The Federal Line Item Veto Experiment: After the Supreme Court Ruling, What's Next?

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The federal line item veto has ceased to exist, thanks to the Supreme Court's June 1998 ruling invalidating the expansion of the president's rescission authority that was contained in the Line Item Veto Act. This article reviews the application of the Act during 1997, its effect on spending and the deficit, the judicial reaction to its use, and the prospects for the restoration of some version of the power. President Clinton was quite restrained in the use of his new power, with the exception of his cancellations in the Military Construction appropriation bill; these were ultimately restored by the Congress. Because of the president's restraint, the Line Item Veto Act had a miniscule affect on spending and the deficit; total cancellations represented less than .04 percent of FY98 discretionary budget authority. Ultimately, the Supreme Court held that the Act violated Article I, Section 7 because it created a Constituionally impermissable way for the president to change laws. There is no clear fallback position for supporters of the Act; alternatives are either difficult to enact, hard to administer, or too weak to be considered an effective substitute. Given the problems in enacting any alternative, it may be that the federal line item veto will end up only as a historical anomaly.

On June 25, 1998, in a six-to-three ruling, the United States Supreme Court held, in the case of *Clinton v. City of New York*, that the Line Item Veto Act, which had taken effect on January 1, 1997, was unconstitutional. The majority wrote that the powers that were conferred upon the president by the Act violated Article 1, Section 7 (the Presentment Clause) of the United States Constitution because they permitted the president to unilaterally repeal provisions of law that had been enacted through the normal lawmaking process.[1] By ruling in this way, the Judicial branch has invalidated a law that was supported by substantial majorities in both houses and was approved by

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the president. The majority opinions and dissents highlighted a fundamental debate about the separation of powers and permissible delegation of legislative authority that has been at the center of constitutional interpretation over the nation's history. As such, the Line Item Veto Act presents an interesting lens through which to view the question of whether the separation of powers permits a delegation to the executive in cases where a clear national interest is determined by the president and the Congress to result from that delegation

The recent Court opinion invalidating the Line Item Veto Act has done more than just add to the constitutional debate. It has essentially relegated the federal line item veto, which was to have remained in effect until January 2005, to a one-year budget experiment. Beyond the constitutional question, therefore, it is instructive to take a preliminary look at how the procedures authorized by the Line Item Veto Act worked during the Act's abbreviated life. The purpose of this article, therefore, is to review the application of the item veto during 1997, discuss more fully the constitutional and separation of powers issues raised by the judiciary, and discuss the future prospects for a federal line item veto. After reminding readers briefly of the characteristics of the new authority granted to the president, this article will turn to the following questions, in an effort to summarize the historical record and lay the groundwork for possible future action by the Congress and the president:

- How was the line item veto power used in the first year?
- What effect did its use have on spending and the deficit?
- How were the internal workings of the Congress affected and how did relations between the Congress and the president change as a result of the line item veto?
- What issues were debated in the courts as they ruled on the constitutionality of the new law?
- Now that the Act has been found unconstitutional, what avenues are open to the Congress if they wish to enact a version of the line item veto that will pass constitutional muster?

It may be tempting to say that the federal line item veto is no longer worth knowing more about, since the Supreme Court has now invalidated it. The extent of sustained legislative and presidential interest in such a tool, however, makes it quite likely that attempts will continue to be made to provide the president a firmer hand in eliminating narrow-interest provisions that have been enacted during the legislative process. For this reason, understanding the way the tool was used during 1997 could inform the debate concerning whether, and how, this new power should be conferred.

A BRIEF REVIEW OF THE LINE ITEM VETO ACT

Understanding the president's use of his new powers, and the Court's response to that use, requires a thorough understanding of the powers granted to the president under the Line Item Veto Act (LIVA). The Act was passed by the Republican Congress in 1995, largely as a legislative response to a promise made in the House Republicans' Contract with America.[2] It is important to remember that the Act did not provide the president with a line item veto at all. That is, the president's options when he received a bill that

had been passed by the Congress were the same as they were in the past—he could sign the bill in its entirety, veto it in its entirety, or let it become law without his signature. A change in the process that permitted him to veto items at the point of presentment would require an amendment to the Constitution.

Instead of providing the president with a line item veto, the LIVA expanded his authority under the Impoundment Control Act of 1974, allowing him to "cancel in whole any dollar amount of discretionary budget authority provided in an appropriation law or any item of new direct spending or limited tax benefit contained in any law."[3] After signing a bill, the president had five days to notify the Congress of any proposed cancellations. The cancellation then automatically took effect unless the Congress, within thirty "days of session," or days in which both houses are in session, specifically disapproved them through enactment of a "disapproval bill." If and when a disapproval bill is passed, the president then could exercise his constitutional authority to veto that bill, and the veto could then be overridden only by a vote of two-thirds of both Houses of Congress.

Several provisions in the law warrant special mention as they substantially affected the manner in which it would be carried out and its ultimate effect on federal spending, the deficit, and the separation of powers:[4]

1. *The LIVA limited the president's authority to entire amounts of discretionary budget authority specified in the bill or in report language.* The definition of a "line item" is not at all straightforward in federal budgeting. The Congress, unlike state legislatures, tends to appropriate in lump sums (some quite large) and then specify more detail in accompanying reports.[5] While these reports do not have the force of law, agencies generally take the guidance included in them very seriously since they must return to the same appropriations committees for funding in subsequent years. The LIVA allowed the president to reach within committee reports to find line items not specified in legislation. For example, items include materials "represented separately in any table, chart, or explanatory text included in the statement of managers or the governing committee report accompanying such law."[6]

2. *The president could cancel any provision of a newly-enacted law that would have the effect of increasing direct spending above the baseline level.* The president was given the authority to reduce items of new direct spending, but he had no authority to reduce direct spending resulting from previously-enacted law or extensions of that law (except in cases where extensions result in increases above the baseline level), which is the source of most of the recent growth in spending.

