SUPREME COURT OF THE UNITED STATES

No. 97–1374

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[June 25, 1998]

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join as to Part III, dissenting.

I

I agree with the Court that the parties have standing, but I do not agree with its ultimate conclusion. In my view the Line Item Veto Act does not violate any specific textual constitutional command, nor does it violate any implicit Separation of Powers principle. Consequently, I believe that the Act is constitutional.

II

I approach the constitutional question before us with three general considerations in mind. *First*, the Act represents a legislative effort to provide the President with the power to give effect to some, but not to all, of the expenditure and revenue-diminishing provisions contained in a single massive appropriations bill. And this objective is constitutionally proper.

When our Nation was founded, Congress could easily have provided the President with this kind of power. In that time period, our population was less than four million, see U. S. Dept. of Commerce, Census Bureau, His-

torical Statistics of the United States: Colonial Times to 1970, pt. 1, p. 8 (1975), federal employees numbered fewer than 5,000, see *id.*, pt. 2, at 1103, annual federal budget outlays totaled approximately $4 million, see *id.*, pt. 2, at 1104, and the entire operative text of Congress's first general appropriations law read as follows:

> "Be it enacted . . . [t]hat there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on import and tonnage, the following sums, viz. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids." Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95.

At that time, a Congress, wishing to give a President the power to select among appropriations, could simply have embodied each appropriation in a separate bill, each bill subject to a separate Presidential veto.

Today, however, our population is about 250 million, see U. S. Dept. of Commerce, Census Bureau, 1990 Census, the Federal Government employs more than four million people, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Analytical Perspectives 207 (1997) (hereinafter Analytical Perspectives), the annual federal budget is $1.5 trillion, see Office of Management and Budget, Budget of the United States Government, Fiscal Year 1998: Budget 303 (1997)

(hereinafter Budget), and a typical budget appropriations bill may have a dozen titles, hundreds of sections, and spread across more than 500 pages of the Statutes at Large. See, *e.g.*, Balanced Budget Act of 1997, Pub. L. 105–33, 111 Stat. 251. Congress cannot divide such a bill into thousands, or tens of thousands, of separate appropriations bills, each one of which the President would have to sign, or to veto, separately. Thus, the question is whether the Constitution permits Congress to choose a particular novel *means* to achieve this same, constitutionally legitimate, *end.*

Second, the case in part requires us to focus upon the Constitution's generally phrased structural provisions, provisions that delegate all "legislative" power to Congress and vest all "executive" power in the President. See Part IV, *infra*. The Court, when applying these provisions, has interpreted them generously in terms of the institutional arrangements that they permit. See, *e.g.*, *Mistretta* v. *United States,* 488 U. S. 361, 412 (1989) (upholding delegation of authority to Sentencing Commission to promulgate Sentencing Guidelines); *Crowell* v. *Benson,* 285 U. S. 22, 53–54 (1932) (permitting non-Article III commission to adjudicate factual disputes arising under federal dock workers' compensation statute). See generally, *e.g.*, *OPP Cotton Mills, Inc.* v. *Administrator of Wage and Hour Div., Dept. of Labor,* 312 U. S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions" without delegating details of regulatory scheme to executive agency); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (Constitution permits "interdependence" and flexible relations between branches in order to secure "workable government"); *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394, 406 (1928) (Taft, C. J.) ("[T]he extent and character of . . . assistance [between the different branches] must be fixed according to common sense and the inherent

necessities of the governmental co-ordination"); *Crowell* v. *Benson, supra*, at 53 ("[R]egard must be had" in cases "where constitutional limits are invoked, not to mere matters of form but to the substance of what is required").

Indeed, Chief Justice Marshall, in a well-known passage, explained,

> "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *McCulloch* v. *Maryland,* 4 Wheat. 316, 415 (1819).

This passage, like the cases I have just mentioned, calls attention to the genius of the Framers' pragmatic vision, which this Court has long recognized in cases that find constitutional room for necessary institutional innovation.

Third, we need not here referee a dispute among the other two branches. And, as the majority points out,

> " 'When this Court is asked to invalidate a statutory provision that has been approved by both Houses of the Congress and signed by the President, particularly an Act of Congress that confronts a deeply vexing national problem, it should only do so for the most compelling constitutional reasons.' " *Ante*, at 29, n. 42 (quoting *Bowsher* v. *Synar,* 478 U. S. 714, 736 (1986) (STEVENS, J., concurring in judgment)).

Cf. *Youngstown Sheet and Tube Co., supra*, at 635 (Jackson, J., concurring) ("Presidential powers are not fixed but fluctuate, depending on their disjunction or conjunction with those of Congress . . . [and when] the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum").

These three background circumstances mean that, when one measures the *literal* words of the Act against the Constitution's *literal* commands, the fact that the Act may closely resemble a different, literally unconstitutional, arrangement is beside the point. To drive exactly 65 miles per hour on an interstate highway closely resembles an act that violates the speed limit. But it does not violate that limit, for small differences matter when the question is one of literal violation of law. No more does this Act literally violate the Constitution's words. See Part III, *infra*.

The background circumstances also mean that we are to interpret nonliteral Separation of Powers principles in light of the need for "workable government." *Youngstown Sheet and Tube Co., supra,* at 635 (Jackson, J., concurring). If we apply those principles in light of that objective, as this Court has applied them in the past, the Act is constitutional. See Part IV, *infra*.

