time that they excluded him.

14 QUESTION: There is also a difference,
15 Mr. Morrison, as Justice Ginsburg was suggesting, between
16 a provision adopted by the whole body that affects only an
17 individual member and a provision adopted by the body,
18 such as a rule change, such as this law, which affects all
19 the members of the House and all the members of the -- of
20 the Senate equal. Isn't that a distinction that can be
21 taken into account in determining whether there is
22 standing?

23 MR. MORRISON: It may be -- it may have some --
24 some bearing on it. But I -- the Solicitor General
25 conceded earlier that the -- that if members from Iowa

1 only had a half a vote on the -- on the farm prices, that
2 that -- that they would have injury. I -- we suggested in
3 our -- our reply brief --

4 QUESTION: That wouldn't affect everybody
5 equally. That -- that's the reason. This is a provision
6 every member of the House is in the same boat, and the
7 House -- the House voted it, you know, by a majority vote.

8 MR. MORRISON: Well, of course, the House cannot
9 change the Constitution. That was clear from the
10 beginning.

11 QUESTION: But the distinction between the Adam
12 Clayton Powell case, which you brought up in your brief,
13 and the half a vote for the Iowans --

14 MR. MORRISON: We gave another hypothetical in
15 which there is a statute passed on a conflict of interest
16 theory, under which members of Congress are forbidden from
17 voting on projects of more than \$50 million if it's in
18 their district. And a member wants to go to court and
19 says, I have been injured because I can no longer vote
20 on --

21 QUESTION: Every member has a district. I mean,
22 General Dellinger recognized that the Powell case, that
23 suit could be brought even if the salary wasn't stopped.
24 I'm not allowed to be a legislator, or my vote counts only
25 half. The -- the majority is -- is seizing on a

1 particular person or group of persons and treating them
2 adversely. But your -- your example --

3 MR. MORRISON: Every member has a right to vote
4 on -- on pending bills. It's in the Constitution.

5 QUESTION: Yes. But the -- the -- you make
6 nothing of the distinction between we single out a group
7 and treat them adversely and what we do to others we do
8 unto ourselves.

9 MR. MORRISON: But in terms of injury, I think
10 that they are -- that they are injured. And that may make
11 a difference in terms of -- of how we -- we -- we feel
12 about it and whether there ought to be prudential reasons
13 why we ought not to allow members of Congress to go to
14 court principally when they're complaining about the --
15 the fact that they were outvoted on -- on a matter in
16 their own house. But here we have --

17 QUESTION: No. But your -- your -- your
18 standing would apply even if the voter voted for the bill.
19 He'd still have standing?

20 MR. MORRISON: He might be disqualified for
21 other reasons. But --

22 QUESTION: But why would he be disqualified?
23 The statute -- he'd be injured just as much as somebody
24 who voted against the bill. I don't see a distinction
25 based on how you vote. He might change his mind.

1 MR. MORRISON: That is true. I was thinking
2 of -- of the equitable situation of clean hands, that
3 somebody might not allow you to come to court --

4 QUESTION: Yes, but we don't look at equities.
5 All of that is put to one side with the statutory
6 provision you rely on --

7 MR. MORRISON: Well -- well, I agree with -- I
8 agree with that. But we don't have to face that issue
9 here.

10 And, of course, it's hard to imagine that this
11 case would come out differently if instead of the five
12 members that we had here, that we had joined us a person
13 who was newly elected to the Congress in November of 1996,
14 who never had an opportunity to vote on it. Does anything
15 in Article III suggest that the result ought to be
16 different? And I suggest to you that it's not.

17 QUESTION: Can I ask you one question on the
18 merits? Suppose -- imagine we have somewhat different
19 laws, but two laws like the following. The first one,
20 Congress says: There follow a list of 1,000
21 appropriations. We delegate to the President the
22 authority to impound or not to impound those monies. Is
23 that objectionable?

24 The second statute says -- by the way, they put
25 in a 5-day deadline for him to make up his mind -- the

1 second statute says: The following are 5 or 50 special
2 provisions of the tax code that will benefit particular
3 individuals. We do two things. We instruct the head of
4 the IRS to consider the merits of each under ordinary
5 rule-delegating powers, and then, within 5 days, to adopt
6 or to reject those which he feels are warranted on the
7 basis of the money available.

