

# Unleashing more pork

BY STEVE CHARNOVITZ

In late June, the Supreme Court declared the Line Item Veto Act unconstitutional by a 6-3 vote. That act, passed in 1996, gave the president the power to "cancel" newly enacted spending and tax preferences in order to reduce the federal budget deficit. The idea, essentially, was to limit wasteful congressional spending.

The court's decision has significant implications not only for lawmakers, but also for litigants seeking to challenge the constitutionality of other federal laws.

The court said the line item veto procedure violates the Presentment Clause of the U.S. Constitution. That's the clause stating that every bill passing the House and Senate shall be presented to the president, who may then either sign or veto it. In a line of cases going back to 1983, the court has interpreted this clause expansively as a prohibition of procedures not detailed in the Constitution.

Although the Line Item Veto Act simply authorizes the president to "cancel" unneeded items, the court perceived such cancellations as a statutory amendment or repeal. Given that central assumption, it followed that the line item veto is unconstitutional because only Congress can amend or repeal laws. According to the court, the Line Item Veto Act is invalid because it authorizes the president to create a different law than the text voted on by the House and Senate.

The three dissenters were quick to criticize this faulty reasoning. In two thoughtful opinions, Justices Breyer, O'Connor and Scalia showed that the majority's central assumption was incorrect. As Justice Breyer explained, President Bill Clinton was not amending or vetoing law when he carried out cancellations. Rather, he was exercising the authority Congress had granted him.

Justice Scalia pungently summarized the situation when he wrote that the Line Item Veto Act's title had "succeeded in faking out the Supreme Court."

To test the logic of the majority opinion, Justice Breyer listed several other laws that delegate authority to the president to change an existing legal status. For example, the Gramm-Rudman Act authorizes the president to cut spending when budget targets are breached. By the majority's analysis, this would seem to violate the Presentment Clause because it leads to a different level of spending than had ever been voted on by the House and Senate.

Another important feature of the court's decision was the comparison between the item veto and trade law. In defending the lawsuit, the Clinton administration pointed out that many decades earlier, the Supreme Court had blessed the

constitutionality of laws that delegate authority to the president to alter tariff levels. The court acknowledged these judicial precedents, but distinguished them from the item veto.

For example, the court explained that the president's tariff retaliation authority was contingent on the occurrence of a new condition — namely, discrimination against U.S. commerce. By contrast, said the court, no new condition has occurred when the president invokes a line item veto shortly after signing a bill into law.

The court may be right about that. But this distinction has troubling implications for other legislation. Consider Title III of the Helms-Burton Act, which authorizes lawsuits to recover property expropriated by Cuba. Helms-Burton also gives the president authority to suspend legal claims under Title III, which Mr. Clinton did just as it went into effect. Had any new conditions occurred to justify that suspension? Seemingly not. Yet Helms-Burton permits such a suspension merely upon a finding that it is necessary to

U.S. interests and will expedite a democratic transition in Cuba.

The line item veto decision reflects an activist Supreme Court, willing to break new legal ground in striking down a popular law. Indeed, this is the first time the court has applied the Presentment Clause to dis-

allow presidential action. It seems likely that this decision will inspire others to challenge laws that blend executive and legislative powers.

Eerily, the court points the way by specifically noting that tariff proclamation authority has never been scrutinized under the Presentment Clause. The court's decision should be carefully considered in the ongoing efforts to give the president flexibility to undo economic sanctions. A law that allows the president to suspend enforcement of a previously enacted sanction might be challengeable as an unconstitutional repeal of that sanction. By contrast, a law that gives the president authority both to apply and withdraw a sanction will pass muster.

The court's decision should also be read closely by members of Congress who want to resurrect the line item veto. It would seem possible to draft a law that meets the court's objections. Unfortunately, in the two years following enactment of the line item veto, congressional leaders have become enamored with pork barrel spending. Taxpayers have a right to be angry and disappointed. But alas, wasteful federal spending will never be declared unconstitutional.