III

The Court believes that the Act violates the literal text of the Constitution. A simple syllogism captures its basic reasoning:

> Major Premise: The Constitution sets forth an exclusive method for enacting, repealing, or amending laws. See *ante,* at 19–21.
>
> Minor Premise: The Act authorizes the President to "repea[l] or amen[d]" laws in a different way, namely by announcing a cancellation of a portion of a previously enacted law. See *ante*, at 18–19.
>
> Conclusion: The Act is inconsistent with the Constitution. See *ante*, at 30–31.

I find this syllogism unconvincing, however, because its Minor Premise is faulty. When the President "canceled"

the two appropriation measures now before us, he did not *repeal* any law nor did he *amend* any law. He simply *followed* the law, leaving the statutes, as they are literally written, intact.

To understand why one cannot say, *literally speaking*, that the President has repealed or amended any law, imagine how the provisions of law before us might have been, but were not, written. Imagine that the canceled New York health care tax provision at issue here, Pub. L. 105–33, §4722(c), 111 Stat. 515 (quoted in full *ante*, at 3, n. 2), had instead said the following:

> Section One. Taxes . . . that were collected by the State of New York from a health care provider before June 1, 1997 and for which a waiver of provisions [requiring payment] have been sought . . . are deemed to be permissible health care related taxes . . . *provided however that the President may prevent the just-mentioned provision from having legal force or effect if he determines x, y and z.* (Assume x, y and z to be the same determinations required by the Line Item Veto Act).

Whatever a person might say, or think, about the constitutionality of this imaginary law, there is one thing the English language would prevent one from saying. One could not say that a President who "prevent[s]" the deeming language from "having legal force or effect," see 2 U. S. C. §691e(4)(B) (1994 ed., Supp. II), has either *repealed* or *amended* this particular hypothetical statute. Rather, the President has *followed* that law to the letter. He has exercised the power it explicitly delegates to him. He has executed the law, not repealed it.

It could make no significant difference to this linguistic point were the italicized proviso to appear, not as part of what I have called Section One, but, instead, at the bottom of the statute page, say referenced by an asterisk, with a

statement that it applies to every spending provision in the act next to which a similar asterisk appears. And that being so, it could make no difference if that proviso appeared, instead, in a different, earlier-enacted law, along with legal language that makes it applicable to every future spending provision picked out according to a specified formula. See, *e.g.*, Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), Pub. L. 99–177, 99 Stat. 1063, 2 U. S. C. §901 *et seq.* (enforcing strict spending and deficit-neutrality limits on future appropriations statutes); see also 1 U. S. C. §1 (in "*any* Act of Congress" singular words include plural, and vice versa) (emphasis added).

But, of course, this last-mentioned possibility is this very case. The earlier law, namely, the Line Item Veto Act, says that "the President may . . . prevent such [future] budget authority from having legal force or effect." 2 U. S. C. §§691(a), 691e(4)(B) (1994 ed., Supp. II). Its definitional sections make clear that it applies to the 1997 New York health care provision, see 2 U. S. C. §691e(8), just as they give a special legal meaning to the word "cancel," 2 U. S. C. §691e(4). For that reason, one cannot dispose of this case through a purely literal analysis as the majority does. Literally speaking, the President has not "repealed" or "amended" anything. He has simply *executed* a power conferred upon him by Congress, which power is contained in laws that were enacted in compliance with the exclusive method set forth in the Constitution. See *Field* v. *Clark*, 143 U. S. 649, 693 (1892) (President's power to raise tariff rates "*was a part of the law itself, as it left the hands of Congress*" (emphasis added)).

Nor can one dismiss this literal compliance as some kind of formal quibble, as if it were somehow "obvious" that what the President has done "amounts to," "comes close to," or is "analogous to" the repeal or amendment of a previously enacted law. That is because the power the Act

grants the President (to render designated appropriations items without "legal force or effect") also "amounts to," "comes close to," or is "analogous to" a different legal animal, the delegation of a power to choose one legal path as opposed to another, such as a power to appoint.

To take a simple example, a legal document, say a will or a trust instrument, might grant a beneficiary the power (a) to appoint property "to Jones for his life, remainder to Smith for 10 years so long as Smith . . . etc., and then to Brown," or (b) to appoint the same property "to Black and the heirs of his body," or (c) not to exercise the power of appointment at all. See, *e.g.*, 5 W. Bowe & D. Parker, Page on Law of Wills §45.8 (rev. 3d ed. 1962) (describing power of appointment). To choose the second or third of these alternatives prevents from taking effect the legal consequences that flow from the first alternative, which the legal instrument describes in detail. Any such choice, made in the exercise of a delegated power, renders that first alternative language without "legal force or effect." But such a choice does not "repeal" or "amend" either that language or the document itself. The will or trust instrument, in delegating the power of appointment, has not delegated a power to amend or to repeal the instrument; to the contrary, it requires the delegated power to be exercised in accordance with the instrument's terms. *Id.*, §45.9, at 516–518.

