

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WILLIAM J. CLINTON, PRESIDENT OF THE UNITED
STATES, ET AL., Appellants v. CITY OF NEW YORK,
ET AL.

CASE NO: 97-1374 c. 4

PLACE: Washington, D.C.

DATE: Monday, April 27, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM J. CLINTON, PRESIDENT :

4 OF THE UNITED STATES, ET AL., :

5 Appellants :

6 v. : No. 97-1374

7 CITY OF NEW YORK, ET AL. :

8 - - - - -X

9 Washington, D.C.

10 Monday, April 27, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:03 a.m.

14 APPEARANCES:

15 SETH P. WAXMAN, ESQ., Solicitor General, Department of
16 Justice, Washington, D.C.; on behalf of the
17 Appellants.

18 LOUIS R. COHEN, ESQ., Washington, D.C.; on behalf of the
19 Appellee Snake River Potato Growers.

20 CHARLES J. COOPER, ESQ., Washington, D.C.; on behalf of
21 the Appellee City of New York.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-1374, William J. Clinton v. The City of
5 New York.

6 General Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE APPELLANTS

9 GENERAL WAXMAN: Mr. Chief Justice, and may it
10 please the Court:

11 Constitutional principles of separation of
12 powers govern both the standing and merits issues of the
13 case. With respect to standing, this Court recognized
14 last term in *Raines v. Byrd* that the Article III inquiry
15 is especially rigorous when plaintiffs challenge the
16 allocation of constitutional power, yet here, in the New
17 York case, the State, which is not even a party, has not
18 been denied a single dollar in medicaid reimbursement and
19 the Secretary of HHS has not even determined that it
20 should.

21 In *Snake River*, the plaintiffs include no entity
22 whose taxes could possibly be affected by the challenged
23 cancellation and they have not shown that the cancellation
24 interfered with any transaction from which they likely
25 would have benefited.

1 On the merits, the President's cancellations
2 violated neither Article I nor the separation of powers.

3 The Presentment Clause was fully satisfied when
4 the President signed the Balanced Budget and Taxpayer
5 Relief Acts making them laws. When the President
6 subsequently cancelled sections 4722(c) and 968, he was
7 not returning portions of the presented bills while
8 signing other portions into law. He was implementing a
9 limited discretionary authority to execute the law as it
10 had been enacted by Congress.

11 Cancellations under the Line Item Veto Act do
12 not prevent Congress from making whatever laws it wants.
13 Congress could readily have exempted sections 4722(c) and
14 968 from the President's authority. It chose not to do so
15 and, indeed, it identified section 968 in the Taxpayer
16 Relief Act as an item subject to cancellation.

17 QUESTION: Is this more constitutionally
18 defensible than what we might call a pure line item veto
19 in which he --

20 GENERAL WAXMAN: It is.

21 QUESTION: In which he can veto the minute
22 that -- before the bill ever becomes law, and is the
23 reason for that because for a moment in time, at least,
24 there's a little law?

25 GENERAL WAXMAN: No.

1 QUESTION: Or a big law?

2 GENERAL WAXMAN: No. The critical reason is the
3 point I just identified, which is in a true line item
4 veto, which everybody understands is unconstitutional, the
5 Congress does not retain control to determine which
6 spending or tax items the President can't cancel.

7 If the President has the authority -- and this
8 is critical. If the President has the authority to cancel
9 a provision before it becomes a law, under the Presentment
10 Clause he can cancel a designated tax or spending item and
11 then sign the law and Congress has thereby deprived itself
12 of the opportunity to create the law.

13 Here, the President signs the law and it becomes
14 a law under the Presentment Clause, and when he does so,
15 if the law contains a designated cancellable item,
16 Congress has made a law telling the President that,
17 subject to certain determinations and certain
18 considerations, and certain certifications, you have a
19 single, binary choice.

20 You can either spend the money as provided, or
21 you can spend it for deficit reduction by putting that
22 money into a lockbox, and in that manner the President is
23 executing the law that Congress has enacted, not vetoing
24 an item or repealing a provision that Congress has
25 enacted.

1 It's no different, I sus -- I suggest, for
2 Article I purposes, than if, instead of enacting the Line
3 Item Veto Act, Congress had simply decided to put in as
4 section 1 of every spending and taxing bill that it enacts
5 what is now section 961 of the Line Item Veto Act. It
6 says, we have the following spending and taxing
7 provisions, but subject to these articulable principles
8 and these constraints, the President may decide, if he
9 signs this law, not to do certain things.

10 QUESTION: Well, so far as the locked box is
11 concerned, this bill is the same as a line item veto. I
12 mean, it's in a locked box that's going to contribute to
13 reducing the deficit. So that's not a distinction between
14 the two.

15 GENERAL WAXMAN: Well, I think the -- I think
16 it's -- the lockbox feature of this, which is the feature
17 that gives the President a single binary choice, tends to
18 make this much less of a delegation problem under
19 separation of powers than might otherwise exist, because
20 in contradistinction to cases in which the Court has
21 upheld, for example, delegation of authority to the FCC or
22 the SEC to essentially create an entire code of conduct
23 for the securities industry, the Line Item Veto Act is
24 not -- and in this respect I think it's unique and
25 uniquely constrained. It's not self-executing.

1 The President can't do anything with his
2 cancellation authority unless Congress subsequently passes
3 an act that has a cancellable item in it and does not
4 provide that the President's authority will not be subject
5 to cancellation.

6 It's almost the -- a mirror image of the
7 Impoundment Control Act.

8 QUESTION: But that's -- that also sounds to me
9 the same as what we might call the pure line item veto.

10 GENERAL WAXMAN: Well, the --

11 QUESTION: A single, simple binary choice. Sign
12 it or X it out.

13 GENERAL WAXMAN: The problem -- the
14 constitutional deficiency in the line item veto, the -- a
15 pure, a true item veto, is that it violates the
16 Presentment Clause, which provides, among other things,
17 that the bill that the President signs making it a law has
18 to be the bill that each -- a majority of each House of
19 Congress enacted, and if the President can excise a
20 provision before he signs the law, that's violated and, as
21 this Court has indicated --

22 QUESTION: But Mr. Waxman, you wouldn't --
23 General Waxman, you wouldn't say that that's remedied if,
24 by the simple fact that it only applies to later laws
25 where Congress says he can do that.

1 I mean, I don't see how that argument carries
2 any water at all.

3 GENERAL WAXMAN: Well --

4 QUESTION: Your argument that, after all, he
5 cannot exercise this function on any legislation, but only
6 later legislation where Congress chooses to let him
7 exercise it. You wouldn't say that that would make an
8 invalid line item veto provision good, would you?

9 GENERAL WAXMAN: I -- if -- there are two bases
10 for a constitutional challenge to this authority. One is
11 under Article I and whether -- and asks the question
12 whether, in fact, the operation of this statute violates
13 the formal requirements of the Presentment Clause or, in
14 effect, effects a repeal.

