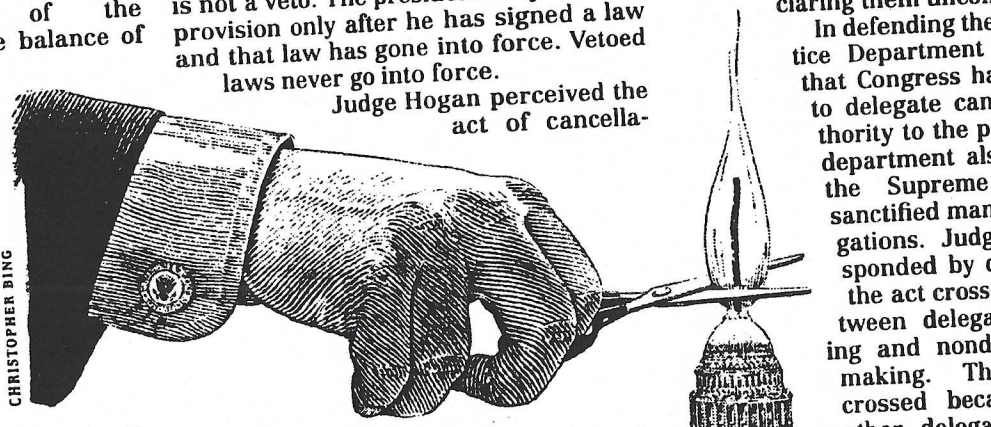
The Line Item Veto Isn't a 'Veto' at All

By Steve Charnovitz SPECIAL TO THE NATIONAL LAW JOURNAL

ON FEB. 12, U.S. District Judge Thomas F. Hogan declared the Line Item Veto Act unconstitutional. According to Judge Hogan, the act "violates the procedural requirements" of the Constitution and "upsets the balance of powers" in government.

Had Congress actually given the president veto authority, the judge would be right. But the act doesn't do that. It simply delegates authority to the president to "cancel" certain tax and spending provisions. Once that is appreciated, it becomes clear that the act is constitutional.


CHRISTOPHER BING

The Supreme Court has scheduled a hearing April 27. At the district court, the plaintiffs were New York and other parties, in one suit, and the Snake River Potato Growers Inc., in another. Three senators submitted an amicus brief arguing that the act is unconstitutional. The U.S. Department of Justice defended the act.

The act operates thus: When a bill is signed, the president has up to five days to cancel any expenditure or limited tax benefit and prevent it from "having legal force or effect." If Congress disagrees, it can reinstate the canceled provision by passing a new law. Congress did this Feb. 25, when it reinstated 38 military projects.

The law's title is ill-chosen. The act gives the president authority to cancel, not to veto. In Judge Hogan's eyes, however, this distinction is meaningless. He explains that if it walks like a duck, swims like a duck and quacks like a duck, then it's a duck. Unfortunately, his aquatic metaphor misses, because it fails to discern objective differences in executive powers. A presidential act to cancel is not a veto. The president may cancel a provision only after he has signed a law and that law has gone into force. Vetoed laws never go into force.

Judge Hogan perceived the act of cancellation as "producing laws" by a method not prescribed in the Constitution. He also accuses the president of having "unilaterally repealed duly enacted provisions." But President Clinton is not producing or repealing law. He is executing a federal law that grants him discretionary cancellation authority. Nor is he acting unilaterally; this is a governance experiment initiated by the Republican-led Congress.

Another problem, according to Judge Hogan, is that if the president cancels wasteful items, the bundle of surviving provisions "will be different from those consented to by both Houses of Congress." But Congress knows the new rules of the legislative game because it wrote them. It has consented in advance to having its handiwork reviewed closely by the president.

Furthermore, it is surprising to hear a judge express concern about piecemeal changes in federal law after enactment by Congress. Since 1870, the Supreme Court has erased more than 120 provisions in federal law by declaring them unconstitutional.

In defending the act, the Justice Department pointed out that Congress has the power to delegate cancellation authority to the president. The department also noted that the Supreme Court has sanctified many broad delegations. Judge Hogan responded by declaring that the act crosses the line between delegable rulemaking and nondelegable lawmaking. The line was crossed because "[u]nlike other delegations of Congressional authority... the Line Item Veto Act authorizes the President to permanently extinguish laws."

There are two problems with Judge Hogan's reasoning here.

First, the act does not authorize permanent cancellation; it expires in 2005. At that point, unless the act is renewed, all previously canceled items will spring back into force.

Second, there are other laws that grant the president the authority to suspend statutes for an unlimited period. Consider tariff-setting. In 1930, Congress enacted 96 pages of tariffs in the Smoot-Hawley Act. In 1934, Congress gave President Franklin D. Roosevelt the authority to issue proclamations to reduce them after a successful trade negotiation.

Today, most of the tariff rates enacted in 1930 remain on the books but have been overwritten by presidential proclamations. Have the high Smoot-Hawley rates been "permanently extinguished"? Free-traders hope so. But Judge Hogan's analysis could cast doubt on the constitutional validity of tariff proclamations that rely on the open-ended delegation of authority to the president.

Another example of presidential authority to refrain from executing a statutory provision is the Jackson-Vanik Amendment to the Trade Act of 1974. The act directs the president to deny most-favored-nation treatment to nonmarket countries, but it authorizes the president to waive this provision when certain conditions have been met regarding emigration; China has received waivers for 17 years. This provision differs from the Line Item Veto Act in that the waiver authority is part of the law being waived. The Line Item Veto Act is separate from the laws whose provisions have been canceled by President Clinton, but this is merely a formalistic difference. Congress could incorporate the line-item authority into each new law.

The Supreme Court should give this matter careful consideration. Affirming Judge Hogan's decision would raise questions about other delegations of authority that undergird the modern American presidency. The closest parallels would be laws giving the president authority to suspend or to waive. But broad legislative authorities to the executive could also be challenged as impermissible congressional delegation. NLJ

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