The trust example is useful not merely because of its simplicity, but also because it illustrates the logic that must apply when a power to execute is conferred, not by a private trust document, but by a federal statute. This is not the first time that Congress has delegated to the President or to others this kind of power– a contingent power to deny effect to certain statutory language. See, *e.g.*, Pub. L. 95–384, §13(a), 92 Stat. 737 ("Section 620(x) of the Foreign Assistance Act of 1961 *shall be of no further force and effect* upon the President's determination and

certification to the Congress that the resumption of full military cooperation with Turkey is in the national interest of the United States and [other criteria]") (emphasis added); 28 U. S. C. §2072 (Supreme Court is authorized to promulgate rules of practice and procedure in federal courts, and "[a]ll laws in conflict with such rules *shall be of no further force and effect*") (emphasis added); 41 U. S. C. §405b (subsection (a) requires the Office of Federal Procurement Policy to issue "[g]overnment-wide regulations" setting forth a variety of conflict of interest standards, but subsection (e) says that "if the President determine[s]" that the regulations "would have a significantly adverse effect on the accomplishment of the mission" of government agencies, "the requirement [to promulgate] the regulations . . . *shall be null and void*") (emphasis added); Gramm-Rudman-Hollings Act, §252(a)(4), 99 Stat. 1074 (authorizing the President to issue a "final order" that has the effect of "*permanently cancell[ing]*" sequestered amounts in spending statutes in order to achieve budget compliance) (emphasis added); Pub. L. 104–208, 110 Stat. 3009-695 ("Public Law 89–732 [dealing with immigration from Cuba] *is repealed* . . . upon a determination by the President . . . that a democratically elected government in Cuba is in power") (emphasis added); Pub. L. 99–498, §701, 100 Stat. 1532 (amending §758 of the Higher Education Act of 1965) (Secretary of Education "may" sell common stock in an educational loan corporation; if the Secretary decides to sell stock, and "if the Student Loan Marketing Association acquires from the Secretary" over 50 percent of the voting stock, "section 754 [governing composition of the Board of Directors] *shall be of no further force or effect*") (emphasis added); Pub. L. 104–134, §2901(c), 110 Stat. 1321–160 (President is "authorized to suspend the provisions of the [preceding] proviso" which suspension may last for *entire* effective period of proviso, if he determines suspension is "appro-

priate based upon the public interest in sound environmental management . . . [or] the protection of national or locally-affected interests, or protection of any cultural, biological or historic resources").

All of these examples, like the Act, delegate a power to take action that will render statutory provisions "without force or effect." Every one of these examples, like the present Act, delegates the power to choose between alternatives, each of which the statute spells out in some detail. None of these examples delegates a power to "repeal" or "amend" a statute, or to "make" a new law. Nor does the Act. Rather, the delegated power to nullify statutory language was *itself* created and defined by Congress, and included in the statute books on an equal footing with (indeed, as a component part of) the sections that are potentially subject to nullification. As a Pennsylvania court put the matter more than a century ago: "The legislature cannot delegate its power to make a law; but it can make a law to delegate a power." *Locke's Appeal*, 72 Pa. 491, 498 (1873).

In fact, a power to appoint property offers a closer analogy to the power delegated here than one might at first suspect. That is because the Act contains a "lockbox" feature, which gives legal significance to the enactment of a particular appropriations item even if, and even after, the President has rendered it without "force or effect." See 2 U. S. C. §691c; see also *ante*, at 22, n. 31 (describing lockbox); but cf. Letter from Counsel for Snake River Cooperative, dated Apr. 29, 1998 (available in Clerk of Court's case file) (arguing "lockbox" feature inapplicable here due to special provision in Balanced Budget Act of 1997, the constitutionality and severability of which have not been argued). In essence, the "lockbox" feature: (1) points to a Gramm-Rudman-Hollings Act requirement that, when Congress enacts a "budget-busting" appropriation bill, automatically reduces authorized spending for a host of

federal programs in a pro rata way; (2) notes that cancellation of an item (say, a $2 billion item) would, absent the lockbox provision, neutralize (by up to $2 billion) the potential "budget busting" effects of other bills (and therefore potentially the President could cancel items in order to "save" the other programs from the mandatory cuts, resulting no net deficit reduction); and (3) says that this "neutralization" will not occur (*i.e.*, the pro rata reductions will take place just as if the $2 billion item had not been canceled), so that the canceled items truly provide *additional* budget savings over and above the Gramm-Rudman-Hollings regime. See generally H. R. Conf. Rep. No. 104–491, pp. 23–24 (1996) (lockbox provision included "to ensure that the savings from the cancellation of [items] are devoted to deficit reduction and are not available to offset a deficit increase in another law"). That is why the Government says that the Act provides a "lockbox," and why it seems fair to say that, despite the Act's use of the word "cancel," the Act does not delegate to the President the power truly to *cancel* a line item expenditure (returning the legal status quo to one in which the item had never been enacted). Rather, it delegates to the President the power to decide *how* to spend the money to which the line item refers– either for the specific purpose mentioned the item, or for general deficit reduction via the "lockbox" feature.

These features of the law do not mean that the delegated power is, or is just like, a power to appoint property. But they do mean that it is not, and it is not just like, the repeal or amendment of a law, or, for that matter, a true line item veto (despite the Act's title). Because one cannot say that the President's exercise of the power the Act grants is, literally speaking, a "repeal" or "amendment," the fact that the Act's procedures differ from the Constitution's exclusive procedures for enacting (or repealing) legislation is beside the point. The Act *itself* was enacted in

accordance with these procedures, and its failure to require the President to satisfy those procedures does not make the Act unconstitutional.

IV

Because I disagree with the Court's holding of literal violation, I must consider whether the Act nonetheless violates Separation of Powers principles– principles that arise out of the Constitution's vesting of the "executive Power" in "a President," U. S. Const., Art. II, §1, and "[a]ll legislative Powers" in "a Congress," Art. I, §1. There are three relevant Separation of Powers questions here: (1) Has Congress given the President the wrong kind of power, *i.e.*, "non-Executive" power? (2) Has Congress given the President the power to "encroach" upon Congress' own constitutionally reserved territory? (3) Has Congress given the President too much power, violating the doctrine of "nondelegation?" These three limitations help assure "adequate control by the citizen's representatives in Congress," upon which JUSTICE KENNEDY properly insists. See *ante*, at 3 (concurring opinion). And with respect to *this* Act, the answer to all these questions is "no."