15 The other large issue is whether this represents
16 a violation of the separation of powers as applied to
17 Congress through the "non-delegation doctrine," and we --

18 QUESTION: Right, but what I'm suggesting is, I
19 don't see how the fact that it only applies to later
20 legislation where Congress lets it apply has any bearing
21 upon either of those questions.

22 GENERAL WAXMAN: Well, if it -- it has a bearing
23 on the Article I issue. I don't think that the timing of
24 this relates to the scope or breadth of the delegation
25 except -- I take that back. I think it relates to both.

1 What Congress -- by making this bill -- this act
2 forward-looking, what it basically is saying, Congress has
3 reserved for itself the right, in every subsequent
4 spending or taxing bill that has a cancellable provision,
5 to decide, at the time that it passes those bills, whether
6 it will or will not allow the President to exercise that
7 authority. Now --

8 QUESTION: That's fine, but once it decides that
9 it will, you have the same problem, that the -- I mean,
10 you may argue that it's no problem on other grounds, but I
11 don't see how it becomes --

12 GENERAL WAXMAN: Well --

13 QUESTION: -- no problem simply because Congress
14 has said the President can do it.

15 GENERAL WAXMAN: There are many historical
16 examples where Congress has given the President authority
17 to, if you will, repeal the effect of a prior enacted
18 statute, but --

19 QUESTION: Yes, but not to repeal the statute,
20 and I mean, that's the difference.

21 GENERAL WAXMAN: Well --

22 QUESTION: The examples that you give are sort
23 of the kind of fact-finding examples in which, if the
24 President finds a given fact to be the case, then a
25 consequence follows and he must declare that consequence

1 and implement it, but that's not what we've got here.

2 GENERAL WAXMAN: Well, I -- with all due
3 respect, Justice Souter, this is not a repeal of a
4 provision. Repeals of provisions of acts, or acts
5 themselves, have got to follow the Presentment Clause.
6 There's no question --

7 QUESTION: Well, but I mean, that's the -- you
8 say it's not, but that's one of the questions.

9 GENERAL WAXMAN: I -- let me try and explain why
10 it --

11 QUESTION: Well, is the effect is -- in effect,
12 is it -- it says the law is no longer there. The law is
13 no longer applicable. You can call it a different word,
14 but it's the same thing. It's gone.

15 GENERAL WAXMAN: Well, Justice Ginsburg, let me
16 try and respond to these two questions in two ways. First
17 of all, under the lockbox provisions of 691c, a cancelled
18 provision does retain real, legal budgetary effect. It
19 removes the amount -- that amount of money under
20 Gramm-Rudman-Hollings and the Budget Enforcement Act from
21 Congress' ability to spend that equivalent amount of
22 money.

23 Under the Budget Enforcement Act, ordinarily, if
24 a particular provision were vetoed, or not -- money were
25 not used by the President, Congress has the authority, up

1 to the budget baseline, to enact another provision and
2 spend that money.

3 A cancellation of a provision in this act
4 requires that that money be devoted to deficit reduction,
5 so first of all it is not true that it has no remaining
6 effect, but even --

7 QUESTION: Well, that's just an effect on
8 Congress' own internal rules.

9 GENERAL WAXMAN: No.

10 QUESTION: Is it?

11 GENERAL WAXMAN: No.

12 QUESTION: Isn't it?

13 GENERAL WAXMAN: It is not. The Budget
14 Enforcement Act as amending the Gramm-Rudman-Hollings Act
15 of 1985 are statutes, laws that bind Congress and the
16 President.

17 They provide mandatory sequestration authority
18 in the President and in Congress in the event that the
19 baseline is exceeded, and what the lockbox provision of
20 the Line Item Veto Act does is to say, if this is not an
21 issue of whether the President wants to implement this
22 provision or not.

23 The President must implement this provision in
24 accordance with the law that Congress enacted, and that
25 means that you can either spend the money, give effect to

1 this provision to build a new dam in West Virginia, or
2 take the money that would have been spent for that and put
3 it in the deficit lockbox which, under the Budget
4 Enforcement Act, means that you cannot by -- enact a
5 compensating piece of legislation to otherwise spend the
6 money. It reduces the amount of money that Congress and
7 the President can spend.

8 But even if it didn't have that effect, we think
9 that even without the lockbox provision this act would be
10 constitutional, because there are many examples, and I
11 respectfully submit that they are not all so easily
12 distinguishable, Justice Souter, of instances where
13 Congress has given one of the other two branches the
14 authority to take acts unilaterally that repeal not the
15 provision but the effect of the provision.

16 I mean, maybe the best example is the Rules
17 Enabling Act, which provides under 28 U.S.C. section
18 2072b, that the court may promulgate rules for the
19 district courts of procedure and evidence and that any --
20 and that those rules will "repeal prior inconsistent
21 statutes" -- I'm quoting from the Supreme Court's decision
22 in Sibbach and from the Court's decision in United States
23 v. Degas --

24 QUESTION: What's the -- I don't want to cut you
25 off because you're giving other examples, but I'd like an

1 example that is the closest you can come to the following,
2 that Congress passes a law that says next year Mr. Smith,
3 Mr. Jones, and 18 other people will not have to pay taxes
4 amounting to \$18 million.

5 And then it says to the President, Mr.
6 President, as you wish, in the national interest you can
7 decide whether Mr. Smith or Mr. Jones or any group of the
8 other 18 will, in fact, pay taxes, up to \$10 million.
9 Now, is there -- the standard being, in the national
10 interest.

11 So he can choose to tax four people, 16 people
12 no people, as he wishes, without a standard but for the
13 national interest.

14 GENERAL WAXMAN: Well --

15 QUESTION: Now, what example is there that's the
16 closest, in the past, to the President having that kind of
17 authority to pick and choose whom to tax, whom not to tax,
18 with the standard of the national interest being the only
19 control?

20 GENERAL WAXMAN: Justice Breyer, the question
21 that you're raising is raising a question not under
22 Article I but under the delegation doctrine.

23 QUESTION: That's right. That's right.

24 GENERAL WAXMAN: I want to make sure that I
25 understand --

1 QUESTION: That's exactly right. I'm accepting
2 all your arguments up to that point, hypothetically.

3 GENERAL WAXMAN: I'll bank that.

4 (Laughter.)

5 GENERAL WAXMAN: The -- under the delegation
6 doctrine, the question always is, after -- well, at least
7 in this century, whether Congress has supplied an
8 intelligible principle or whether, as -- under the test
9 that this Court frequently announces, it is
10 constitutionally significant if Congress clearly
11 delineates the general policy, the public agency that is
12 to implement the policy, and the boundaries of the
13 delegated authority.

14 Now, in your question you have posited an
15 example in which Congress has given the President no
16 intelligible principle other than the national interest.
17 I think that raises a much more difficult question than we
18 have here, because an argument could be made that the
19 President is constitutionally required to act in the
20 national interest, but the issue would be, is the
21 principle sufficiently intelligible.

