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Line Item Veto Act Unconstitutional: *Clinton v. City of New York*

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Summary

On June 25, 1998, the United States Supreme Court in *Clinton, et al. v. City of New York, et al.*, held that the Line Item Veto Act, violated the Presentment Clause of the Constitution. The Clause requires that every bill which has passed the House and Senate before becoming law must be presented to the President for approval or veto, but is silent on whether the President may amend or repeal provisions of bills that have passed the House and Senate in identical form. The Court interpreted silence on this issue as equivalent to an express prohibition.

The Court concluded that the Line Item Veto Act unconstitutionally empowered the President unilaterally to repeal or amend provisions of duly enacted bills. Nonvetoed items that emerged as law were truncated versions of bills that passed both Houses of Congress, but not the product of the finely wrought procedure for lawmaking designed by the Framers of the Constitution. For background information on the line item veto issue, see the *Guide to CRS Products* under Budgets-Process. This report will not be updated.

On June 25, 1998, the United States Supreme Court in *Clinton, et al. v. City of New York, et al.*, 118 S.Ct. 2091 (1998), held that the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996), 2 U.S.C. §§ 691 *et. seq.*, was unconstitutional, affirming a district court disposition in *City of New York, et al. v. Clinton, et al.*, and *Snake River Potato Growers, Inc., et al. v. Rubin, et al.*, 985 F.Supp. 168 (D.D.C. 1998). In an opinion written by Justice Stevens and joined by five members, Chief Justice Rehnquist, and Justices Kennedy, Souter, Thomas, and Ginsburg, the Court held that the Act violated the Presentment Clause of the Constitution, art. I, § 7, cl. 2, which states that every bill before becoming law must be presented to the President for approval or veto.

The Act empowered the President, within five days (excluding Sundays) after signing a bill, to cancel in whole three types of provisions--any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. The

President was required to determine that the cancellation would reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest. He also had to notify Congress by transmitting a special message within five calendar days (excluding Sundays) after enactment.

A cancellation took effect upon receipt by Congress of a special message. A cancellation, under the Act, prevented any dollar amount of discretionary budget authority, item of new direct spending, or limited tax benefit from having legal force or effect. If a disapproval bill was enacted into law, however, the cancellation set forth in the special message was null and void.

The City of New York and other parties challenged the President's cancellation of an item of new direct spending in section 4722(c) of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, 515 (1997), which waived a provision of the Social Security Act, 42 U.S.C. § 1396b(w). This Social Security Act provision reduced federal subsidies paid to states to help finance medical care for the indigent by the amounts of certain taxes that the states levied on health care providers. The waiver in section 4722(c) permitted the state of New York to continue to receive a federal subsidy without reduction for taxes it had levied on providers.

The Snake River Potato Growers, Inc. and other parties challenged the President's cancellation of a limited tax benefit, section 968 of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788, 895-896 (1997). Section 968 amended section 1042 of the Internal Revenue Code, 26 U.S.C. § 1042. Before Congress passed section 968, the Code permitted owners of investor-owned business corporations to acquire a corporation, including a food processing or refining company, in a merger or stock-for-stock exchange in which the seller could defer paying capital gains taxes. If the purchaser was a farmers' cooperative, however, the parties could not structure a transaction of this kind and the seller was not allowed to defer paying capital gains tax because the stock of cooperatives may be held only by their members. Section 968 extended the tax deferral benefit to owners of certain food refiners and processors who sold their stock to eligible farmer's cooperatives, thus placing the cooperatives on an equal footing with investor-owned businesses.

The Supreme Court first addressed jurisdictional questions. It found that the question presented was ripe for judicial resolution because the President had exercised cancellation authority granted by the Line Item Veto Act. The Court also found that the City of New York and the Snake River Potato Growers, Inc. had legal standing to bring their suits because they would suffer concrete injury if the presidential cancellations were upheld.

Finding that the parties before the Court had legal standing distinguished the *Clinton* case from a case it had heard a year earlier, *Raines v. Byrd*, 521 U.S. ____ (1997), 117 S. Ct. 2312 (1997). In the *Raines* case, the Court vacated the district court opinion, *Byrd v. Raines*, 956 F. Supp. 25 (1997), which had held the Line Item Veto Act unconstitutional, and remanded the case to the district court with instructions to dismiss the complaint for lack of jurisdiction. The remand order was based on the Court's view that the Members of Congress who brought the suit did not have standing because they had not alleged sufficiently concrete injury.

Moving to the merits in the *Clinton* case, the Court found that in both legal and practical effect, the President's cancellations pursuant to the Act amended two acts of Congress by repealing a portion of each one. The Court quoted from an earlier Supreme Court opinion, "[R]epeal of statutes, no less than enactment, must conform with Article I." *Clinton v. City of New York*, 118 S.Ct. 2091, 2103 (1998) (*Clinton*), *quoting from* *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 954 (1983). The Court added that, "There is no provision of the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton* at 2103.