A

Viewed conceptually, the power the Act conveys is the right kind of power. It is "executive." As explained above, an exercise of that power "executes" the Act. Conceptually speaking, it closely resembles the kind of delegated authority– to spend or not to spend appropriations, to change or not to change tariff rates– that Congress has frequently granted the President, any differences being differences in degree, not kind. See Part IV–C, *infra*.

The fact that one could also characterize this kind of power as "legislative," say, if Congress itself (by amending the appropriations bill) prevented a provision from taking

effect, is beside the point. This Court has frequently found that the exercise of a particular power, such as the power to make rules of broad applicability, *American Trucking Assns., Inc.* v. *United States,* 344 U. S. 298, 310–313 (1953), or to adjudicate claims, *Crowell* v. *Benson*, 285 U. S., at 50–51, 54; *Wiener* v. *United States,* 357 U. S. 349, 354–356 (1958), can fall within the constitutional purview of more than one branch of Government. See *Wayman* v. *Southard,* 10 Wheat. 1, 43 (1825) (Marshall, C. J.) ("Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself"). The Court does not "carry out the distinction between legislative and executive action with mathematical precision" or "divide the branches into watertight compartments," *Springer* v. *Philippine Islands,* 277 U. S. 189, 211 (1928) (Holmes, J., dissenting), for, as others have said, the Constitution "blend[s]" as well as "separat[es]" powers in order to create a workable government. 1 K. Davis, Administrative Law §1.09, p. 68 (1958).

The Court has upheld congressional delegation of rulemaking power and adjudicatory power to federal agencies, *American Trucking Assns.* v. *United States, supra*, at 310–313; *Wiener* v. *United States, supra,* at 354–356, guideline-writing power to a Sentencing Commission, *Mistretta* v. *United States,* 488 U. S., at 412, and prosecutor-appointment power to judges, *Morrison* v. *Olson,* 487 U. S. 654, 696–697 (1988). It is far easier *conceptually* to reconcile the power at issue here with the relevant constitutional description ("executive") than in many of these cases. And cases in which the Court may have found a delegated power and the basic constitutional function of another branch conceptually irreconcilable are yet more distant. See, *e.g., Federal Radio Comm'n* v. *General Elec. Co.,* 281 U. S. 464 (1930) (power to award radio licenses not a "judicial" power).

If there is a Separation of Powers violation, then, it

must rest, not upon purely conceptual grounds, but upon some important conflict between the Act and a significant Separation of Powers objective.

B

The Act does not undermine what this Court has often described as the principal function of the Separation of Powers, which is to maintain the tripartite structure of the Federal Government– and thereby protect individual liberty– by providing a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo*, 424 U. S. 1, 122 (1976) *(per curiam); Mistretta* v. *United States, supra*, at 380–382. See The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison) (separation of powers confers on each branch the means "to resist encroachments of the others"); 1 Davis, *supra*, §1.09, at 68 ("The danger is not blended power . . . [t]he danger is unchecked power"); see also, *e.g.*, *Bowsher* v. *Synar,* 478 U. S. 714 (1986) (invalidating congressional intrusion on Executive Branch); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.,* 458 U. S. 50 (1982) (Congress may not give away Article III "judicial" power to an Article I judge); *Myers* v. *United States,* 272 U. S. 52 (1926) (Congress cannot limit President's power to remove Executive Branch official).

In contrast to these cases, one cannot say that the Act "encroaches" upon Congress' power, when Congress retained the power to insert, by simple majority, into any future appropriations bill, into any section of any such bill, or into any phrase of any section, a provision that says the Act will not apply. See 2 U. S. C. § 691f(c)(1) (1994 ed., Supp. II); *Raines* v. *Byrd,* 521 U. S. ___, ___, (1997) (slip op., at 13) (Congress can "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act"). Congress also retained the power to "disapprov[e]," and thereby reinstate, any of the President's cancellations.

See 2 U. S. C. §691b(a). And it is Congress that drafts and enacts the appropriations statutes that are subject to the Act in the first place– and thereby defines the outer limits of the President's cancellation authority. Thus *this* Act is not the sort of delegation "without . . . sufficient check" that concerns JUSTICE KENNEDY. See *ante*, at 3 (concurring opinion). Indeed, the President acts only in response to, and on the terms set by, the Congress.

Nor can one say that the Act's basic substantive objective is constitutionally improper, for the earliest Congresses could have, see Part II, *supra*, and often did, confer on the President this sort of discretionary authority over spending, see *ante*, at 15 (SCALIA, J., concurring in part and dissenting in part). Cf. *J. W. Hampton*, 276 U. S., at 412 (Taft, C. J.) ("contemporaneous legislative exposition of the Constitution when the founders of our Government and the framers of our Constitution were actively participating in public affairs . . . fixes the construction to be given to its provisions"). And, if an individual Member of Congress, who say, favors aid to Country A but not to Country B, objects to the Act on the ground that the President may "rewrite" an appropriations law to do the opposite, one can respond, "But a majority of Congress voted that he have that power; you may vote to exempt the relevant appropriations provision from the Act; and if you command a majority, your appropriation is safe." Where the burden of overcoming legislative inertia lies is within the power of Congress to determine by rule. Where is the encroachment?