22 Now, the best cases that we have for the
23 historical precedence for giving the President
24 discretionary authority to cancel limited tax cuts or
25 revenue-generating or nonrevenue-losing provisions would

1 be the cases that are recited in J. W. Hampton and in
2 Skinner, where the President was often authorized to
3 decide whether or not to collect duties or tariffs and
4 several of these temporary provisions were permanent, and
5 I think -- you know, it's --

6 QUESTION: But those were based on factual
7 determinations that the President was entitled to make
8 under the statute, weren't they?

9 GENERAL WAXMAN: They were, and the issue --
10 sometimes the determinations were specifically outlined,
11 as in Field v. Clark, where it was very specific, and
12 sometimes they were very, very general, and the issue then
13 is only whether the President has a sufficiently
14 intelligible principle.

15 You know, what's interesting about these old
16 cases, and there are many, many of them, is that these
17 were authorities that the President was exercising. This
18 was discretion he was exercising at a time in our country
19 before we had an income tax and when in general the very
20 large portion of the Federal revenues were raised by
21 tariffs and custom duties.

22 QUESTION: Well, in Justice Breyer's
23 hypothetical, you and he seemed readily to agree that we
24 can just look at this as a delegation problem. From the
25 taxpayer's standpoint, this was a law that's been

1 cancelled, and the taxpayer has an expectation the law's
2 not going to be cancelled unless both Houses of Congress
3 agree on it. Delegation is not just a subset of this
4 larger problem, it seems to me.

5 GENERAL WAXMAN: No.

6 QUESTION: I don't think that larger problem
7 goes away with Justice Breyer's hypothetical.

8 GENERAL WAXMAN: I didn't mean to suggest that
9 it would. I -- there are two different bases for
10 constitutional challenge. One which I was discussing with
11 Justice Breyer is whether or not there is a delegation of
12 authority that exceeds what Congress may do under the
13 Separation of Powers Clause.

14 The other constellation of issues relate to
15 Article I, and I respectfully suggest that with respect to
16 these limited tax cuts the Article I problem is even less
17 than with respect to the other provisions, because this is
18 not an example of the President repealing a provision of
19 the law that Congress has enacted.

20 With respect to the limited tax cuts under
21 section 691f, the Joint Committee on Taxation is required
22 to go through and specify in the actual tax bill which
23 provisions of the bill are limited tax cuts subject to the
24 President's cancellation, so -- and that's exactly what
25 was done in this case in the Taxpayer Relief Act.

1 There is a provision in which the Congress has
2 said, attention, Mr. President, please look at the
3 following provisions. These are limited tax cuts as to
4 which you will have cancellation authority if you wish it.

5 QUESTION: How does that affect a constitutional
6 question?

7 GENERAL WAXMAN: Well, it -- what it
8 demonstrates, Chief Justice Rehnquist, is that what the
9 President is doing is not repealing a provision of a law
10 that Congress has enacted, but executing a discretionary
11 authority that Congress has given him.

12 Let me give you an example that was helpful to
13 me when I first started thinking about this problem. If
14 Congress enacted a law -- and there is a very precise
15 historical precedence for this.

16 Congress passed a law that contained 10
17 different spending items, but they put a provision in that
18 basically said, in legalese, look, Mr. President, we think
19 all 10 of these projects are worthwhile, but we're very
20 concerned about the deficit, and we don't really think
21 that the country ought to be funding more than eight of
22 them. Use the following factors and pick whichever eight
23 of the 10 you want.

24 Nobody, I suggest, would suggest that there is
25 an Article I problem there. The President --

1 QUESTION: Well, if the factors are not factual,
2 someone would suggest that.

3 GENERAL WAXMAN: They --

4 QUESTION: If the -- if in your example the
5 factors that the Congress specified were straight fact as
6 opposed to normative factors, we'd be back in the old
7 cases that you and I referred to earlier, but if the
8 example is a normative example, as in the public interest,
9 then those cases are not authority, and you have, it seems
10 to me, a very different Article I problem.

11 GENERAL WAXMAN: I --

12 QUESTION: Or at least if you make some of those
13 10 not simply refusal to spend money, but elimination of
14 taxes. I mean, you could get anything through on the
15 basis of the prior authority the President has always had
16 simply not to expend money which Congress has authorized
17 but not -- not compelled him to spend. That's easy. But
18 make some of those 10 tax provisions.

19 GENERAL WAXMAN: Well, again, this Court in
20 Skinner stated that the standard for separation of powers
21 analysis with respect to tax provisions is no different
22 than it is with respect to spending provisions or any
23 other provision in the Constitution under Article I.

24 That is, the same standard of nondelegation
25 applies, and it applies with particular force here because

1 in the tax provision the Line Item Veto Act provides that
2 the Congress will specify for the President in the actual
3 bill that's -- taxing bill that's presented to him which
4 items he should -- he may or may not cancel.

5 Now, that may be -- that may leave a delegation
6 doctrine issue if you think that he doesn't have
7 sufficient intelligible principles, but it is not a
8 question of the President, by exercising a discretionary
9 choice that Congress gives him in the law that's passed,
10 an Article I problem, unless I'm seriously astray.

11 QUESTION: Is there anything like, here's a
12 laundry list of items, Mr. President. Here's a capital
13 gains treatment for so-and-so, and relief from taxes from
14 so-and-so. We don't want to take the political heat for
15 making the choice, so you pick.

16 That sounds to me like legislating. I mean,
17 whatever legal dressing that you give to it, it's saying
18 to the President, you make this hard choice that we don't
19 want to make. We're giving out all these plums to
20 everybody and we don't want to take away any of them. You
21 do it.

22 GENERAL WAXMAN: And what's troublesome about
23 your example, Justice Ginsburg, relates not to Article I,
24 because the law has been passed and signed by the
25 President, but to the separation of powers.

1 Congress cannot, we know, delegate its law-
2 making power. It can't delegate the authority to make the
3 laws, and if it just passes a law that says, here are two
4 things we think are really nice, but we don't really have
5 the money to spend and you just pick whichever one you
6 want, I think the Court would appropriately say, look, the
7 Congress has delegated its law-making function because it
8 has not provided a "intelligible principle" by which the
9 executive can exercise his discretion.

10 In this case --

11 QUESTION: What is the constitutional
12 distinction between what you call law-making and law-
13 repealing? There isn't any.

14 GENERAL WAXMAN: Between law-making and law --

15 QUESTION: In Justice Ginsburg's example an
16 appeal is being effected, and that is law-making.

17 GENERAL WAXMAN: If Congress -- there is -- it
18 is not our contention that a repeal of a law can be
19 effectuated by any means other than those specified in
20 Article I.