The Constitution, the Court said, assigns two lawmaking responsibilities to the President. Article II, § 3 directs the President from time to time to give Congress information on the state of the union and to recommend such measures as the President judges necessary and expedient. Article II, § 7, cl. 2 states that a bill, before it becomes law, must be presented to the President. If the President approves a bill, he must sign it, but if not, he must return it, with his objections, to the House of origin. A return, known as a veto, is subject to override by a two-thirds vote of each House.

The Court noted the differences between a return under art. II, § 7, cl. 2, and a President's cancellation pursuant to the Line Item Veto Act. A constitutional return takes place *before* a bill becomes law; a statutory cancellation occurs *after* the bill becomes law. A constitutional return is of an entire bill; a statutory cancellation is of only part of a bill. The Court said that, "Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of the unilateral presidential action that either repeals or amends parts of duly enacted statutes." *Id.*

The Court added that there were powerful reasons for construing constitutional silence on the question of unilateral presidential action to repeal or amend parts of duly enacted statutes as equivalent to express prohibition. It observed that the procedures governing the enactment of statutes in the text of article I of the Constitution were the product of great debates and compromises. Moreover, the first president understood the text of the Presentment Clause as requiring that he either "approve all parts of a bill, or reject it *in toto*." *Id.* at 2104, *quoting from* *33 Writings of George Washington* 96 (J. Fitzpatrick ed., 1940).

The Court rejected an assertion that the cancellations under review did not effect a repeal of the canceled items because the Act had a "lockbox" provision that prevented Congress and the President from spending the savings. The Court noted that provisions of the Act, 2 U.S.C. §§ 691e(4)(B) and (C), expressly provided that a cancellation prevented a direct spending or tax benefit provision "from having legal force or effect." *Clinton* at 4550. It added:

That a canceled item may have real, budgetary effect as a result of the lockbox procedure does not change the fact that by canceling the items at issue in the cases, the President made them entirely inoperative as to appellees. Section 968 of the Taxpayer Relief Act no longer provides a tax benefit, and § 4722(c) of the Balanced Budget Act no longer relieves New York of its contingent liability. Such significant changes do not lose their character simply because the canceled provisions may have some continuing financial effect on the government. *Id.* (footnotes omitted).

Two other arguments made by the government also were found unpersuasive--(1) the cancellations were merely exercises of discretionary authority granted to the President by the Balanced Budget Act and the Taxpayer Relief Act read in light of the Line Item Veto Act; and (2) the authority to cancel tax and spending items in practical effect was no more and no less than the power to decline to spend specified sums of money or to decline to implement specified tax measures.

The Court noted that in *Field v. Clark*, 143 U.S. 649 (1892), it upheld the constitutionality of the Tariff Act of 1890, Act of October 1, 1890, 26 Stat. 567 (1890), turning down an assertion that the Act unconstitutionally delegated legislative power to the President. The 1890 Act authorized the President to suspend an exemption from import duties on certain agricultural items "whenever and so often" as he was satisfied that any country producing and exporting those products imposed duties on American products that he deemed to be "reciprocally unequal and unreasonable."

The Court in the *Clinton* case held that the bases for upholding presidential suspensions in the *Field* case did not apply to cancellations of provisions of duly enacted statutes. First, exercise of the suspension power was contingent upon a condition that did not exist when the Tariff Act was passed--the imposition of "reciprocally unequal and unreasonable" import duties by other countries. By contrast, the exercise of the cancellation power under the Line Item Veto Act within five days after approving the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed the statutes. *Id.* at 2105.

Second, under the Tariff Act, the President had a duty to suspend the exemption when he determined that the contingency had arisen. While the Line Item Veto Act required the President to make three determinations before canceling a provision, 2 U.S.C. § 691(a)(A), those determinations did not qualify his discretion to cancel or not to cancel, the Court said. Finally, whenever the President suspended an exemption from duties under the Tariff Act, he executed the policy Congress had embodied in the statute. Whenever the President canceled an item of direct spending or limited tax benefit, by contrast, he rejected a policy judgment of Congress and substituted his own policy. *Id.* at 2105-2106.

The Court also did not agree with the contention that the President's authority to cancel new direct spending and tax benefit items was no greater than the traditional authority granted by statutes such as those that appropriated "sums not exceeding" specified amounts. Statutes of this kind gave the President wide discretion with respect to both amounts to be spent and how money would be allocated among different functions. The Court said that no such statute gave the President the unilateral power to change the text of duly enacted statutes. *Id.* at 2107.

In closing, the Court emphasized three points. First, it expressed no opinion on the wisdom of the procedures authorized in the Line Item Veto Act. Second, the Court expressly declined to address an alternative basis that the district court opinion used to strike down the Act, that it violated the principle of separation of powers because it "impermissibly disrupted the balance of powers among the three branches of government." *Id.* at 2108, *quoting from* *City of New York, et al. v. Clinton, et al.*, and *Snake River Potato Growers, Inc., et al. v. Rubin, et al.*, 985 F. Supp. 168, 179 (1998). The Supreme Court said that its holding that the Act violated the Presentment Clause rendered unnecessary addressing the separation of powers issue. Third, the Court indicated that its

decision rested on the narrow ground that the procedures prescribed in the Line Item Veto Act were not authorized by the Constitution's requirements for lawmaking—bicameral passage of the identical texts of bills by the House and Senate and presentment to the President.