Nor can one say the Act's grant of power "aggrandizes" the Presidential office. The grant is limited to the context of the budget. It is limited to the power to spend, or not to spend, particular appropriated items, and the power to permit, or not to permit, specific limited exemptions from generally applicable tax law from taking effect. These

powers, as I will explain in detail, resemble those the President has exercised in the past on other occasions. See Part IV–C, *infra*. The delegation of those powers to the President may strengthen the Presidency, but any such change in Executive Branch authority seems minute when compared with the changes worked by delegations of other kinds of authority that the Court in the past has upheld. See, *e.g.*, *American Trucking Assns., Inc.* v. *United States,* 344 U. S. 298 (1953) (delegation of rulemaking authority); *Lichter* v. *United States,* 334 U. S. 742 (1948) (delegation to determine and regulate "excessive" profits); *Crowell* v. *Benson,* 285 U. S. 22 (1932) (delegation of adjudicatory authority); *Commodity Futures Trading Comm'n* v. *Schor,* 478 U. S. 833 (1986) (same).

C

The "nondelegation" doctrine represents an added constitutional check upon Congress' authority to delegate power to the Executive Branch. And it raises a more serious constitutional obstacle here. The Constitution permits Congress to "see[k] assistance from another branch" of Government, the "extent and character" of that assistance to be fixed "according to common sense and the inherent necessities of the governmental co-ordination." *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S., at 406. But there are limits on the way in which Congress can obtain such assistance; it "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311, 324 (1931). Or, in Chief Justice Taft's more familiar words, the Constitution permits only those delegations where Congress "shall lay down by legislative act an *intelligible principle* to which the person or body authorized to [act] is directed to conform." *J. W. Hampton, supra*, at 409 (emphasis added).

The Act before us seeks to create such a principle in

three ways. The first is procedural. The Act tells the President that, in "identifying dollar amounts [or] . . . items. . . for cancellation" (which I take to refer to his selection of the amounts or items he will "prevent from having legal force or effect"), he is to "consider," among other things,

> "the legislative history, construction, and purposes of the law which contains [those amounts or items, and] . . . any specific sources of information referenced in such law or . . . the best available information . . . ." 2 U. S. C. §691(b) (1994 ed., Supp. II).

The second is purposive. The clear purpose behind the Act, confirmed by its legislative history, is to promote "greater fiscal accountability" and to "eliminate wasteful federal spending and . . . special tax breaks." H. R. Conf. Rep. No. 104–491, p. 15 (1996).

The third is substantive. The President must determine that, to "prevent" the item or amount "from having legal force or effect" will "reduce the Federal budget deficit; . . . not impair any essential Government functions; and . . . not harm the national interest." 2 U. S. C. §691(a)(A) (1994 ed., Supp. II).

The resulting standards are broad. But this Court has upheld standards that are equally broad, or broader. See, *e.g.*, *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing as "public interest, convenience, or necessity" require) (internal quotation marks omitted); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 600–603 (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); *United States* v. *Rock Royal Co-operative, Inc.,* 307 U. S. 533, 577 (1939) (if milk prices were "unreasonable," Secretary could "fi[x]" prices to a level that was "in the public interest"). See also *Lichter* v.

United States, 334 U. S. 742, 785–786 (1948) (delegation of authority to determine "excessive" profits); *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946) (delegation of authority to SEC to prevent "unfairly or inequitably" distributing voting power among security holders); *Yakus* v. *United States*, 321 U. S. 414, 427 (1944) (upholding delegation to Price Administrator to fix commodity prices that would be "fair" and "equitable").

Indeed, the Court has only twice in its history found that a congressional delegation of power violated the "nondelegation" doctrine. One such case, *Panama Refining Co.* v. *Ryan,* 293 U. S. 388 (1935), was in a sense a special case, for it was discovered in the midst of the case that the particular exercise of the power at issue, the promulgation of a Petroleum Code under the National Industrial Recovery Act, did not contain any legally operative sentence. *Id.*, at 412–413. The other case, *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U. S. 495 (1935), involved a delegation through the National Industrial Recovery Act, 48 Stat. 195, that contained not simply a broad standard ("fair competition"), but also the conferral of power on private parties to promulgate rules applying that standard to virtually all of American industry. *Id.*, at 521–525. As Justice Cardozo put it, the legislation exemplified "delegation running riot," which created a "roving commission to inquire into evils and upon discovery correct them." *Id.*, at 553, 551 (concurring opinion).

The case before us does not involve any such "roving commission," nor does it involve delegation to private parties, nor does it bring all of American industry within its scope. It is limited to one area of government, the budget, and it seeks to give the President the power, in one portion of that budget, to tailor spending and special tax relief to what he concludes are the demands of fiscal responsibility. Nor is the standard that governs his judgment, though broad, any broader than the standard that currently gov-

erns the award of television licenses, namely "public convenience, interest, *or* necessity." 47 U. S. C. §303 (emphasis added). To the contrary, (a) the broadly phrased limitations in the Act, together with (b) its evident deficit reduction purpose, and (c) a procedure that guarantees Presidential awareness of the reasons for including a particular provision in a budget bill, taken together, guide the President's exercise of his discretionary powers.