21 It is our contention, Justice Souter, that when
22 Congress passes a law that contains two spending or taxing
23 or tax cut provisions and says to the President, with
24 whatever principles or not, you may choose which one of
25 these to execute and which one not to, the President is

1 exercising a discretionary authority that Congress has
2 given him, and if they've given him sufficient
3 intelligible principles, it's constitutional.

4 Now, in the --

5 QUESTION: Well, of course, that -- this case is
6 different, because it says you have -- you can either
7 implement both, one, or neither.

8 GENERAL WAXMAN: Well, I --

9 QUESTION: That's what this case is.

10 GENERAL WAXMAN: Well, first of all, the Line
11 Item Veto Act applies to three very, very specifically
12 defined provisions relating to spending and revenue that
13 account for a very small portion of the Federal budget
14 deficit, and it provides that before an item will be
15 cancellable it must satisfy each of three criteria, and
16 even if it does, the President must make three
17 different -- make certain determinations.

18 He must take into consideration a number of
19 factors that are specified, and he must identify for the
20 Congress a number of factors in his cancellation message.

21 QUESTION: Well, General Waxman, you say it
22 applies only to a very small amount of spending, but if we
23 uphold it here, it could then be extended to a vast amount
24 of spending. I don't see that's a constitutional
25 distinction.

1 GENERAL WAXMAN: I think there would be a
2 different question -- we might be prepared to defend it,
3 but there would be a different question if the President
4 was given the authority to cancel existing items of direct
5 spending, which would be the equivalent of the repeal of
6 the effect of a prior law.

7 Here, we're only talking about new spending,
8 discretionary spending and new items of direct spending
9 account for one-third, approximately one-third of the
10 Federal budget.

11 The discretionary spending part is the same
12 authority that the Presidents have clearly had since the
13 first Congress not to spend the full amount of
14 appropriated funds or to -- you know, to act with almost
15 complete discretion under lump sum appropriation
16 authority.

17 QUESTION: This is --

18 QUESTION: You equate with spending letting
19 people keep their money, and that is to say, not enforcing
20 a tax? I mean, I'm not sure that's a proper equation.

21 GENERAL WAXMAN: Well, I'm not suggesting that
22 there is --

23 QUESTION: Appropriations bills have always been
24 treated differently, and when you extend it from simple
25 appropriations and say the President, even though it's

1 been appropriated, doesn't have to spend it, to -- to the
2 fact he can be given the option, you know --

3 GENERAL WAXMAN: No, Justice Scalia, I -- I
4 was --

5 QUESTION: It's your choice, enforce the tax or
6 not.

7 GENERAL WAXMAN: We're not saying that. It's
8 not our position that, because the President has had
9 historical discretionary authority, when Congress has
10 given it to him, to decline to spend items or to abolish
11 agencies, or transfer agency functions, therefore there's
12 no difference with taxes.

13 The point I was making with the Chief Justice
14 was the analogy between discretionary spending and what
15 the law calls new items of direct spending.

16 With respect to the tax provisions, this ship is
17 prepared to stand on its own bottom, which is, we think
18 that there is independent historical precedent for
19 Congress giving the President the discretionary authority
20 to decline to implement certain revenue provisions upon
21 the application of certain intelligible principles.

22 QUESTION: But throughout on that, on the
23 particular -- it's the same point, that I want to get
24 something you almost said, and you stopped --

25 GENERAL WAXMAN: Thank you.

1 QUESTION: -- just before you said it, and that
2 is the reason that the -- to uphold the tax provisions,
3 you say, is not to give the President total authority
4 under the Constitution to rule by decree, should Congress
5 want him to do it, because there's an intelligible
6 principle.

7 GENERAL WAXMAN: Yes.

8 QUESTION: And the intelligible principle, you
9 say, is not just, do what's in the public interest, it
10 is -- ?

11 GENERAL WAXMAN: The intelligible principle is
12 that -- first of all, in order for there to be a targeted
13 tax cut, there has to be a baseline tax, but the President
14 must determine, number 1, that cancellation will reduce
15 the Federal budget deficit, and this is not, by the way,
16 as the other side contends, an ipso facto claim, because
17 many tax provisions are enacted on the notion and on the
18 budgetary assumption that they will generate additional
19 economic activity and raise taxes, and in that instance
20 the President would not be able to make that
21 determination -- raise money and provide more taxes.

22 Secondly, he must determine that it will not
23 impair any essential Government function, that it will not
24 harm the national interest, and in making those
25 determinations the President is directed to consider the

1 legislative history, the construction and purposes of the
2 law which contains the item to be cancelled, which might
3 relate, in the case of the State --

4 QUESTION: How much time does he have to make
5 these determinations?

6 GENERAL WAXMAN: He has 5 days after he signs
7 the bill, which would give him a maximum of 10 days.

8 Now, in the context of the -- in the regime of
9 the Budget Enforcement Act and Gramm-Rudman-Hollings,
10 where OMB and CBO are required to make daily -- weekly, if
11 not daily calculations about where we are in terms of the
12 budget baseline and the spending caps, there is a very
13 important purpose to be served by requiring the President
14 to decide yes or no, whether or not a particular item will
15 be cancelled, and then to give the Congress the authority,
16 particularly with respect to annual appropriations bills,
17 to try and file -- to enact, consider and enact a
18 disapproval bill.

19 I mean, the irony of the --

20 QUESTION: General Waxman, would you give -- I'm
21 coming back to Justice Breyer's question. Would you give
22 me something a little more -- that I can sink my teeth
23 into?

24 You've told me what these things that the
25 President cancels cannot be. They cannot do this, and

1 they cannot do that. That limits the universe of what he
2 can cancel. Now, once that universe is limited -- they
3 can't be this and they can't be that -- what must they be?

4 GENERAL WAXMAN: Well, they must --

5 QUESTION: What is the criterion? I mean, to
6 say you've just limited the universe of possible
7 cancellations --

8 GENERAL WAXMAN: Are we talking about tax
9 benefits here?

10 QUESTION: Anything, the tax benefits or the
11 elimination of spending.

12 GENERAL WAXMAN: The President -- the only --

13 QUESTION: What is the criterion when he selects
14 it? You've told me what he can't cancel. Now, how does
15 he decide what he must cancel?

16 GENERAL WAXMAN: He must determine, number 1, is
17 this a cancellable item, which in the case of tax
18 provisions, he's helped with by the legislation he's
19 considering.

20 QUESTION: All right.

21 GENERAL WAXMAN: Because Congress tells him
22 that.

23 QUESTION: That just limits the universe.

24 GENERAL WAXMAN: Right. Second of all, he
25 must -- he cannot cancel unless he makes the three

1 determinations that I've said.

2 QUESTION: All of which just limit the universe.

3 GENERAL WAXMAN: Right, and --

4 QUESTION: The universe is limited. We have the
5 universe.

6 GENERAL WAXMAN: That's right, and --

7 QUESTION: Now, how does he make the decision?
8 What is the criterion that Congress has given him to pick
9 what to cancel?