8 Now, what would the constitutional objection be
9 to either of those bills, and why aren't they this?

10 MR. MORRISON: If the -- if the -- you used --
11 Your Honor used the word "impoundment" in the first
12 statement, and I wanted to be clear about the meaning of
13 that term.

14 QUESTION: Well, don't hold me to the -- to
15 the -- I'm not trying to be --

16 MR. MORRISON: But if -- if Your Honor -- I
17 don't mean the word itself, but if in that context the
18 concept is the concept which we have here, which is a
19 permanent repeal of the law, such that the President
20 cannot change his mind again, nor can his successors, nor
21 can changed circumstances revive the law, that the only
22 thing that can -- can do it is a new law, in my view, that
23 is precisely what we have here, and it is a repeal. It is
24 the power to extinguish the law and not to execute the
25 law.

1 Now, in the second situation, it was a little
2 harder for me to understand what the rejection was. If it
3 is the same kind of provision, the same kind of permanent
4 change, off or on, it is the same kind of lawmaking, not
5 law executed that we have here --

6 QUESTION: It wouldn't be --

7 MR. MORRISON: -- in the line item veto.

8 QUESTION: It wouldn't be surprising -- I mean,
9 maybe it is -- they don't normally do it. But it -- it
10 wouldn't be surprising for Congress to say to the head of
11 the IRS, We direct you to consider the five following
12 measures. Consider whether or not you want to enact a
13 rule that will turn them into law. Decide, yes or no.

14 MR. MORRISON: Well, they surely have the
15 constitutional authority to ask the IRS --

16 QUESTION: Yes.

17 MR. MORRISON: -- as part of its interstitial
18 lawmaking authority.

19 QUESTION: Yes. And then they say, by the way,
20 you have to say yes or no within 5 days, and -- and, by
21 the way, unless you actually say no, it's yes.

22 MR. MORRISON: But then it doesn't -- if --

23 (Laughter.)

24 MR. MORRISON: If it leaves the statute intact,
25 unlike this one, where for all practical purposes, these

1 provisions are gone upon cancellation, if it leaves the
2 statute intact, that's one thing. But what we have here
3 is a permanent change in the law, as if the pages were
4 being cut out of the United States Code. The statute says
5 that these provisions shall have no further legal force
6 and effect. The words "repeal" and "veto" were repeatedly
7 used in the legislative history. The Congress sought to
8 enact a line item veto, and that is what they did here.

9 QUESTION: Well, there's a similar result with
10 some of those statutes that gave the President authority
11 to cease foreign aid when a certain event should occur or,
12 you know --

13 MR. MORRISON: In virtually every one of those
14 cases -- I believe every one that we have been able to
15 discover a point or two -- the President could change his
16 mind again. If the situation changed, the words used were
17 "suspension" rather than "cancellation." The notion of
18 administering the law rather than permanently changing the
19 law. And we believe that every one of those cases,
20 including the lump sum --

21 QUESTION: Is that -- is that true of the
22 agricultural statute they cite in their reply brief?
23 They -- I think I remember reading that, saying that
24 statute is totally -- put an end -- am -- am I right or
25 wrong about that?

1 MR. MORRISON: Yes, it was based upon a narrow
2 set of circumstances. That statute, by the way, was
3 enacted in 1933, and it continues in effect today. I find
4 that relative little precedent in terms of what kind of
5 thing we have here.

6 QUESTION: Well, is it strictly the 5 days? I
7 mean I don't know why 20 years --

8 MR. MORRISON: No, it's not strictly the 5 days,
9 Justice Stevens.

10 QUESTION: Okay. So that a statute that said,
11 whenever the President decides to terminate this program,
12 he may do so, period, and that's the end of it, that would
13 be unconstitutional, too?

14 MR. MORRISON: If that is all that it said --
15 and that it was permanently terminated --

16 QUESTION: Right.

17 MR. MORRISON: -- that he could not revive it
18 again --

19 QUESTION: Right.

20 MR. MORRISON: -- that, to us, is -- is
21 lawmaking rather than law executing. But we can envision
22 a --

23 QUESTION: I think it's worse that he should be
24 able to repeal it and reenact it, repeal it and reenact
25 it. You think -- you --

1 MR. MORRISON: It's not worse or better, Your
2 Honor. It's --

3 QUESTION: -- it seems to me that's giving him
4 even -- even greater power.

5 MR. MORRISON: It's the -- that is not the test,
6 I believe. I believe the test is whether, under the
7 Constitution, he is engaging in Article II activities,
8 carrying out the laws, or whether he is engaging in
9 Article I activities, making the law. And by permanently
10 ending the law, he has shifted the line from Article II to
11 Article I.

