

A constitutional question

BY STEVE CHARNOVITZ

Earlier this month President Clinton used his "item veto" power to cancel one spending and two tax provisions. They were part of the new budget and tax laws he signed a few days earlier. The constitutionality of these item vetoes will soon be determined in court.

The first impression of many legal analysts is that the veto will be invalidated. But a closer examination shows the issues to be complex.

The Line Item Veto Act was passed in April 1996 and went into effect last January. Following a challenge by six members of Congress, U.S. District Court Judge Thomas Penfield Jackson declared the act to be unconstitutional.

In July, though, the Supreme Court vacated this decision on grounds that members of Congress had not suffered sufficient injury to confer a right to sue.

Now that Mr. Clinton has canceled specific measures, there will be injured parties with standing to lodge a lawsuit.

The three measures that Mr. Clinton canceled do not deserve to be the law of the land. The two tax provisions provide narrow exemptions with little economic justification.

The spending measure provides a special Medicaid exemption solely for New York. The unworthy nature of these measures shows how an item veto can be used to counteract special-interest lawmaking.

A true item veto would be unconstitutional. During the past century, many U.S. presidents have lamented that their veto power was not flexible enough to zero out unworthy provisions. But it was always recognized that fixing this required a constitutional amendment.

In characterizing the new procedures as a "line-item veto," the Congress has invited the criticism that it is trying to amend the Constitution through the back door.

In his decision last spring, Judge Jackson declared that "Never before has Congress attempted to give away the power to shape the content of a statute of the United States, as the act purports to do."

In his opinion last June, Supreme Court Justice John Paul Stevens argued that the item veto as unconstitutional because it can produce post-veto laws that have not been approved by the Congress.

The first step in analyzing this new presidential power is to recognize that it is not a true item veto. The president has no legislative power to reshape statutes or to delete provisions from them.

When Mr. Clinton signed the tax and budget bills two weeks ago, they became federal law in

toto. The president's power to cancel specific measures kicks in only after a bill becomes a law. Once that occurs, the president has five days to cancel particular provisions.

For annual appropriations, he is empowered to impose a rescission; this means the money never gets spent. For entitlement programs and narrow tax provisions, the president is empowered to prevent those provisions "from having legal force or effect." These presidential powers expire in 2005.

Although many presidents have asserted an inherent Constitutional authority to "impound" funds so as to avoid wasteful expenditures, this practice has been resisted by Congress, and sometimes by the courts.

The new item veto, however, presents an entirely different issue. Mr. Clinton is not acting unilaterally. Rather, Congress has authorized him to cancel appropriations. It would be perverse indeed if the courts were to rule that Congress may authorize a president to spend money, but may not authorize him to refrain from spending it.

The president's new power to suspend the legal effect of narrow tax measures would seem to fit squarely into our Constitutional framework and historical precedent.

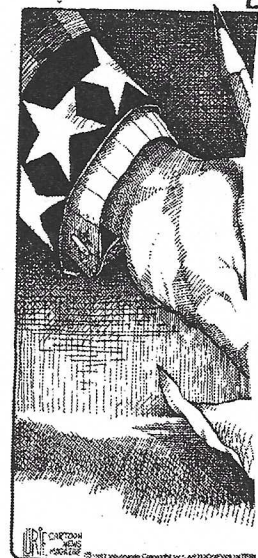
As long ago as 1824, Congress gave the president power to "suspend" previously enacted import duties. Indeed, since the days of Cordell Hull, U.S. trade policy has been grounded in the idea that Congress should delegate tariff-setting authority to the president.

But if Congress may not give the president power to cancel a new tax provision, how can Congress give the president power to cancel a longtime tariff? The Constitution should not be read to prevent Congress from granting stronger budgetary and tax powers to the president.

Technically, the only law at risk is the Line Item Veto Act. But a broad Supreme Court ruling would cast doubt on other laws that delegate suspension authority to the president.

As the Justice Department prepares to redefend the item veto, it would be helpful for business groups to lend support. This should not be just Mr. Clinton's fight.

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