10 GENERAL WAXMAN: May I answer?

11 He is given in the statute a multitude of
12 factors that he must consider and certify to Congress, and
13 within that realm he has discretion, much less discretion
14 than the FCC, or the SEC, or the ICC have been given.

15 Thank you.

16 QUESTION: Thank you, General Waxman.

17 Mr. Cohen, we'll hear from you.

18 ORAL ARGUMENT OF LOUIS R. COHEN

19 ON BEHALF OF THE APPELLEE

20 SNAKE RIVER POTATO GROWERS

21 MR. COHEN: Thank you, Mr. Chief Justice, and
22 may it please the Court:

23 I think the problem with the Line Item Veto Act
24 is quite basic. The legislative power is the power to
25 write Federal statutes in their exact final form. That

1 power is vested in Congress, nontransferably. The
2 President's role in the legislative process is limited to
3 approving or returning in whole each bill that's presented
4 to him. The act gives the President the power to edit tax
5 and spending bills --

6 QUESTION: Well, technically the President has
7 to sign it, so it goes into effect, so you're really
8 having to deal with what happens after that.

9 MR. COHEN: Yes, but what we have here, Justice
10 O'Connor, is a device of saying, sign the bill first and
11 then you can immediately cancel the parts you don't
12 approve. The two steps taken together signing and
13 cancelling, together produce a statute that was not passed
14 by either House of Congress.

15 A post-enactment line item veto is functionally
16 equivalent to a pre-enactment line item veto.

17 QUESTION: They say no. They say that the
18 statute -- the provisions he cancels are not utterly
19 ineffective, that they still have some legislative effect,
20 namely the lockbox effect. What is your response to the
21 lockbox argument, that those provisions at least have that
22 effect of preventing future appropriations?

23 MR. COHEN: My response is that in my case, the
24 Snake River case, where we're talking about cancelling a
25 provision of the Internal Revenue Code, I don't think

1 there is any lockbox effect, but even in the spending --

2 QUESTION: The lockbox applies only in he
3 spending area?

4 MR. COHEN: I think that's right, but even in
5 the spending context a lockbox is simply a congressional
6 declaration that it won't otherwise spend money pursuant
7 to a provision that Congress -- that the President has
8 cancelled.

9 QUESTION: That it won't, but it can, can't it?

10 MR. COHEN: Well, it can by passing a new law.

11 QUESTION: Well, which the President has to
12 sign.

13 MR. COHEN: Which the President has to sign.

14 QUESTION: I mean, it can do anything by passing
15 a new law.

16 MR. COHEN: Yes. I think that's my point, that
17 the President's action here is final, and it takes
18 congressional action to restore the appropriation that the
19 President has cancelled or the tax provision that the
20 President has cancelled.

21 Several of General Waxman's arguments it seems
22 to me pose the following hypothetical. He suggests that
23 because Congress is aware, when it passes a later statute,
24 of the earlier Line Item Veto Act, it's no different from
25 putting a cancellation provision in each bill. I think it

1 is different in certain ways, but I also think that
2 Congress couldn't do that, either.

3 If Congress were to pass an Internal Revenue
4 Code of 1999 with a special provision saying, the
5 President may cancel any one or more of the provisions of
6 this law if the cancellation would raise tax revenues and
7 not harm the United States, Congress would be abdicating
8 its constitutional responsibility to write tax statutes,
9 and I think the Court would say that as a matter of
10 Article I law the Congress is giving the President
11 something that the Constitution requires it to do.

12 QUESTION: Suppose they add to it, and the cut
13 must be in the public interest, convenience, and
14 necessity.

15 MR. COHEN: Well, I said not contrary to the
16 national interest. I don't think that helps.

17 QUESTION: Oh, you think that's --

18 MR. COHEN: No, I think that's the same.

19 QUESTION: Well, gee, we let the FCC do that.
20 Why wouldn't we trust the President at least as much as we
21 trust the FCC? We at least elect the President.

22 MR. COHEN: I think what we let the FCC do is
23 regulate in the public interest as defined in a statutory
24 context.

25 QUESTION: There are many judgments that the FCC

1 makes that are really constrained by nothing except public
2 interest, convenience, and necessity, quite a few.

3 MR. COHEN: But the public interest itself has a
4 historical and a statutory context. We know what the
5 FCC's responsibilities are. We know who it regulates.

6 But I don't think you need even to get to the
7 question whether this is delegation running riot, because
8 I think you --

9 QUESTION: It isn't running riot. It's just a
10 little bit. I think that's what saves the FCC. Well, it
11 isn't the whole economy. It's not like -- you know, not
12 like what Franklin Roosevelt tried to do with -- in the
13 sick chicken case.

14 MR. COHEN: That's right.

15 QUESTION: But -- it's very limited. But this
16 is very limited, too. It's just a certain number of
17 provisions --

18 MR. COHEN: No, it's 70 --

19 QUESTION: -- of a certain sort.

20 MR. COHEN: It's 79 provisions, 79 tax
21 provisions. It could be 179 tax provisions.

22 I don't see the difference between this and
23 passing an entire code in which you say the President can
24 cancel any of the provisions of this code if he determines
25 that doing so would not be contrary to the national

1 interest, which is all that this statute says, and I think
2 what's wrong is that he is, by doing that, producing a
3 truncated statute that Congress didn't pass, a --

4 QUESTION: Well, does your argument rest on our
5 determining that somehow we look at it all together and
6 decide that the Article I requirements were never met in
7 the first place, or that, okay, it went into effect and
8 it's an unconstitutional repeal?

9 MR. COHEN: Justice O'Connor, I think I win
10 either way. I think that if you say there's no
11 substantive, intervening event between these two steps, a
12 long-winded President could take both steps literally in
13 the same breadth, if he were alone in the room he could
14 sign them in either order and just report what he's done,
15 that there is no substantive distinction, and that this is
16 a device to get around what General Waxman concedes would
17 be unconstitutional.

18 But I also think that if you take that first
19 step seriously, as a separate step, we now have an enacted
20 law that the President is unilaterally repealing. To be
21 sure, Congress has given him the power to repeal it, but
22 the question is whether Congress could constitutionally do
23 that.

24 QUESTION: Is the locked box provision in all
25 respects constitutional, in your view? At least it does

1 give the President a choice between two different kinds of
2 laws. He spends or he locks, and the locking mechanism,
3 according to the Government, has some very substantive,
4 important effect. It's different than just vetoing.

5 MR. COHEN: Well --

6 QUESTION: Is the Government right about that?

7 MR. COHEN: No. First of all, as I said before,
8 Justice Kennedy, it has no application to my Snake River
9 case, which particularly relates to the Internal Revenue
10 Code, but second, the lockbox I don't think saves a bill
11 that says, you may declare a particular provision to be
12 without legal force and effect.