12 QUESTION: Unless he has criteria.

13 MR. MORRISON: It is possible that he is no
14 longer -- that if he's permanently terminating -- there
15 are circumstances in which, if -- even though it becomes
16 legally reversible, that it might be considered, at least
17 on an individual basis, carrying out the law.

18 QUESTION: I don't understand that. You can
19 give him criteria for terminating the law? He can
20 terminate the law so long as he has criteria? I don't
21 understand that.

22 MR. MORRISON: Well, there have been some laws
23 in which the -- the President's power, as a practical
24 matter terminates, at a -- at a given time, and he's told
25 he has to do something and he -- and he carries out the

1 law in that particular fashion. I would not want to say
2 that there is no law that I can think of in which a
3 President could not be given the authority to say that, at
4 this point, that -- that the law may be -- may be
5 terminated because he would be ending the execution of the
6 law. If the --

7 QUESTION: But the -- the theory is that he
8 wouldn't be terminating the law. The theory there would
9 be that the law had a termination point upon the making of
10 a finding.

11 MR. MORRISON: Yes.

12 QUESTION: And isn't that where --

13 MR. MORRISON: It is -- it is -- it is
14 legislating in contingency, as -- as the Court has
15 referred to it in several cases --

16 QUESTION: Yes.

17 MR. MORRISON: -- in which the -- the
18 termination process is part of the law itself. Here
19 the -- the President has the unfettered power to decide
20 whether to cancel anything or not. And if so, how much.
21 He is no mandated to save a single nickel under this
22 program if he chooses not to do so.

23 QUESTION: So --

24 QUESTION: But once -- but once you acknowledge
25 the legitimacy of these other statutes, all we're really

1 arguing about is an excessive delegation question, not --
2 not at all a -- you know --

3 MR. MORRISON: We don't believe so for the
4 reasons set forth in my brief. I see my time is up.

5 Thank you.

6 QUESTION: Thank you, Mr. Morrison.

7 General Dellinger, you have 2 minutes remaining.

8 REBUTTAL ARGUMENT BY WALTER DELLINGER

9 ON BEHALF OF APPELLANTS

10 GENERAL DELLINGER: Mr. Chief Justice, Justice
11 Kennedy raised the question about irregularity in the
12 legislative process as being an allegation that would give
13 rise to standing. I want to note that the Defendants in
14 this case are the Secretary of the Treasury and Director
15 of OMB. If there is -- we don't believe there was any
16 defect in the internal procedures because the members'
17 votes were counted and the bill was presented to the
18 President and he complains about what the President does
19 thereafter. But if there were an actual deprivation of
20 the right to vote, the appropriate suit would be against,
21 I would assume, someone in the legislative branch.

22 It is not the case that when the President
23 exercises his discretion to cancel in order to carry out
24 deficit reduction that the provision has no legal force
25 and effect. What the statute actually says is that the

1 budget authority has no legal force or effect. The Act --
2 the provision continues to define the amount of money
3 that, for Gramm-Rudman and pay-as-you-go purposes and
4 sequestration purposes, the amount of allowable spending
5 is reduced.

6 Here you have a restriction of the President's
7 delegated authority to cover one-third of the budget only
8 for a period of 8 years, where he may draw upon the entire
9 expertise of the executive branch in making a conclusion
10 that it is better to allocate some money exclusively to
11 deficit reduction. We believe that that broad
12 congressional and executive consensus should be sustained.

13 Thank you.

14 CHIEF JUSTICE REHNQUIST: Thank you, General
15 Dellinger. The case is submitted.

16 (Whereupon, at 11:36 a.m., the case in the
17 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

FREDERICK D. RAINES, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, ET AL., Appellants v. ROBERT C. BYRD, ET AL.
CASE NO. 96-1671

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna Marie Federico-----

(REPORTER)