3. *The president could cancel "limited tax benefits."* The application of the item veto authority to tax legislation was advocated by those who argued that tax "pork" should not be taken off the table when appropriated "pork" was being put on the chopping block. The Act defined a "limited tax benefit" as a "revenue losing provision" from any change in the Internal Revenue Code of 1986 affecting "100 or fewer beneficiaries" (ten or fewer for temporary or transition rules) in any fiscal year. The congressional Joint Committee on Taxation (JCT) was empowered to search through

revenue provisions to identify limited tax benefits.

4. *A "lockbox" procedure was created in order to require reductions to be used for deficit reduction, rather than being available for other spending.* The drafters of this legislation wanted to ensure that the cancellations of spending or of limited tax benefits that resulted from the exercise of the power created by this legislation could not be used to finance other increases in spending or tax cuts. Under current budget procedures, in which discretionary spending is limited by the caps created under the 1990 Budget Enforcement Act, vetoed appropriated items would free up money that could be appropriated in subsequent spending bills. Similarly, vetoed direct spending items or targeted tax benefits, if part of deficit-neutral bills, would create room in the pay-as-you-go (PAYGO) accounts for new tax or entitlement legislation. The Line Item Veto Act eliminated these possibilities. The Office of Management and Budget (OMB) was required to adjust the discretionary spending caps downward by the amount of the rescinded funds. In the case of the cancellation of direct spending items and limited tax benefits, the law requires that the savings be excluded from PAYGO balances; they, therefore, would not be available for other direct spending initiatives or tax cuts.

HOW DID THE PRESIDENT USE THE NEW POWER IN 1997?

Although the president's new item veto power took effect on January 1, 1997, he was severely limited in his ability to use the power formally during the first half of the year. Virtually no bills reached his desk that contained limited tax benefits, new direct spending items, or discretionary items. With the passage of the twin "balanced budget" bills in late 1997, however, the president had his first opportunity to use the new authority. As appropriation bills began reaching the president's desk in late summer and early fall, his opportunities to use his cancellation authority increased substantially.

Use of the Item Veto on the 1997 Reconciliation ("Balanced Budget") Legislation

The president took advantage of his first real chance to use the item veto by canceling three items that were part of the so-called "balanced budget" legislation that reached his desk in the summer of 1997. Two of these were included in the Taxpayer Relief Act (TRA) of 1997 (P.L. 105–34), and one was contained in the Balanced Budget Act (BBA) of 1997 (P.L. 105–33).

Clinton was particularly restrained in his use of the new item veto authority on the TRA, canceling only two revenue provisions. The first was a provision that would have allowed certain types of financial firms to avoid taxes from overseas operations. The second would have enabled agri-businesses to defer capital gains to certain taxes on the sale of assets to farmer's cooperatives.[7] The Congressional Budget Office estimated that the two cancellations would increase revenues by a total of $178 million between 1998 and 2002. The president's cancellations covered only a small percentage

of the eighty limited tax benefits that had been identified in the TRA by the JCT.[8] President Clinton explained the failure to veto these other provisions by noting that about one-third of them represented administration initiatives, about 40 percent were sound public policy *or were important to bill negotiators*, and about 25 percent provided reasonable transition relief to taxpayers affected by the reconciliation bill.[9]

The direct spending provision from the BBA cancelled by the president would have allowed New York state to use so-called "provider taxes" to boost the amount that the state would receive from the federal government under Medicaid. Over the last several years, many states have used such tax schemes in an effort to inflate the amount that they report spending under Medicaid; since Medicaid funding is provided to the states on a cost reimbursement basis, this has the effect of increasing the percentage of total Medicaid costs funded by the federal government. In canceling this provision, Clinton said that it unfairly benefited New York compared to the rest of the country. CBO estimated that the cancellation would save $200 million, all in fiscal year 1998.[10]

A key objection on the part of House members to these vetoes was that the president had reneged on a deal that the he had with the Congress on reconciliation—that is, they argued that agreement on the broad outlines implied agreement on the details as well. In particular, the House Commerce Committee claimed to have documentation that the New York state provider tax item was a specific part of the budget negotiations, contradicting administration claims that it was not.[11] One of the key sponsors of the Line Item Veto Act argued against the president using it on the reconciliation bill at all. Senator John McCain (R–AZ), a key sponsor of the LIVA, urged President Clinton in a letter to wait until he received the appropriation bills in September, in particular because the reconciliation items were "part of a deal." Accordingly, McCain said that he hoped the president would not "use the line item veto to strike items from the (budget) deal."[12]

The Congress did not formally vote on a disapproval bill covering any of these three vetoed items. While several such bills were introduced, and some efforts were made to enact new tax provisions aimed at the same target but more palatable to the president, 1997 closed with each of these cancellations having taken effect (some of them, as noted below, were invalidated by subsequent court challenges).

Military Construction—An Aggressive Use of the Power

By far the most far reaching and aggressive use of the item veto power during 1997 involved the appropriation bill providing funding for military construction. This bill has long been famous for its potential to deliver constituent benefits, and was thus perhaps destined to be a prime target for use of the cancellation authority, particularly for a president relatively less enthusiastic about military spending than some of his predecessors.[13]

In total, President Clinton used his cancellation power to strike thirty-eight projects, with a fiscal year 1998 price tag of $287 billion. This represented approximately 3

percent of the total FY98 budget authority of just over $9 billion included in the bill. At the press conference announcing the Military Construction vetoes, National Economic Council Chair Gene Sperling argued that the projects that were vetoed were chosen on the basis of "neutral policy criteria." OMB Director Franklin Raines went on to specify those criteria:

1. None of the projects were in the president's budget request for military construction;
2. The Defense Department verified that the design work necessary to commence the project had not begun, making it very unlikely that any of the projects would actually begin in fiscal year 1998; and
3. The project did not make a substantial contribution to the well-being and quality of life of men and women in the armed forces.