1

The relevant similarities and differences among and between this case and other "nondelegation" cases can be listed more systematically as follows: First, as I have just said, like statutes delegating power to award broadcast television licenses, or to regulate the securities industry, or to develop and enforce workplace safety rules, the Act is aimed at a discrete problem: namely, a particular set of expenditures within the federal budget. The Act concerns, not the entire economy, cf. *Schecter Poultry Corp.*, *supra*, but the annual federal budget. Within the budget it applies only to *discretionary* budget authority and *new* direct spending items, that together amount to approximately a third of the current annual budget outlays, see Tr. of Oral Arg. 18; see also Budget 303, and to "limited tax benefits" that (because each can affect no more than 100 people, see 2 U. S. C. §691e(9)(A) (1994 ed., Supp. II)), amount to a tiny fraction of federal revenues and appropriations. Compare Analytical Perspectives 73–75 (1997) (listing over *$500 billion* in overall "tax expenditures" that OMB estimated were contained in federal law in 1997) and Budget 303 (federal outlays and receipts in 1997 were both over *$1.5 trillion*) with App. to Juris. Statement 71a (President's cancellation message for Snake River appellees' limited tax benefit, estimating annual "value" of benefit, in terms of revenue loss, at about *$20 million*).

Second, like the award of television licenses, the par-

ticular problem involved– determining whether or not a particular amount of money should be spent or whether a particular dispensation from tax law should be granted a few individuals– does not readily lend itself to a significantly more specific standard. The Act makes clear that the President should consider the reasons for the expenditure, measure those reasons against the desirability of avoiding a deficit (or building a surplus) and make up his mind about the comparative weight of these conflicting goals. Congress might have expressed this matter in other language, but could it have done so in a *significantly* more specific way? See *National Broadcasting Co.* v. *United States,* 319 U. S., at 216 ("[P]ublic interest, convenience, or necessity" standard is " 'as concrete as the complicated factors for judgment in such a field of delegated authority permit' ") (quoting *FCC* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 138 (1940)). The statute's language, I believe, is sufficient to provide the President, and the public, with a fairly clear idea as to what Congress had in mind. And the public can judge the merits of the President's choices accordingly. Cf. *Yakus* v. *United States, supra*, 321 U. S., at 426 (standards were "sufficiently definite and precise to enable . . . the public to ascertain . . . conform[ity]").

Third, in insofar as monetary expenditure (but not "tax expenditure") is at issue, the President acts in an area where history helps to justify the discretionary power that Congress has delegated, and where history may inform his exercise of the Act's delegated authority. Congress has frequently delegated the President the authority to spend, or not to spend, particular sums of money. See, *e.g.*, Act of Sept. 29, 1789, ch. 23, §1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, §1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, 1 Stat. 190; Emergency Relief Appropriation Act of 1935, 49 Stat. 115 (appropriating over $4 billion to be spent "in the discretion and under the direction of the President" for economic relief measures); see also *ante*, at 15–16 (SCALIA, J.,

concurring in part and dissenting in part) (listing numerous examples).

Fourth, the Constitution permits Congress to rely upon context and history as providing the necessary standard for the exercise of the delegated power. See, *e.g.*, *Federal Radio Comm'n* v. *Nelson Brothers Bond & Mortgage Co. (Station WIBO),* 289 U. S. 266, 285 (1933) ("public interest, convenience, or necessity [standard] . . . is to be interpreted by its context"); *Fahey* v. *Mallonee*, 332 U. S. 245, 253 (1947) (otherwise vague delegation to regulate banks was "sufficiently explicit, against the background of custom, to be adequate"). Relying upon context, Congress has sometimes granted the President broad discretionary authority over spending in laws that mention no standard at all. See, *e.g.*, Act of Mar. 3, 1809, ch. 28, §1, 2 Stat. 535–536 (granting the President recess authority to transfer money "appropriated for a particular branch of expenditure in [a] department" to be "applied [instead] to another branch of expenditure in the same department"); Revenue and Expenditure Control Act of 1968, Pub. L. 90–364, §§202(b), 203(b), 82 Stat. 271–272; (authorizing the President annually to reserve up to $6 billion in outlays and $10 billion in new obligation authority); Second Supplemental Appropriations Act, 1969, Pub. L. 91–47, §401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. 91–305, §§401, 501, 84 Stat. 405–407. In this case, too, context and purpose can give meaning to highly general language. See *Federal Radio Commn.* v. *Nelson Bros., supra*, at 285; *Fahey* v. *Malonee, supra,* at 250–253; cf. *Lichter* v. *United States,* 334 U. S., at 777 (Congress has "at least expressed . . . satisfaction with the existing specificity of the Act"); *Train* v. *City of New York,* 420 U. S. 35, 44–47 (1975) (disallowing President Nixon's efforts to impound funds because Court found Congress did not *intend* him to exercise the power in that instance).

On the other hand, I must recognize that there are im-

portant differences between the delegation before us and other broad, constitutionally-acceptable delegations to Executive Branch agencies– differences that argue against my conclusion. In particular, a broad delegation of authority to an administrative agency differs from the delegation at issue here in that agencies often develop subsidiary rules under the statute, rules that explain the general "public interest" language. Doing so diminishes the risk that the agency will use the breadth of a grant of authority as a cloak for unreasonable or unfair implementation. See 1 K. Davis, Administrative Law §3:15, pp. 207–208 (2d ed. 1978). Moreover, agencies are typically subject to judicial review, which review provides an additional check against arbitrary implementation. See, *e.g.*, *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.,* 463 U. S. 29, 40–42 (1983). The President has not so narrowed his discretionary power through rule, nor is his implementation subject to judicial review under the terms of the Administrative Procedure Act. See, *e.g.*, *Franklin* v. *Massachusetts,* 505 U. S. 788, 801 (1992) (APA does not apply to President absent express statement by Congress).