13 The President isn't deciding to spend the money
14 in some other way. He's simply cancelling --

15 QUESTION: Well, they say it's now going to have
16 legal effect because it's in the locked box, and that's
17 just a -- that's another legal effect.

18 MR. COHEN: It's no --

19 QUESTION: It's different, say, from simply
20 vetoing.

21 MR. COHEN: Well, it's no different from the
22 legal -- I don't think it's any different from the legal
23 effect of cancelling any other appropriation which
24 Congress would therefore have to reappropriate if it
25 wanted particular money spent.

1 QUESTION: Mr. Cohen, are you going to address
2 the jurisdictional issues? I hate to ask this question,
3 but you know --

4 MR. COHEN: Yes. I think --

5 QUESTION: -- what's it to you?

6 (Laughter.)

7 QUESTION: None of these provisions directly
8 affect your client at all.

9 MR. COHEN: Yes, they do, and I really think our
10 standing case is quite straightforward. Congress passed
11 section 968 for the specific purpose of helping farmers
12 buy processing facilities through their cooperatives.
13 This particular farmer and cooperative, Mr. Cranney and
14 Snake River, were personally working actively to buy such
15 facilities with the anticipated help of section 968.

16 QUESTION: It helped you to buy them by helping
17 the seller to sell them --

18 MR. COHEN: Yes.

19 QUESTION: -- right?

20 MR. COHEN: Yes.

21 QUESTION: But what it did immediately was to
22 help the seller to sell them. If we had the seller in
23 front of us, who said, I'm denied this tax benefit that I
24 was going to get for selling the facility, I could
25 understand it.

1 But what if you had a tax break that applied to
2 somebody who was about to buy a car, and the automobile
3 manufacturer comes in, he says, you know, he didn't buy
4 the car because you took away the tax break. Would he
5 have standing to come before us? And that's essentially
6 the position that you're in.

7 MR. COHEN: I think somebody who had taken
8 sufficiently concrete steps toward -- toward --

9 QUESTION: Buying it?

10 MR. COHEN: Toward buying a car could have
11 standing to challenge the cancellation of a tax provision
12 that changed the price of the car.

13 Here, the evidence --

14 QUESTION: I won't try to reduce it to the
15 absurd, if --

16 MR. COHEN: Well --

17 QUESTION: Are you relying on Congress' finding
18 that the way to help the farmer's coops is to give this
19 break to the potential seller? I mean, it was
20 Congress' --

21 MR. COHEN: Congress' finding and the
22 Government's concession that that was the purpose of the
23 statute, which they finally made in their reply brief,
24 plus, the only evidence, and there is evidence in this
25 case, which is Mr. Cranney's declaration, which is that

1 he and Snake River were actively working, that there had
2 been two actual transactions, that one of the actual
3 transactions was more expensive because section 968 was
4 not available, that they were working on another
5 transaction which was premised on the availability of
6 section 968 --

7 QUESTION: I assume it was a transaction that
8 was beneficial to both parties, or they wouldn't have
9 entered into it right? It was a voluntary deal. Why
10 isn't the seller here? I mean, you would think if this
11 beneficial deal were destroyed by the law the seller would
12 have had an objection, too?

13 MR. COHEN: Well, he simply chose not to
14 litigate.

15 We're not talking just about one transaction.
16 Cranney's declaration also says there were ample other
17 facilities available. They -- and that Snake River was
18 interested in buying more than one facility -- this was --

19 QUESTION: I'm not just --

20 MR. COHEN: -- an active program that Congress
21 wanted to assist, and the assistance was --

22 QUESTION: It might seem very reasonable for
23 this case, but I really worry about what kind of standing
24 law we establish if we say that someone who was indirectly
25 benefited by a tax break and which -- even if you add, and

1 which indirect benefit was envisioned by Congress.

2 Congress often envisions all sorts of indirect
3 benefits from a tax break. It's going to stimulate the
4 economy. I mean, every -- you know, there'll be more
5 sales of hot dogs at the ball park or something. Can the
6 hot dog vendor bring suit?

7 MR. COHEN: It's got to be sufficiently
8 specific, targeted toward a small group of beneficiaries,
9 with beneficiaries who are actively pursuing it.

10 It seems to me that we're very much in the
11 position of the plaintiffs in Associated General
12 Contractors, the position of plaintiffs in Bryant v.
13 Yellen, people who are interested in a business
14 opportunity which they are actively pursuing, and an
15 illegal act concretely and significantly, importantly
16 interferes with their pursuit of a valuable business
17 opportunity.

18 Each case has got to be judged on its own merits
19 on this kind of thing, but I think Judge Hogan's
20 conclusion that it was highly likely that these plaintiffs
21 would have been able to do particular transactions taking
22 advantage of section 968 is amply supported by evidence
23 that the Government never chose to challenge.

24 QUESTION: And respect whether that was the
25 raison d'être for Congress passing in this. It wasn't the

1 processor, but it was the coop --

2 MR. COHEN: Oh, I think that's very clear. I
3 think that's very clear. The congressional sponsors said
4 that. The structure of the act makes that clear. It
5 singles out -- doesn't say the processor can sell to
6 anybody it wants to and he gets the benefit. It says the
7 processor gets the benefit selling --

8 QUESTION: But that's not part of the --

9 MR. COHEN: The President agreed to that.

10 QUESTION: That's not part of the Article III
11 analysis. We don't ask for purposes of Article III
12 whether you're within the scope of the intended benefit.
13 That's --

14 MR. COHEN: I think --

15 QUESTION: That's discretionary.

16 MR. COHEN: I think you ask for purposes of
17 Article III whether the plaintiff has a sufficiently
18 concrete --

19 QUESTION: Right.

20 MR. COHEN: -- interest so that --

21 QUESTION: Right.

22 MR. COHEN: -- he would --

23 QUESTION: It goes to concreteness, which --

24 MR. COHEN: -- personally benefit in a tangible
25 way --

1 QUESTION: Right.

2 MR. COHEN: -- from the court's intervention.

3 I think --

4 QUESTION: And no proximity requirement.

5 There's no proximity requirement, just an Article III,
6 just concrete injury, no matter how remote. If you can
7 show that that ripple in the pond affected you, no matter
8 how remote it was --

9 MR. COHEN: No.

10 QUESTION: -- you have Article III standing?

11 MR. COHEN: No. I think he has to have -- there
12 has to be a realistic possibility, at least, of a
13 transaction. Here a transaction was highly likely, and
14 there has to be a significant --

15 QUESTION: That doesn't go to remoteness. That
16 goes to whether you can show that it actually hurt you.
17 You say you -- if you can show that it actually hurt you,
18 no matter how remote from the -- from what you're
19 complaining about --

20 MR. COHEN: I think the Court's opinion in
21 Bennett v. Spear makes it clear that you can have a chain
22 of causation and you don't have to have the last link in
23 the chain --

24 QUESTION: Thank you, Mr. Cohen.

25 MR. COHEN: Thank you.

1 QUESTION: Mr. Cooper, we'll hear from you.

2 ORAL ARGUMENT OF CHARLES J. COOPER

3 ON BEHALF OF APPELLEE CITY OF NEW YORK

4 QUESTION: Since we're already on the subject of
5 standing, why don't you start with that for the New York
6 petitioner -- the respondents.