Raines went on to indicate that these criteria were "not partisan; no decision was made based on political party or location of the project."[14]

Subsequently, the administration's effort to establish "neutral" criteria for exercising the vetoes backfired when the administration was forced to concede that it had erred in estimating the status of eighteen of the thirty-eight projects.[15] For example, the Army said that no design work had been done on a project at Fort Campbell, Kentucky, when the design was found to be 90 percent completed.[16]

Both the initial presidential cancellations and the admission that the administration had made errors in applying criteria brought howls of protest from Members of Congress. Members of Congress, in part, complained that they had not been notified in advance and thus could not lobby to the president on behalf of their projects. In fact, at an October 9 Senate Appropriations Committee hearing, some proponents of the line-item veto in theory, including Senators Larry Craig (R–ID) and Robert Bennett (R–UT), suggested that they felt differently not that they had seen it applied. Senator Ted Stevens (R–AK), the Chairman of the Senate Appropriations Committee, moved immediately to introduce a disapproval bill.[17]

Both Houses of Congress eventually passed bills disapproving the cancellation of the thirty-eight projects. In the Senate, the disapproval bill passed on October 30 by a vote of sixty-nine to thirty, providing for a three vote cushion over the two-thirds necessary to override a presidential veto.[18] The House passed the bill by an even more lopsided vote of 352 to 64. The president ultimately, as expected, vetoed the disapproval bill on November 13, setting up an effort to override his veto.[19] The Congress took up their override attempt in February 1998. On February 5, the House voted 347 to 69 to override the president's veto of the disapproval bill. When the Senate followed suit by a vote of seventy-eight to twenty on February 25, the disapproval bill became law (P.L. 105–159), thus nullifying the president's cancellations.

Use of the New Authority on Other Appropriation Bills

The president, of course, had ample opportunity to use the cancellation authority on other appropriated items, but was substantially more restrained on subsequent bills. The massive $247.5 billion defense appropriation bill, which reached the president only a week after the Military Construction bill, drew only thirteen cancellations worth a total of $144 million. This restraint came in spite of the fact that "the Congress had inserted into the Pentagon budget 750 projects, worth more than $11 billion, that the Administration had not requested and did not want."[20] In spite of this restraint, however, his veto still managed to infuriate at least one of its victims. Representative Jerry Lewis (R–CA), angered over a Clinton veto of a medical research project in the Pentagon budget, indicated that the president's action was ill-advised, given that Lewis is chairman of the fifty-two member California delegation in the House and was in a key position to deliver on fast-track trade legislation, the administration's top 1997 legislative priority.[21]

On the other hand, the president let the vast majority of the Defense add-ons stand. Among the projects to escape the president's vetoes in the Defense bill was a provision written into the bill by Senator Daniel Inouye (D–HI), the ranking Democrat on the Defense subcommittee. This language will allegedly, at a cost of $250,000, benefit only one firm, the American Classic Voyages Company. In an October 16 letter to Clinton, a reportedly "incensed" Senator McCain said, "I fail to see how a $250,000 earmark of funds to transfer commercial shipbuilding technology to the Navy, coupled with language creating a 30-year monopoly for a cruise line in Hawaii, contributes in any way to national security."[22]

Clinton seemed to acknowledge that he was holding his fire in light of the recent experience with the Military Construction bill. "I know that a lot of members who voted for the line-item veto in Congress now wonder whether they did the right thing now that I'm exercising it," said Clinton. "But I would like to remind you again that I have deferred in great measure to Congress." In fact, some administration officials acknowledged that Clinton intentionally limited his use of the veto in the defense bill to avoid antagonizing members on fast track.[23]

If the president had fired a warning cannon on the Military Construction bill and used a peashooter on Defense, his response on other appropriation bills was largely to leave his weapon in its holster. The single major exception to this reticence was the president's cancellation, in the appropriation bill including funding for the Treasury department, the Postal Service, and related agencies, of a provision permitting federal employees to switch from the Civil Service Retirement System (CSRS) to the Federal Employees Retirement System (FERS). Clinton said that the provision was "hastily conceived" and said that it would have cost taxpayers $854 million over five years in reduced receipts to the retirement trust funds.[24] The major controversy surrounding this use concerned whether the president had exceeded the authority provided him under the Act. The president, in his special message including the cancellation, argued

that the provision was a "dollar amount of discretionary budget authority" as provided for by the Act. As CBO subsequently noted, however, the "Line Item Veto Act . . . does not support such a classification" (nor did the FERS provision meet the definition of a "limited tax benefit," since its effect was too broad).[25] For this reason, the National Treasury Employees Union filed a court challenge, arguing that President Clinton had overstepped his authority. The administration ultimately recanted in response to that challenge, effectively restoring the FERS provision.

Cancellations in other bills were few and far between. President Clinton did veto a handful of projects (worth $19.3 million) from the $21 billion Energy and Water appropriations bill, the highest profile of which was a $1.9 million project supported by Senate Majority Leader Trent Lott (R–MI).[26] In the Labor/HHS bill, the president did not use his line item veto to cut any projects. Apparently four or five had been considered as candidates for veto (and Senator McCain had urged that several earmarks be vetoed), but none were actually canceled. An administration official was quoted as saying that "on that bill, we're usually fighting for more."[27]

EFFECT OF THE LINE ITEM VETO ON SPENDING AND THE DEFICIT

Because the president made such limited use of the new authority provided to him and because some of it was invalidated by subsequent legislative or executive action, the budgetary effect of the Line Item Veto Act in the first year would have been quite small, even if it had ultimately been declared constitutional. CBO estimated that the eighty-two cancellations that the president made from the eleven laws would have saved about $355 million in outlays or increased revenues in fiscal year 1998 and just under $1 billion for the five-year period through 2002. The reversal of the cancellations affecting the Military Construction bill and the FERS open season lowered the five year savings by approximately 40 percent, to less than $600 million (see Table 1).