If the Line Item Veto Act were valid, 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. ... If there is to be a new procedure in which the President will play a different role in determining the final text of what may "become law," such a change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution. *Id.* at 2108 (internal quotation from the text of the Presentment Clause).

In a concurring opinion, Justice Anthony M. Kennedy wrote that exercise of the line item veto violated the principle of separation of powers embodied in the Constitution. He said that by increasing the power of the President beyond what the Framers envisioned, the Act compromised the political liberty of citizens, liberty which the separation of powers seeks to secure. *Id.* at 2110.

Justice Antonin Scalia, in an opinion joined by Justice O'Connor and, in part, by Justice Breyer, concurred in part and dissented in part. He did not agree with the Court that the Snake River Potato Growers, Inc. had standing to file suit. Consequently, he believed that the Court lacked jurisdiction to resolve the President's authority to cancel a limited tax benefit. He agreed with the Court that the New York appellees had standing to challenge an item of direct spending. *Id.* at 2110.

Justice Scalia dissented from the Court's holding on the merits, that exercise of cancellation authority pursuant to the Line Item Veto Act violated the Presentment Clause. He asserted that the President had complied with the procedures prescribed in the Clause because he did not cancel the item of new direct spending until *after* the House and Senate had passed the Balanced Budget Act and *after* he had signed it into law. *Id.* at 2115.

Justice Scalia said that the case did not present a question under the Presentment Clause; instead, it presented one under the doctrine of unconstitutional delegation of legislative authority, *i.e.*, whether authorizing the Executive to reduce a congressional disposition usurped the nondelegable lawmaking function of Congress and violated the principle of separation of powers. Applying this test, he found that the President's cancellation authority under the Line Item Veto Act was no broader than the discretion traditionally granted to the President in executing spending laws, such as those that appropriated "sums not exceeding" a specified amount.

Insofar as the degree of political, "lawmaking" power conferred upon the Executive is concerned, there is not a dime's worth of difference between Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the nation. *Id.* at 2116 (emphasis in original).

Justice Stephen G. Breyer also dissented from the opinion of the Court and a portion of his dissent was joined by Justices Scalia and O'Connor. Unlike the Court, he viewed the President's exercise of line item veto authority as executing the Line Item Veto Act and not as repealing or amending specific items that were the subject of that exercise. *Id.* at 2123. Justice Breyer also believed that the Act did not violate the principle of separation of powers. He said that Congress did not give the President non-Executive power or the power to encroach upon Congress' own constitutionally reserved territory. He added that Congress did not grant the President too much power and thereby violate the nondelegation doctrine. *Id.* at 2125.

The decision of the Court declaring the Line Item Veto Act unconstitutional nullified cancellations at issue in the case before it. The Supreme Court has said that a law that is repugnant to the Constitution "is void and is as no law. Ex parte Siebold, 100 U.S. 371, 376 (1880), *quoted in* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995) (Scalia concurring) (Hyde). The Court also has stated that if a plaintiff seeks to enjoin an act that would harm him or her and that is about to be taken by a governmental official under a statute that has been declared unconstitutional, "The court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding." *Massachusetts v. Mellon*, 262 U.S. 447, 488-489 (1923), *quoted in* Hyde at 760 (Scalia concurring).

Voiding the cancellations restored legal effect to vetoed items that were subject to the suit as if they had not been canceled. It revived authority to spend the item of new direct spending in section 4722c of the Balanced Budget Act of 1997 and to grant the limited tax benefit in section 968 of the Taxpayer Relief Act of 1997.

The Court's decision to strike down the Line Item Veto Act has precedential effect. The Supreme Court has held that, "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993), *reiterated in* Hyde at 752.

After reviewing the Court's reason for striking down the Line Item Veto Act, the Department of Justice determined that the ruling invalidated each of the cancellations made pursuant to the Act, including those that were not subject to the suit. Acting on this determination, the Office of Management and Budget made available to affected agencies all funds that had been canceled pursuant to the Act, with the exception of one item relating to mineral rights in Montana that was being withheld pursuant to a rescission proposal submitted to Congress on July 24, 1998. Letter from Jacob J. Lew, Acting Director of the Office of Management and Budget, to Robert C. Byrd, United States Senator (July 28, 1998). *See* 144 Cong. Rec. H 6485 (daily ed. July 27, 1998), and 63 Fed. Reg. 41303 (Aug. 3, 1998), for the text of the proposal requesting that Congress rescind \$5.2 million in royalties that the federal government would lose from a conveyance of federal mineral rights to the state of Montana in section 503 of the Department of the Interior and Related Agencies Appropriations Act, Fiscal Year 1998, Pub. L. No. 105-83.