7 MR. COOPER: Mr. Chief Justice and may it please
8 the Court:

9 Certainly, Justice O'Connor. My friend General
10 Waxman says that the plaintiffs in the New York City case
11 have not got standing because they have not been denied a
12 single dollar, and it is true that we haven't been denied
13 a single dollar, but we nonetheless have actual harm and
14 we have a very serious threat of imminent harm.

15 First, with respect to actual harm, what if
16 section 4722(c) had said that the United States Treasury
17 will indemnify the State of New York, dollar for dollar,
18 for any lost medicaid funds if HCFA doesn't grant the
19 waivers?

20 Your Honor, losing that insurance policy would
21 clearly be an injury to my clients. The insurance
22 industry is based upon the notion that that is a valuable
23 commodity, and trillions of dollars exchange hands every
24 year on that reality.

25 We had something much better than an insurance

1 policy against loss from an adverse decision. We had a
2 favorable decision, so as a --

3 QUESTION: I'm wondering, on your indemnity
4 example, it would be at least premature to bring it.
5 Suppose the chances were 99 percent that the indemnity
6 would never have to be paid, could you then sue -- oh,
7 well, we might need this indemnity?

8 MR. COOPER: Your Honor, when I leave this Court
9 I'll get in my car, and the chances are extremely slim
10 that I will run into you, but I won't get into my car
11 without liability insurance, and I've paid a lot of money
12 for that liability insurance, Your Honor.

13 Here, the chances that they're going to waive --
14 that they're going to deny our waivers are very good.

15 QUESTION: Oh, but it's different, because your
16 conduct is affected by knowing you have the insurance
17 policy, and that's not true here. This was an after-the-
18 fact enactment by the Congress, so it's quite a different
19 hypothetical, really.

20 MR. COOPER: Well, Your Honor --

21 QUESTION: It's as if there were already an
22 injury and there might not be a lawsuit.

23 MR. COOPER: No, there was an injury before we
24 received section 47229(c). The Government said that the
25 medicaid funds belonged to them and under the statute,

1 that was true. They were the property of the United
2 States.

3 After the cancellation, as a matter of law, that
4 money belonged to my clients. Now, once the cancellation
5 has gone into effect, the United States Government again
6 says that as a matter of law, the medicaid laws, the money
7 belongs to them.

8 QUESTION: It belongs to your clients, or does
9 it belong to New York State? I guess I'm not up on
10 these --

11 MR. COOPER: Your Honor, New York State has
12 enacted State laws that pass through that loss. This
13 burden will land on our shoulders.

14 QUESTION: Ah, but that's the problem in New
15 York law. It isn't -- in other words, it isn't this
16 statute that prevents the money from getting to your
17 clients. It's a New York statute, right?

18 MR. COOPER: That's true, Your Honor.

19 QUESTION: You're saying that because there is
20 this other thing, res inter alia -- inter alius acta,
21 right, something that pertains to somebody else, you won't
22 get the money.

23 What if you had a wager with somebody that you'd
24 get the money, and that cancellation causes you to lose
25 that wager, would that give you standing to come before

1 us?

2 MR. COOPER: Your Honor, I doubt the wager could
3 be enforced --

4 QUESTION: Oh, no, this is in a State that
5 allows -- encourages wagering, as a matter of fact.

6 (Laughter.)

7 MR. COOPER: Your Honor, we have much more than
8 a wager here. We have a law of many years standing, or
9 many laws of many years standing in New York State which
10 say that if these waivers are denied, if the taxes
11 themselves are declared impermissible, it follows as a
12 matter of State law that the health care providers must
13 pay -- must essentially give that money back.

14 QUESTION: So the only contingency on your
15 argument is whether the Secretary is going to act to bail
16 you out, and your point there is, the President in effect
17 has said that she won't, is that it?

18 MR. COOPER: Your Honor, that's not the only
19 contingency.

20 QUESTION: What's -- what else?

21 MR. COOPER: Well, Congress could pass --

22 QUESTION: Okay, under existing law.

23 MR. COOPER: -- another law --

24 QUESTION: Under existing law.

25 MR. COOPER: Under existing law --

1 QUESTION: You know, New York could change it's
2 law, too, but under existing law, there's the one
3 contingency left, right, and you're saying that does not
4 count against us for standing because the President in
5 effect has said that's not going to happen, otherwise I
6 wouldn't be reducing the deficit.

7 MR. COOPER: Your Honor, that's true. I mean,
8 the President has not allowed the United States Congress
9 to grant these waivers. It is unlikely in the extreme
10 he's going to allow little old HCFA to grant us these
11 waivers, and Your Honor, the fact that there is another
12 method for New York to achieve complete relief doesn't
13 reduce in any way the value of the method that has already
14 yielded complete success.

15 QUESTION: Mr. Cooper, I don't know why you
16 didn't accept the wager hypothetical. It seems to me a
17 wager's a lot like a lawsuit, that if you have a lawsuit,
18 a wager pending which you may win or may lose and Congress
19 passes a law and says you lose, it seems to me you're
20 hurt.

21 MR. COOPER: Yes, Your Honor.

22 QUESTION: So I think a wager's a very good
23 example, is what I'm suggesting.

24 (Laughter.)

25 MR. COOPER: And I certainly accept your vast

1 improvement over my answer.

2 QUESTION: Can I ask you one --

3 QUESTION: And that's all it takes, just that
4 you're hurt?

5 MR. COOPER: Excuse me?

6 QUESTION: If you're hurt, you can sue, right?

7 MR. COOPER: If you're injured in fact --

8 QUESTION: Injured in fact. You're way out at
9 the edge of the pond and a ripple reaches you. So long as
10 you prove that the ripple reaches you, you can come into
11 court.

12 MR. COOPER: Your Honor --

13 QUESTION: No matter how many intervening
14 actors, New York State, you know, the agricultural coop,
15 whatever.

16 MR. COOPER: Your Honor, I wouldn't be making
17 this argument if I were here to say that New York might
18 pass laws that would then shift this burden onto my
19 shoulders. That would be speculative. But New York has
20 passed the laws, Your Honor. This will happen as a matter
21 of law unless New York repeals its laws, which is no less
22 speculative than if Congress acts now a third law to
23 adjust these rights and interests.

24 QUESTION: Why didn't the State join this
25 lawsuit, Mr. Cooper? We don't have the State of New York

1 in here, and that's puzzling.

2 MR. COOPER: Your Honor, the record isn't
3 revealing on this, and I have nothing other than rumor and
4 speculation to offer to you on that issue.