The president's cancellations had a particularly small effect on discretionary spending. In total, the president's seventy-nine cancellations from nine appropriations bills reduced budget authority by $477 million out of total discretionary budget authority of more than $526 billion provided for in these bills. This means that the president's total cancellations represented less than one tenth of a percent of all discretionary BA provided for in the thirteen appropriations bills. If we reduce the effect of the president's cancellations by the amount included in the Military Construction bill that was subsequently disapproved by the Congress, the remaining cancellations represented less than four hundreth of a percent of all 1998 discretionary budget authority.

The fact that the Line Item Veto Act had a negligible effect on spending and the deficit in the first year, of course, does not mean that it might not have had a greater effect in future years. It also does not mean that the item veto might not affect the composition of spending in significant ways. Clearly the president believed that his initial use was partially intended to have a deterrent effect: "When you know the president is prepared to use the line item veto, that tends to operate as a deterrent

TABLE 1
Budgetary Effect of Cancellations Made by the President Under the Line Item Veto Act (millions of dollars)

Cancellation	1998 BA	1998 O	1998–2002 BA	1998–2002 O
Spending Cancellations				
Balanced Budget Act of 1997	–200	–200	–200	–200
Military Construction Approp.	–287	–28	–287	–271
Defense Appropriations	–144	–73	–144	–142
All Other Appropriations	–46	–25	4	5
Total Spending Cancellations	–677	–326	–629	–608
Tax Benefit/Revenue Cancellations				
Cancellation	1998 Rev.			1998–2002 Rev.
Tax Payer Relief Act of 1997	–25			–178
Treasury Appropriations Act	–4			–151
Total Tax/Revenue Cancellations	–29			–329
All Cancellations				
	1998 Effect			1998–2002 Effect
Total Budgetary Effect	–355			–937
Cancellations Overturned				
Total Budgetary Effect	30			368
Net Budgetary Effect of All Cancellations Except Those Overturned				
Net Budgetary Effect	–325			–579

Source: Calculated from Table I, Testimony of June O'Neill before the Committee on Rules, U.S. House of Representatives, March 11, 1998, pp. 7–8. Negative numbers indicate that the change reduces the deficit or increases the surplus. Budgetary effects include outlays and revenues.

Note: BA=budget authority, O=outlays.

against the most egregious kinds of projects that would otherwise not be funded. "So it would suit me if, after a while, the use of the veto became quite rare because there was a disciplined agreement not to have projects that ought not to have been funded in the first place."[28]

The president also understandably protected programs that he viewed as a high priority while canceling projects that were a high priority for the Congress. For example, in the Commerce-Justice-State appropriation bill, a number of add-ons were included for all manner of projects benefiting small business, local police, and various universities. In the end, however, Mr. Clinton cancelled just two items totaling $5.3 million from the $31.8 billion bill.[29] On the other hand, he used the veto power much more aggressively on defense; this in part may reflect the priorities of this president versus those of this Congress.

The line item veto power certainly might have had a greater effect if the president had used the power more aggressively. It is important to note here, however, that there may be significant political limits to the level at which the president can exercise the item veto. The more projects that the president includes for cancellation, the easier it is for the Congress to put together a coalition to oppose those cancellations. In the Military Construction bill, for example, the inclusion of a relatively large number of projects may have made it easier for opponents of the president's actions to put together the coalitions for override.

The fact that it is easier to put together a coalition to oppose a large number of cancellations in the single bill than it is to put together one in opposition to a smaller number of cancellations suggests that it is harder for the president to prevail in cases where he uses the power more aggressively. It seems highly unlikely, for example, that the president would have prevailed if he had proposed canceling all (or even half) of the 750 add-ons in the Defense bill. To the extent that this is true, it provides limits on the extent to which the president's priorities could have been substituted for those of the Congress.

EFFECT OF THE LINE ITEM VETO ON CONGRESSIONAL AND INTERBRANCH BEHAVIOR

One has to look beyond the simple application of the line item veto to look for evidence of its effect. Beyond any budgetary impact that it might have, it is also necessary to evaluate its effect on the budget process itself, and its impact on Congressional and presidential behavior.

First, the Congress might have been expected to change the nature of its appropriations process because of the existence of the line item veto. The Congress might have included fewer targets for the president to veto within appropriation bills. Further, given the special status given to report language and the "all or nothing" choice given to the president, the Congress could have been less specific in the guidance given in reports. This would probably have resulted in such guidance being communicated to cabinet agencies in other, less formal, ways. Agencies would be likely to treat the less formal types of instructions with the same respect that they now treat report language. The "packaging effect" just described, by the way, has been found in academic research on the effect of the line item veto at the state level.[30]

Second, the Congress could simply have chosen to write legislation in such a way that specifically prevented the item veto from being applied to specific bills. Such a prohibition would likely have occurred only in cases where the Congress feels quite strongly about protecting its priorities. This could have opened the Congress up to charges of hypocrisy, if they appeared to be providing the president with item veto authority and then taking it away. It could also have resulted in the president vetoing a bill that attempted to limit his authority (although the "all or nothing" veto has proved to be a rather blunt instrument in the past).[31]

There is no real evidence that the Congress turned to using these limitations much (if at all) in 1997, but this in part is because that the Congress was not confronting a president that they were convinced would use the power aggressively against them. In the vast majority of instances (the exception being Military Construction) they were proved correct. Interviews with Congressional staff conducted for this article suggest that the item veto was not really on the appropriators' radar screens in 1997. They were reportedly waiting to see how the power would be used before deciding whether any preemptive response was necessary from the Congress.[32]

One might also have anticipated an increased incidence of pressure from the president in an effort to coerce members of Congress to follow administration priorities. Here there are two main possibilities. First, the threat of the line item veto could have decreased the level of Congressional add-ons; again, interviews with Congressional staffers suggested no real evidence of this having occurred so far.