While I believe that these last-mentioned considerations are important, they are not determinative. The President, unlike most agency decisionmakers, is an elected official. He is responsible to the voters, who, in principle, will judge the manner in which he exercises his delegated authority. Whether the President's expenditure decisions, for example, are arbitrary is a matter that in the past has been left primarily to those voters to consider. And this Court has made clear that judicial review is less appropriate when the President's own discretion, rather than that of an agency, is at stake. See *Dalton* v. *Specter,* 511 U. S. 462, 476 (1994) (Presidential decision on military base closure recommendations not reviewable; President could "approv[e] or disapprov[e] the recommendations for whatever

reason he sees fit"); *Franklin*, 505 U. S., at 801 (President's decision whether or not to transmit census report to Congress was unreviewable by courts for abuse of discretion); cf. *id.*, at 799–800 (it was "important to the integrity of the process" that the decision was made by the President, a "constitutional officer" as opposed to the unelected Secretary of Commerce). These matters reflect in part the Constitution's own delegation of "executive Power" to "a President," U. S. Const., Art. II, §1, cf. *Clinton* v. *Jones*, 520 U. S. ___, ___, (1997) (slip op., at 1–2) (BREYER, J., concurring in judgment) (discussing unitary executive), and we must take this into account when applying the Constitution's nondelegation doctrine to questions of Presidential authority.

Consequently I believe that the power the Act grants the President to prevent spending items from taking effect does not violate the "nondelegation" doctrine.

2

Most, but not all, of the considerations mentioned in the previous subsection apply to the Act's delegation to the President of the authority to prevent "from having legal force or effect" a "limited tax benefit," which term the Act defines in terms of special tax relief for fewer than 100 (or in some instances 10) beneficiaries, which tax relief is not available to others who are somewhat similarly situated. 2 U. S. C. §691e(9) (1994 ed., Supp. II). There are, however, two related significant differences between the "limited tax benefit" and the spending items considered above, which make the "limited tax benefit" question more difficult. First, the history is different. The history of Presidential authority to pick and to choose is less voluminous. Second, the subject matter (increasing or decreasing an individual's taxes) makes the considerations discussed at the end of the last section (*i.e.*, the danger of an arbitrary exercise of delegated power) of greater concern. But these differences, in my view, are not sufficient to change the

"nondelegation" result.

For one thing, this Court has made clear that the standard we must use to judge whether a law violates the "nondelegation" doctrine is the same in the tax area as in any other. In *Skinner* v. *Mid-America Pipeline Co.,* 490 U. S. 212 (1989), the Court considered whether Congress, in the exercise of its taxing power, could delegate to the Secretary of Transportation the authority to establish a system of pipeline user fees. In rejecting the argument that the "fees" were actually a "tax," and that the law amounted to an unconstitutional delegation of Congress' own power to tax, the unanimous Court said that:

> "From its earliest days to the present, Congress, when enacting tax legislation, has varied the degree of specificity and the consequent degree of discretionary authority delegated to the Executive . . . . We find no support . . . for [the] contention that the text of the Constitution or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power. . . . Even if the user fees are a form of taxation, we hold that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges. Congress may wisely choose to be more circumspect in delegating authority under the Taxing Clause than under other of its enumerated powers, but this is not a heightened degree of prudence required by the Constitution." *Id.,* at 221–223.

For another thing, this Court has upheld tax statutes that delegate to the President the power to change taxes under very broad standards. In 1890, for example, Congress authorized the President to "suspend" the provisions

of the tariff statute, thereby raising tariff rates, if the President determined that other nations were imposing "reciprocally unequal and unreasonable" tariff rates on specialized commodities. Act of Oct. 1, 1890, ch. 1244, §3, 26 Stat. 612. And the Court upheld the statute against constitutional attack. *Field* v. *Clark,* 143 U. S., at 693–694 ("no valid objection can be made" to such statutes "conferring authority or discretion" on the President) (internal quotation marks omitted); see also Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (President "authorized" to "suspend the operation of" a customs law "if in his judgment the public interest should require it"); Act of June 4, 1794, ch. 41, §1, 1 Stat. 372 (empowering President to lay an embargo on ships in ports "whenever, in his opinion, the public safety shall so require" and to revoke related regulations "whenever he shall think proper"). In 1922 Congress gave the President the authority to adjust tariff rates to "equalize" the differences in costs of production at home and abroad, see Tariff Act of 1922, ch. 356, §315(a), 42 Stat. 941–942. The Court also upheld this delegation against constitutional attack. See *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394 (1928).

These statutory delegations resemble today's Act more closely than one might at first suspect. They involve a duty on imports, which is a tax. That tax in the last century was as important then as the income tax is now, for it provided most of the Federal Government's revenues. See U. S. Dept. of Commerce, Census Bureau, Historical Statistics of the United States: Colonial Times to 1970, pt. 2, at 1106 (in 1890, when Congress passed the statute at issue in *Field*, tariff revenues were 57% of the total receipts of the Federal Government). And the delegation then thus affected a far higher percentage of federal revenues than the tax-related delegation over extremely "limited" tax benefits here. See *supra*, at 18–19.

The standards at issue in these earlier laws, such as

"unreasonable," were frequently vague and without precise meaning. See, *e.g.*, Act of Oct. 1, 1890, §3, 26 Stat. 612. Indeed, the word "equalize" in the 1922 statute, 42 Stat. 942, could not have been administered as if it offered the precision it seems to promise, for a tariff that literally "equalized" domestic and foreign production costs would, because of transport costs, have virtually ended foreign trade.

