

# Death of the line-item veto

BY STEVE CHARNOVITZ

Earlier this month, a U.S. district court declared the Line Item Veto Act to be unconstitutional. That ruling derailed what would have been a fascinating experiment — namely, giving the president power to cancel specific spending items and narrow tax preferences in omnibus legislation.

The court's decision, unless reversed by the Supreme Court, also created an opening for new challenges to be launched against established congressional transfers of power to the president.

A final decision by the Supreme Court is expected by this summer.

The Line Item Veto Act was one of the few promises in the Republican "Contract with America" to be translated into law. After it became effective on Jan. 1, six members of Congress — all on the losing side of House or Senate votes — carried the fight to a courtroom.

In invalidating the item veto, U.S. District Court Judge Thomas Penfield Jackson said that Congress cannot give the president more options than the Constitution specifically provides.

In drafting the line-item veto, the conference committee explained that Congress wanted the president to be able "to surgically terminate federal budget obligations." The court admitted there is a longtime practice of delegating power to the president to suspend laws and impound funds. But the judge perceived the line-item veto as "revolutionary" because it gave a president authority to cancel an item permanently.

Certainly, there is a difference between turning a law off permanently and turning it off temporarily. The latter is reversible. Yet, if irreversibility is the court's only hang-up with the line-item veto legislation, then Congress could easily fix that by giving the president power to un-cancel an item.

However, the court seemed

to suggest that irreversibility was not the only legal hurdle for the law. It also was troubled by the fact that the act "hands off to the president authority over fundamental legislative choices."

The judge distinguished this from situations in which Congress gives the president authority to respond to changing conditions. But he did not explain how to tell the difference between proper and improper congressional hand-offs.

Judge Jackson complained that the Line Item Veto Act "spares Congress the burden of making those vexing choices of which programs to preserve and which to cut." That it does. But how does this differ from

Burton Act of 1996 authorizes the president to suspend the right to file lawsuits over property allegedly confiscated by Cuba. And, indeed, President Clinton suspended this right two weeks before it was to take effect.

Similarly, the Trade Act of 1974 denies most-favored-nation status to certain non-market countries, but lets the president waive this denial each year. Successive presidents have done so since 1981. If Congress is forbidden to employ such suspensions whenever "fundamental legislative choices" are involved, then future presidents might enjoy less flexibility.

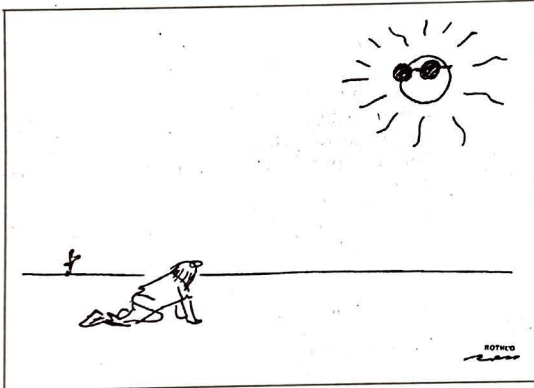
One positive feature of the Line Item Veto Act is that it expires after eight years. That is a good way to test whether such veto power works. Judge Jackson noted in his decision that Congress remains free to pass a constitutional amendment establishing a line-item veto. But that advice ignores a constitutional amendment's unsuitability as a political laboratory.

The passage of the Line Item Veto Act last year with President Clinton's signature was largely an election-year charade. The politicians took credit for its passage and then handed it off to the judiciary with the expectation that it would be struck down. Yet in sending this case to the courts, Congress risked a decision that may snag more than the line-item veto.

Judge Jackson stated in his ruling that "not even the most beguiling of upgrades to the machinery of national government will be countenanced unless it comports with the constitutional design."

Some readers may be beguiled by the item veto; others are horrified by it. But everyone favoring upgrades to the machinery of government has a stake in this case.

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trade negotiating authority, which spares Congress from determining which tariffs to preserve and which to cut?

*How does the line-item veto differ from trade negotiating authority, which spares Congress from deciding which tariffs to preserve and which to cut?*

Indeed, sparing Congress was the inspiration behind the Reciprocal Trade Agreements Act of 1934, devised by Secretary of State Cordell Hull. Mr. Hull had served in Congress, so he knew that Congress should be spared such vexing choices.

There are many instances in which Congress writes a new law and then gives the president power to annul it immediately. For example, the Helms-