Second, it could have given the president an opportunity to use the threat of a line item cancellation to bargain for other things. Here there is some limited evidence of a connection between the line item veto and other policies. Members of Congress were reportedly contacted in an effort to connect their votes on key issues to presidential support of particular projects. One report noted an apparent connection between the support of $3.5 billion in funding for the IMF by Representative Sonny Callahan (R–AL) and a $1.5 million project intended to expand a veterans cemetery in Mr. Callahan's home city of Mobile.[33]

Further, there was in some cases a connection between the budget and other priorities, such as "fast track" trade authority. Apparently when Representative Mike Parker (R–MS) heard that a particular project might be vetoed, he "explained that it was unwise to line item a person who was leaning toward fast track." The project was not vetoed.[34] Conversely, after Clinton's vetoes on the Military Construction bill cancelled projects in the districts of both Representatives Norman Sisisky (D–VA) and Tillie Fowler (R–FL), both Sisisky and Fowler told colleagues that they would oppose fast track.[35] And Representative Robert Matsui (D–CA), the leading Democrat on the Ways and Means Committee's subcommittee on trade (with jurisdiction over fast track) acknowledged that "Members have discussed linkage between" the line item veto and fast track.[36] (Other threats were not so thinly veiled. After the Military Construction vetoes, Senator Stevens said, "I'd hate to be a presidential nominee waiting for confirmation right now."[37]) Despite any efforts by the president to link fast track and the item veto, ultimately the president did not prevail on fast track. This suggests that whatever difference line item veto threats may have made, they were not sufficient to affect the outcome.

On the other hand, there were apparently some (albeit limited) cases where the Congress structured appropriation bills to allow the president to strike offending provisions for them. For example, a $10 million Montana mineral rights transfer vetoed on November 20 was added to the Interior Department appropriation to get Western conservative votes for White-House supported land deals, but the appropriation bill was structured to ensure that Mr. Clinton could strike it later.[38]

THE COURTS RESPOND TO THE LINE ITEM VETO ACT

Both the passage of the Line Item Veto Act and the president's use of his new power under the Act prompted legal challenges. Soon after the Act took effect, six current and former members of Congress challenged the constitutionality of the new law. This led to the Act being declared unconstitutional by U.S. Seventh District Court Judge Thomas Penfield Jackson in April 1997. On appeal, the U.S. Supreme Court ruled, in a June 26, 1997, opinion, that the current and former members of Congress who brought suit lacked the legal standing to do so. In his majority opinion, Chief Justice Rehnquist argued that the Congress could not grant itself standing through legislation; that, in the absence of an institutional injury that is "personal, particularized, concrete, or otherwise judicially cognizable" the members of Congress who brought this suit lacked standing. Chief Justice Rehnquist summarized as follows:[39]

> . . . appellees have alleged not injury to themselves as individuals, the institutional injury they allege is wholly abstract and widely dispersed, and their attempt to litigate this dispute at this time and in this form is contrary to historical experience . . . our conclusion neither deprives Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriation bills from its reach) nor forecloses the Act from Constitutional challenge (by someone who suffers judicially cognizable injury as a result of the Act). Whether the case would be different if any of these circumstances were different we need not now decide.

Of course, President Clinton's application of his cancellation authority led to further legal challenge, since the victims of these cancellations believed that their injuries were real. First, a suit filed in October 1997 by the National Treasury Employees Union (NTEU) charged that the president's actions in vetoing the FERS open season were inappropriate for two reasons. First "reductions in employee contributions to the Civil Service Retirement and Disability Fund are not dollar amounts of 'discretionary budget authority,' and the President acted contrary to the Act in treating them as such." Further, however, the NTEU argued that, even if the president's actions were lawful, they were unconstitutional, in part because they violate both the veto requirements of Article 1, Section 7, and represent an "abdication of legislative control over the fisc" by "unconstitutionally shift(ing) lawmaking power to the executive branch."[40] This suit, had it gone forward, would have required the judicial branch to wade headlong into the arcania of budget scorekeeping, since they would have had to decide whether the FERS provision was indeed "discretionary." As it was, the administration withdrew its objections at the eleventh hour, and proposed the cancellation of the FERS open season as part of its 1999 budget. This cancellation was never enacted into law, and the FERS open season went forward as originally enacted by the Congress.

Other suits were brought against the administration over its use of the line item veto against the reconciliation bills. The first was brought by the city of New York against the president for his veto of the provider tax provision in the Balanced Budget Act.[41] The second was brought by the Snake River (Idaho) Potato Growers over the cancella-

tion of a limited tax benefit included in the Taxpayer Relief Act; this provision would have benefited the potato growers.[42] The former complaint mirrored the NTEU complaint in its assertion that the Line Item Veto Act was unconstitutional, but did not assert that the president's actions were outside of the legal definitions in the Act. The latter complaint established standing for the plaintiffs, but did not cite the specific legal or constitutional violation.

The Justice Department, on November 13, asked a federal judge to dismiss the New York City Medicaid lawsuit, saying that the City had no standing to sue over the issue. The Department argued that New York City and the other plaintiffs had failed to show any direct injury from the veto, and that, further, since Medicaid gives federal funds to the states, New York City is not the appropriate entity to bring such a suit.[43]

On February 12, 1998, Judge Thomas Hogan of the U.S. District Court for the District of Columbia, acting in response to both the City of New York and Snake River Potato Growers cases, found that the plaintiffs each had standing, and declared the Line Item Veto Act to be unconstitutional. Judge Hogan stated that the Act violated Article I because:[44]

> [t]he laws that resulted after the president's line item veto were different from those consented to by both Houses of Congress. There is no way of knowing whether these laws, in their truncated form, would have received the requisite support from both the House and the Senate. Because the laws that emerged after the Line Item Veto are not the same laws that proceeded through the legislative process, as required, the resulting laws are not valid. . . . Unilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent.