5 QUESTION: Well, then, don't.

6 MR. COOPER: But --

7 QUESTION: It's disappointing though, you know.
8 We went into a big wind-up last year also, without a
9 pitch, and you would have thought that whoever wanted to
10 bring it back would have gotten somebody who had been
11 immediately affected by this case, and it's astounding
12 that we get two people who are -- you know, they're down
13 the line.

14 QUESTION: Well, there are probably a lot of
15 people who don't want to lose all their profits by paying
16 lawyers.

17 (Laughter.)

18 MR. COOPER: Well, that answer definitely has
19 some seriousness to it. There are a lot of people in the
20 back of the canoe not pulling an oar in this case, Your
21 Honor --

22 QUESTION: Can I ask you one --

23 MR. COOPER: -- but we're injured, and that's
24 the issue, perhaps downstream, but --

25 QUESTION: With respect to the -- another piece

1 of this threshold issue, you have no individuals in this
2 group unless -- you have a couple of unions, and they have
3 members, so what is the harm to the unions and their
4 members that would give them standing to be in this
5 assemblage of plaintiffs?

6 MR. COOPER: Their harm is one step farther
7 downstream, I will grant you. It is that the loss of
8 \$2.6 billion in medicaid matching funds is going to have a
9 very real and very serious effect on health care providers
10 in the State of New York and will be visited directly in
11 terms of the employment opportunities of those health care
12 providers which the unions represent.

13 But I don't have to rely upon my union members,
14 in my opinion, to satisfy the individual requirement of
15 the Line Item Veto Act. That term is amenable to an
16 interpretation that it would include the other clients
17 that I represent, Justice Ginsburg, and to interpret it
18 the way General Waxman suggests would really be quite
19 absurd.

20 It would make no sense at all for Congress to
21 want this case in this Court for resolution of this
22 constitutional issue as quickly as possible and then say
23 only natural persons can take that expedited route, and
24 all other persons, municipalities, States, my clients,
25 have to go through a lengthy sojourn through the normal

1 litigation process, including the court of appeals.

2 QUESTION: Can I ask you one question on the
3 merits, if you're finished with the standing?

4 MR. COOPER: I certainly am. I'd love to get to
5 the merits, Your Honor.

6 QUESTION: I've one -- the question I have,
7 which is really my only question here, is this. Assume
8 with me for a second that the Solicitor General --
9 assume -- is right that this isn't really a legislative
10 veto statute. That's the title, but that's not what it's
11 about.

12 There is a law, a law of the United States. The
13 budget has been signed.

14 Then the question is, could Congress delegate to
15 the President the authority -- and let's take what I think
16 is the hardest part, the authority to take 100 human
17 beings that have received in 100 provisions 100 tax
18 benefits, all different ones, and the Congress says to the
19 President, Mr. President, those people will not be taxed
20 next year, but we give to you the authority to pick and
21 choose among them and impose certain taxes on them,
22 according to a standard.

23 Now, I take it what he says is, the standard has
24 to be -- it has to be really revenue-raising, it can't
25 harm an essential function, it has to be in the national

1 interest and, Mr. President, you have to read the bill,
2 you have to give your reasons, you have to look through
3 the entire thing carefully, taking into account its
4 history and purposes, and probably a word that might come
5 to mind is, is it pork?

6 All right. Assuming that they tell the
7 President to do all that in respect to taxes, how is that
8 different than telling the FCC to go look through people
9 in the communications area and give licenses or not, or
10 make other rules and regs or not in respect to "the public
11 interest"?

12 If you can do the one under the Constitution,
13 why can't you do the other?

14 MR. COOPER: Your Honor, we don't tell the FCC
15 that it can rescind a law, that it can render a law of no
16 force and effect. That's what Congress has told the
17 President he may do.

18 General Waxman has said that repeals must
19 satisfy the Presentment Clause, and there's no room for
20 General Waxman or anyone else to argue otherwise.

21 QUESTION: What about the lockbox effect? Do
22 you maintain there is no effect once there is a
23 cancellation? Is there an effect on what Congress can
24 later enact?

25 MR. COOPER: Let me answer this, what different

1 effect would there be if the statute, instead of using the
2 term cancel, and defining it to mean repeal, had said
3 repeal? There would be no difference in the operation of
4 this statute.

5 And with respect to the lockbox specifically,
6 Your Honor, that simply makes clear that the President has
7 only a repeal power. He doesn't have a power of revision.
8 He can't take that money and do something he would prefer
9 to do with it, and neither can Congress. But if Congress
10 wants to spend that money again, whether it's in a lockbox
11 or not, what does it have to do? It has to pass a new
12 law.

13 And without the lockbox that would be true.
14 With the lockbox, that is true. The only difference is,
15 it may well be that they have to add another sentence to
16 the statute that they enacted.

17 QUESTION: No, but the lockbox puts into effect,
18 as I understand it -- correct me if I'm wrong -- certain
19 mechanisms under the Budget Deficit Reduction Act.

20 MR. COOPER: Yes. Well --

21 QUESTION: So that here the President is making
22 one of two choices, each of which alter the situation from
23 where it was before the law was enacted in the first
24 place.

25 MR. COOPER: Your Honor, I have to confess I've

1 never met anyone who understood entirely the operation of
2 the lockbox, but it -- one thing that simply cannot be
3 escaped or blinked is the fact that when the President
4 cancels a provision, under the act itself, it extinguishes
5 the authority. It extinguishes the law itself.

6 That operates on the law, not the money. This
7 isn't a spending discretion, and the Solicitor General has
8 made a very powerful presentation for the proposition that
9 Congress can give sweeping spending authority to the
10 President and has since the First Congress. We don't
11 resist that.

12 QUESTION: May I ask you, Mr. Cooper, because I
13 frankly am troubled with this lockbox idea, but is it any
14 different if, after the particular item is put in the
15 lockbox, than if it had never been enacted in the first
16 place and, if so, what is the difference, the particular
17 provision that goes into the lockbox?

18 MR. COOPER: Your Honor, I honestly am not
19 entirely sure, but I will grant the Solicitor General that
20 it may well be that that money is treated differently than
21 if it had never --

22 QUESTION: It's counted against what
23 expenditures have been made. Even if the President
24 ultimately doesn't use it, it's counted, since the law has
25 been passed which authorized it.

1 MR. COOPER: Yes, but I think it's a function of
2 fact that the money came into existence, the authority to
3 spend the money came into existence, which is the only
4 difference between that and a true line item veto, so that
5 reality is what gives rise to the necessity --

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cooper.
7 The case is submitted.

8 Spectators are admonished, do not talk until you
9 get out of the courtroom. The Court remains in session.

10 (Whereupon, at 11:04 a.m., the case in the
11 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:

WILLIAM J. CLINTON, PRESIDENT OF THE UNITED STATES, ET AL., Appellants
v. CITY OF NEW YORK, ET AL.

CASE NO: 97-1374

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

BY Donna Marie Fedele-----

(REPORTER)