Nor can I accept the majority's effort to distinguish these examples. The majority says that these statutes imposed a specific "duty" upon the President to act upon the occurrence of a specified event. See *ante*, at 25. But, in fact, some of the statutes imposed no duty upon the President at all. See, *e.g.*, Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (President "authorized" to "suspend the operation of" a customs law "if in his judgment the public interest should require it"). Others imposed a "duty" in terms so vague as to leave substantial discretion in the President's hands. See Act of Oct. 1, 1890, 26 Stat. 612 (President's "duty" to suspend tariff law was triggered "whenever" and "so often as" he was "satisfied" that "unequal and unreasonable" rates were imposed); see also *Field* v. *Clark*, *supra*, at 691 (historically in the flexible tariff statutes Congress has "invest[ed] the President with large discretion").

The majority also tries to distinguish these examples on the ground that the President there executed congressional policy while here he rejects that policy. See *ante*, at 24–29. The President here, however, in exercising his delegated authority does not *reject* congressional policy. Rather, he *executes* a law in which Congress has specified its desire that the President have the very authority he has exercised. See Part III, *supra*.

The majority further points out that these cases concern imports, an area that, it says, implicates foreign policy and therefore justifies an unusual degree of discretion by the President. See *ante*, at 27. Congress, however, has not

limited its delegations of taxation authority to the "foreign policy" arena. The first Congress gave the Secretary of the Treasury the "power to mitigate or remit" statutory penalties for nonpayment of liquor taxes "upon such terms and conditions as shall appear to him reasonable." Act of Mar. 3, 1791, ch. 15, §43, 1 Stat. 209. A few years later, the Secretary was authorized, in lieu of collecting the stamp duty enacted by Congress, "to agree to an annual composition for the amount of such stamp duty, with any of the said banks, of one per centum on the amount of the annual dividend made by such banks." Act of July 6, 1797, ch. 11, §2, 1 Stat. 528. More recently, Congress has given to the Executive Branch the authority to "prescribe all needful rules and regulations for the enforcement of [the Internal Revenue Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue." 26 U. S. C. §7805(a). And the Court has held that such rules and regulations, "which undoubtedly affect individual taxpayer liability, are . . . without doubt the result of entirely appropriate delegations of discretionary authority by Congress." *Skinner* v. *Mid-America Pipeline Co.,* 490 U. S., at 222. I do not believe the Court would hold the same delegations at issue in *J. W. Hampton* and *Field* unconstitutional were they to arise in a more obviously domestic area.

Finally, the tax-related delegation is limited in ways that tend to diminish any widespread risk of arbitrary Presidential decisionmaking:

(1) The Act does not give the President authority to change general tax policy. That is because the limited tax benefits are defined in terms of deviations from tax policy, *i.e.*, special benefits to fewer than 100 individuals. See 2 U. S. C. §691e(9)(A)(i) (1994 ed., Supp. II); see also Analytical Perpectives 84 (defining "tax expenditure" as "a preferential exception to the baseline provisions of the tax structure").

(2) The Act requires the President to make the same kind of policy judgment with respect to these special benefits as with respect to items of spending. He is to consider the budget as a whole, he is to consider the particular history of the tax benefit provision, and he is to consider whether the provision is worth the loss of revenue it causes in the same way that he must decide whether a particular expenditure item is worth the added revenue that it requires. See *supra*, at 16.

(3) The delegated authority does not destroy any individual's expectation of receiving a particular benefit, for the Act is written to say to the small group of taxpayers who may receive the benefit, "Taxpayers, you will receive an exemption from ordinary tax laws, but only if the President decides the budgetary loss is not too great."

(4) The "limited tax benefit" provisions involve only a small part of the federal budget, probably less than one percent of total annual outlays and revenues. Compare Budget 303 (federal outlays and receipts in 1997 were both over *$1.5 trillion*) with App. to Juris. Statement 71a (President's cancellation message for Snake River appellees' limited tax benefit, estimating annual "value" of benefit, in terms of revenue loss, at about *$20 million*) and Taxpayer Relief Act of 1997, §1701, 111 Stat. 1099 (identifying only 79 "limited tax benefits" subject to cancellation in the entire tax statute).

(5) Because the "tax benefit" provisions are part and parcel of the budget provisions, and because the Act in defining them, focuses upon "revenue-losing" tax provisions, 2 U. S. C. §691e(9)(A)(i) (1994 ed., Supp. II), it regards "tax benefits" as if they were a special kind of *spending,* namely spending that puts back into the pockets of a small group of taxpayers, money that "baseline" tax policy would otherwise take from them. There is, therefore, no need to consider this provision as if it represented a delegation of authority to the President, outside the budget

expenditure context, to set major policy under the federal tax laws. But cf. *Skinner* v. *Mid-America Pipeline, supra*, at 222–223 (no "different and stricter" nondelegation doctrine in the taxation context). Still less does approval of the delegation in this case, given the long history of Presidential discretion in the budgetary context, automatically justify the delegation to the President of the authority to alter the effect of other laws outside that context.

The upshot is that, in my view, the "limited tax benefit" provisions do not differ enough from the "spending" provisions to warrant a different "nondelegation" result.

V

In sum, I recognize that the Act before us is novel. In a sense, it skirts a constitutional edge. But that edge has to do with means, not ends. The means chosen do not amount literally to the enactment, repeal, or amendment of a law. Nor, for that matter, do they amount literally to the "line item veto" that the Act's title announces. Those means do not violate any basic Separation of Powers principle. They do not improperly shift the constitutionally foreseen balance of power from Congress to the President. Nor, since they comply with Separation of Powers principles, do they threaten the liberties of individual citizens. They represent an experiment that may, or may not, help representative government work better. The Constitution, in my view, authorizes Congress and the President to try novel methods in this way. Consequently, with respect, I dissent.