The decision of the lower court was appealed to the Supreme Court, which heard oral arguments on April 27, 1998. On June 25, 1998, by a six to three margin, the Court agreed with the lower court that the Line Item Veto Act ran afoul of the Presentment Clause. Justice John Paul Stevens wrote the majority opinion, joined by Chief Justice William Rehnquist, Justice Anthony Kennedy, Justice David Souter, Justice Clarence Thomas, and Justice Ruth Bader Ginsburg. Writing for the majority, Justice Stevens specifically rejected the arguments of the Clinton Administration that the appellees in the case had not suffered actual injury, and that the cancellations were simply exercises of the president's discretionary authority akin to the refusal to spend funds. Rather, he argued that "in both legal and practical effect, the presidential actions at issue have amended two acts of Congress by repealing a portion of each. . . . There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."[45] Justice Stevens differentiated the power exercised under the Act from the power to "return" a bill before it has been approved, since a return affects the entire bill before it becomes law, while the "cancellation" under the LIVA affects only a portion after it has already been signed into law.

In invalidating the Act, the majority emphasized two points. First, that the invalidation was not intended as a comment on the "wisdom of the procedures authorized"

under the Act, but simply argued that, as a matter of constitutional law, the procedures were impermissible because they allowed bills to become law that had not complied with the Article 1, Section 7 requirements.[46] In short, the majority held that the Constitution requires that, in order for a bill to become a law, it has to pass the House, the Senate, and be approved by the president in an identical form. If the president may unilaterally change a bill after it becomes law, the majority said, "it would authorize the president to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature."[47] Second, because the case was decided on the more narrow Article 1, Section 7 grounds, the Court viewed it as unnecessary to address the affect that the law would have on the separation of powers.

In a concurring opinion, Justice Kennedy waded more directly into the separation of powers question. While recognizing that the purposes of the Act were important, Justice Kennedy warned that "[f]ailure of political will does not justify unconstitutional remedies."[48] He reminded his colleagues of the intentions of the founders when they divided authority among the branches:[49]

> Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: "The accumulation of all powers, legislative, executive and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny. . .". The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two.

In a dissenting opinion, Justice Steven Breyer, joined by Justice Sandra Day O'Connor and Justice Antonin Scalia, fundamentally disagreed with the majority that the Line Item Veto Act's procedures violated Article 1, Section 7. Rather, the dissent argued that "[w]hen the President 'canceled' the two appropriations 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."[50] In short, the dissenting justices believed that the power granted the president under the LIVA was fundamentally executive in nature; he was delegated such power when the LIVA became law. In their minds, it closely resembles the power to make regulations, or to adjudicate, which have frequently been upheld as constitutional. In making this argument, Justice Breyer quoted from a 125-year old Pennsylvania court opinion, which states that "[t]he legislature cannot delegate its power to make a law; but it can make a law to delegate a power."[51]

Justice Scalia, in a separate dissent, made it clear that he found the majority opinion—that the LIVA had violated the Presentment clause—to be wholly unpersuasive, and that in fact he believed that the majority had been hoodwinked, perhaps by the title of the LIVA itself:[52]

> The short of the matter is this: Had the Line Item Veto Act authorized the president to "decline to spend" any item of spending contained in the Balanced Budget Act of 1997, there is not the

slightest doubt that authorization would have been constitutional. What the Line Item Veto Act does instead—authorizing the President to "cancel" an item of spending—is technically different. But the technical difference does not relate to the technicalities of the Presentment Clause, which have been fully complied with; and the doctrine of unconstitutional delegation, which is at issue here, is preeminently not a doctrine of technicalities. The title of the Line Item Veto Act, which was perhaps designed to simplify for public comprehension, or perhaps merely to comply with the terms of a campaign pledge, *has succeeded in faking out the Supreme Court.* The President's action it authorizes in fact is not a line item veto and thus does not offend Art. I, Section 7; and, insofar as the substance of that action is concerned, it is not different from what Congress has permitted the President to do since the formation of the Union. (emphasis added)

In the end, the judicial disagreement came down to whether the powers provided to the president under the Act were powers that it is permissible for the Congress to delegate. Justices Stevens, O'Connor, and Scalia thought so; clearly a majority of the justices thought otherwise. The result of the Supreme Court opinion is clear—for now, it has converted the federal line item veto from a long-term experiment to a one-year blip on the federal budgeting radar screen.

CONCLUSION: WHAT HAPPENS NOW?

Given the continued interest among some members of Congress in providing the president with expanded power in the budget process, the Supreme Court opinion may not have resolved this issue once and for all. Already several bills have been introduced by Members of Congress seeking a constitutional means of accomplishing the same result intended by the authors of the Line Item Veto Act. These bills take three forms:

1. An amendment to the Constitution, which would permit the president to veto portions of bills upon presentment, as occurs in many states.[53]
2. Separate enrollment, which requires appropriation bills to be broken up into many—possibly thousands of—"mini-bills" by the enrolling clerk prior to presentment to the president for his signature (since each line item would be a separate bill, it would result in a de facto line item veto).[54]
3. Expedited rescission, which would ensure the president a vote on any proposed rescissions that he offered under the Impoundment Control Act. Under expedited rescission, a majority of each house would be necessary in order to approve the president's proposed rescissions. If one House disapproved, the other would not have to act, and the funds would be released for obligation.[55]

In the final analysis, there is no clear fallback position for supporters of the Line Item Veto Act. The majority opinion stated flatly that a different role for the president in the lawmaking process could only "come through the Article V amendment procedures."[56] If that is the case, the future of the federal item veto may not be decided for some time. Constitutional amendments are notoriously difficult to enact, given that they require a two-thirds majority in each House and must be ratified by three-fourths of the state legislatures. Further, since most "line items" in the federal budget are found not in statute but in report language, it is worth asking whether a constitutional

amendment would have the effect that supporters desire. The statutory alternatives each have (potentially fatal) flaws as well. The separate enrollment approach is a potential administrative nightmare for the enrolling clerk. Further, it shares the problem of not permitting the president to reach into committee reports to find line items. Finally, expedited rescission, which passed the House on several occasions when the Democrats controlled that body, was generally vilified by many supporters of the Line Item Veto Act as a much weaker substitute.

Even if some alternative is agreed to, at least two technical issues that surfaced during the one-year experiment under the LIVA may have to be considered in drafting an alternative. First, some questions were raised concerning the capacity of the Administration to review bills for the presence of item vetoes. The Line Item Veto Act required the president to present his "special message," proposing cancellations of items included in a particular bill, within five days after signing that bill. Since the president initially has ten days after receipt of the bill prior to taking action, this means that the White House had up to fifteen days to analyze those bills for which cancellations were proposed. There are at least two reasons to believe that more time might have been required for a thorough review. First, appropriation bills have a habit of arriving in bunches, particularly near the end of the fiscal year.[57] Second, a decision concerning what action to take on a particular bill is liable to involve a number of people in the executive branch, from the White House staff, to OMB, to the affected agency; such consultation can be time-consuming. The broader issue that needs to be resolved by the Congress concerns how much time an Administration needs to evaluate whether or not to veto an item. Under separate enrollment, for example, the president would have only the initial ten day period provided for under the Constitution. This, based on the record under the Line Item Veto Act, is not much time to consider thousands of line items, each contained in a separate bill.

Second, an unanticipated question that was raised in the aftermath of the president's 1997 cancellations was the extent to the presidential line item veto should be available only when the budget is in deficit. This issue initially surfaced because the president, in transmitting his special message proposing cancellations, was required to certify that each cancellation would "reduce the Federal budget deficit." This led some to conclude that the president's cancellation authority was not available unless there *was* a deficit.[58] While the arcane arguments concerning whether the LIVA powers would have continued in an environment where the budget is in surplus are not worth raising in detail given the demise of the LIVA, the broader question of the purpose of giving the president a line item veto remains. Given the projection by both CBO and OMB of surpluses well after the year 2000, a linkage between the line item veto and deficit reduction might lead to a conclusion that the problem that the item veto was designed to address has indeed been solved.

On the other hand, if the purpose of the line item veto is not to reduce the deficit, but to affect the composition of spending, then supporters might find ample reason to continue to push for it. The belief that "pork" is wasteful, narrow interest spending that

the president, as a representative of the general interest, should have an opportunity to strike out, should have no relationship to the presence or absence of a deficit. If you believe that providing the president with this power will lead to "better" budget outcomes (the definition of "better" being in the eye of the beholder), then the argument is equally valid whether the budget is in deficit or surplus.

The absence of a deficit may, on the other hand, change the political calculation for Members of Congress substantially. It may be far more difficult to convince a majority of each House to support providing the president with greater control in the budget process, without the apparently easy justification that the deficit provides for taking that action. In the end, 1997 may represent merely a historical anomaly—the first and only year that the president of the United States could reach into legislation to separate what, in his view, was the legislatively-inspired chaff from the executive-supported wheat.

NOTES

1. Clinton, President of the United States, et al. v. City of New York, et al. Appeal from the United States District Court for the District of Columbia, No. 97–1374. Argued April 27, 1998. Decided June 25, 1998. Draft of preliminary print of the United States Reports.
2. For more details on the legislative history and background of the line item veto, see Philip Joyce and Robert Reischauer, "The Federal Line-Item Veto Act: What is it and What Will it Do," *Public Administration Review* 57 (July/August 1997), pp. 95–104.
3. U.S. House of Representatives (1996). Conference Report: The Line Item Veto Act. House Report 104–491, March 21, p. 19.
4. The listing is summarized from Joyce and Reischauer, op. cit.
5. Fisher, Louis, and Neal Devins, "How Successfully Can the States' Item Veto be Transferred to the President?," *Georgetown Law Journal* 75: 1 (October 1986), pp. 159–197.
6. U.S. House of Representatives (1996). Conference Report: The Line Item Veto Act. House Report 104–491, March 21, p. 19.
7. National Journal's Congress Daily, August 11, 1997.
8. Andrew Taylor, "Clinton Finds New Veto Power Too Tempting to Postpone," *Congressional Quarterly Weekly Report*, August 16, 1997, p. 1951.
9. "Clinton Line-Item Vetoes One Spending, Two Tax Items from Reconciliation Bills," BNA Washington Insider, August 12, 1997.
10. New York state estimated the effect of the veto to be more than $2 billion. CBO, however, used "probabilistic" scoring on the bill. Since it viewed the probability as being only 10 percent that the administration would not resolve the issue administratively, it identified the savings as only $200 million. See letter from June E. O'Neill to The Honorable John Kasich, Chairman, House Budget Committee, September 8, 1997.
11. National Journal's Congress Daily, August 12, 1997.
12. National Journal's Congress Daily, August 8, 1997.
13. See R. Douglas Arnold, *Congress and the Bureaucracy: A Theory of Influence* (New Haven: Yale University Press, 1979), for a discussion of the history of spending on military infrastructure.
14. White House, Office of the Press Secretary, Press Briefing, October 6, 1997.
15. "Senate Votes to Override Vetoes of 36 Projects," *Congressional Quarterly Weekly Report*, November 1, 1997, p. 2699.

16. "Stevens Waves Off Olive Branch from Raines on Vetoed Items," *Congressional Quarterly Weekly Report*, October 25, 1997.
17 Andrew Taylor, "Line-Item Boosters Reconsider as Clinton Vetoes Hit Home," *Congressional Quarterly Weekly Report*, October 11, 1997, p. 2459.
18 "Senate Votes to Override Vetoes of 36 Projects," *Congressional Quarterly Weekly Report*, November 1, 1997, p. 2699.
19. "Clinton Veto Halts Attempt at Line-Item Override," *Congressional Quarterly Weekly Report*, November 15, 1997, p. 2831.
20. John M. Broder, "Clinton Gently Vetoes $144 million in Military Budget Items," *New York Times*, October 14, 1997, p. A12.
21 Ibid.
22. Donna Cassata, "President Uses a Delicate Touch in Vetoing Military Spending," *Congressional Quarterly Weekly Report*, October 18, 1997, p. 2557.
23. Eric Pianin and Bradley Graham, "Clinton Tempers Line-Item Approach," *Washington Post*, October 15, 1997, p. A4.
24. "U.S. Workers' Shift in Pensions Vetoed," *Washington Post*, October 17, 1997, p. Al.
25. Testimony of June O'Neill before the Subcommittee on Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, March 11, 1998, p. 14.
26. "Clinton Trims More 'Pork' Line by Line," *Washington Post*, October 18, 1997, p. A4.
27. Labor-HHS Approps Bill Poised to Escape Clinton Vetoes," National Journal's Congress Daily, November 19, 1997.
28. "Clinton Line-Item Vetoes One Spending, Two Tax Items from Reconciliation Bills," BNA Washington Insider, August 12, 1997.
29. David Rogers, "Clinton Uses Line-Item Veto Authority on Military More Than on Domestic Side of Budget," *Wall Street Journal*, November 21, 1997, p. A25.
30. Abney, Glenn, and Thomas Lauth, "The Line-Item Veto in the States: An Instrument of Fiscal Control or an Instrument of Partisanship?," *Public Administration Review* 45, Number 3 (May/June 1985), pp. 37–377; Thompson, Pat, and Steven R. Boyd, "Use of the Item Veto in Texas, 1940–1990," *State and Local Government Review* Vol. 26, Number 1 (Winter 1994), pp. 38–45.
31. Each of the preceding strategies is discussed in more detail in Joyce and Reischauer, "The Federal Line-Item Veto," op. cit., pp. 100–101.
32. In addition to reviewing journalistic accounts and other documents, for this section a series of interviews were conducted with Congressional staff asking for their impressions concerning the ways in which the Act had affected the operations of the Congress and its relations with the president. These interviews included staff from the Congressional Budget Office, the House and Senate Committees on the Budget, and the Senate Appropriations Committee. Efforts to conduct similar interviews with executive branch officials were unsuccessful; officials were unwilling to talk, quite probably because of the pending Supreme Court case. Because executive branch officials were not interviewed, it is possible that some of the results reported carry a legislative bias.
33. David Rogers, "Line-Item Veto Was Supposed to Strengthen Hand of Clinton, but It Put Him on Defensive This Fall," *Wall Street Journal*, November 21, 1997, p. A24.
34. Ibid.
35. Andrew Taylor, "Line-Item Boosters Reconsider as Clinton Vetoes Hit Home," *Congressional Quarterly Weekly Report*, October 11, 1997, p. 2461.
36. Juliet Elperin, "Angered by Line-Items, Dems May Withdraw Trade Votes," *Roll Call*.
37 Andrew Taylor, "Line-Item Boosters Reconsider."
38. Rogers, "Line Item Veto Was Supposed to Strengthen Hand of Clinton," op. cit.
39. Opinion of Chief Justice William Rehnquist in the case of *Frederick (sic) D. Raines, et al., v. Robert C. Byrd, et al.*, Opinion Number 96–1671, June 26, 1997.

40. *National Treasury Employees Union, and Frank Heffler and Shirley Johnson, Plaintiffs, v. United States of America and William J. Clinton and Franklin D. Raines, Defendants*, brief filed in United States District Court for the District of Columbia, October 23, 1997, pp 2–3.
41. *City of New York, et al., v. William J. Clinton, Donna E. Shalala*, brief filed October 16, 1997 in the United States District Court for the District of Columbia.
42. *Snake River Potato Growers, Inc.* and *Mike Cranney v. Robert E. Rubin*, complaint filed October 21, 1997.
43. BNA Health Care Daily, Bureau of National Affairs, November 17, 1997.
44. *City of New York, et al., v. William J. Clinton,* and *Snake River Potato Growers, Inc. et al. v. Robert E. Rubin*, Decision of the United States District Court for the District of Columbia, February 12, 1998.
45. *Clinton v. City of New York*, Draft of preliminary United States Reports print, p. 8.
46. *Clinton v. City of New York*, pp. 11–12.
47. *Clinton v. City of New York*, p. 12.
48. *Clinton v. City of New York*, p. 12.
49. *Clinton v. City of New York*, pp. 12–13.
50. *Clinton v. City of New York*, p. 16.
51. *Clinton v. City of New York*, p. 18.
52. *Clinton v. City of New York*, p. 32.
53. See, for example, H. J. Res. 72, introduced by Representative Jo Ann Emerson (R-MO).
54. The most prominent example is S. 2221, introduced on June 25, 1998 (the date of the Supreme Court ruling) by Senator John McCain (R-AZ), perhaps the leading Congressional supporter of the line item veto.
55. See H.R. 4174, introduced by Representative John Kasich, Chairman of the House Budget Committee, also on June 25, 1998.
56. *Clinton v. City of New York*, p. 3.
57. Alexis Simendinger, "The Art of the Line-Item Veto," *National Journal*, October 18, 1997, p. 2089.
58. George Hager, "A Law of Unintended Consequences," *Congressional Quarterly Weekly Report*, October 18, 1997, p. 2566.