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# How a Bill Does Not Become a Law: The Supreme Court Sounds the Death Knell of the Line Item Veto - Clinton v. City of New York

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# How A Bill Does Not Become A Law: The Supreme Court Sounds The Death Knell of The Line Item Veto

*Clinton v. City of New York*

524 U.S. 417 (1998)

*J. Stephen Kennedy**

"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 a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution."[1]

## I. Introduction

In an effort to remedy the all too common legislative practice of stuffing major tax and appropriations bills with "pet-project dollars" and "pork," Congress passed the Line Item Veto Act, giving the President the power to eliminate wasteful spending provisions within legislation.[2] It is interesting to note that even though former President Ronald Reagan espoused the most recent advocacy of the line item veto as a presidential check on Congress, it was President Bill Clinton who signed it into law and first used it.

The United States Supreme Court declared the Line Item Veto Act[3] unconstitutional on June 25, 1998, in its six to three decision in *Clinton v. City of New York*.[4] After determining that the plaintiffs had "standing" to challenge the Act, Justice Stevens, writing for the majority, concluded that the Line Item Veto Act[5] violated the express language of the Constitution's Presentment Clause.[6]

Billed as the most exciting and anticipated case of the Court's last term,[7] *Clinton* actually provided the Supreme Court with its second opportunity to adjudge the vitality of the line item veto. Previously, in *Raines v. Byrd*,[8] the Court held that the plaintiff legislators challenging the Line Item Veto Act[9] lacked standing. Based on the Court's decision in *Clinton*, declaring the Act unconstitutional, the line item veto's reemergence for the enjoyment of any future President is unlikely unless Congress comes up with a constitutionally viable form of reincarnation.

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1. Clinton v. City of New York, 524 U.S. 417, 449 (1998); *cf.* U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779, 837 (1995).
2. *See* Jeff Bleich *et al.*, *A Term About Something*, 58 Or. St. B. Bull. 19 (1998).
3. 2 U.S.C. § 691 (1996).
4. 524 U.S. 417 (1998).
5. *Id.*
6. U.S. Const. art. I, § 7.
7. Bleich, *supra* note 2, at 19.
8. 521 U.S. 811 (1997).
9. 2 U.S.C. § 691.

## II. FACTS AND PROCEDURAL HISTORY

Less than two months after the Court's decision in *Raines*,[10] President Clinton used the line item veto power to cancel § 4722(c) of the Balanced Budget Act of 1997,[11] and § 968 of the Taxpayer Relief Act of 1997.[12] The President's actions led to the filing of *Clinton v. New York*.[13] To understand the reasoning behind this action, a discussion of the relevant statutes is necessary.

### *A. President Clinton's Use of the Line Item Veto Act*

#### 1. Section 4722(c) of the Balanced Budget Act

Title XIX of the Social Security Act[14] grants the federal government authority to funnel large sums of money to the states to help them care for the indigent.[15] In 1991, Congress decided that those state grants should be reduced by the sum of certain taxes garnered from health care providers within the states.[16] In 1994, the Department of Health and Human Services (hereinafter "HHS") notified the state of New York that fifteen of its taxes fell under the 1991 Act, thus putting New York $955 million in debt to the federal government.[17] New York's application for a waiver was not acted on in any year leading up to the President's action. By March of 1997, New York owed the United States $2.6 billion.[18]

In § 4722(c) of the Balanced Budget Act of 1997, Congress attempted to aid New York and alleviate its debt by providing that the disputed taxes were "'deemed to be permissible health care related taxes and in compliance with the requirements'" of the 1991 statute.[19] Unfortunately for New York, on August 11, 1997, the President exercised the line item veto and canceled § 4722(c) in order to reduce the federal budget deficit, and also because it gave New York favored treatment over other states.[20]

#### 2. Section 968 of the Taxpayer Relief Act

Through § 968 of the Taxpayer Relief Act of 1997, Congress amended § 1042 of the Internal Revenue Code in an effort to allow owners of certain food processors and refiners to defer the recognition of gain after selling their stock to eligible farmers' cooperatives.[21] By amending § 1042, Congress intended to "facili-

10. *Raines*, 521 U.S. 811.
11. Pub. L. No. 105-33.
12. Clinton v. City of New York, 524 U.S. 417, 421 (1998).
13. Pub. L. No. 105-34.
14. *See* 42 U.S.C. § 1396d(b).
15. *Clinton*, 524 U.S. at 422.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at 423.
21. *Id.* at 424.

tate the transfer of refiners and processors to farmers' cooperatives."[22] Importantly, § 968 was specifically identified in the Act as "subject to the line item veto."[23]

President Clinton canceled § 968 on the very same day that he canceled the provision favoring New York's health care programs.[24] The President based this decision on his belief that the provision lacked any safeguards, and that it failed to narrowly target smaller cooperatives.[25]

### *B. The Case*

Two separate suits were filed as a result of the President's action.[26] The City of New York, two hospital associations, one hospital, and two unions representing health care employees comprised the plaintiffs in the first suit.[27] In the second suit, the plaintiffs included a farmers' cooperative, made up of thirty potato growers from Idaho, and an individual farmer, Mike Cranney, who was a member and officer of the cooperative.[28] The two suits were consolidated and heard before the United States District Court for the District of Columbia. The district court determined that the plaintiffs had standing under Article III of the Constitution.[29]

Appellee New York City Health and Hospitals Corporation (hereinafter "NYCHHC"), responsible for operating public health care facilities throughout the city, would have been forced to pay the state of New York retroactive tax payments totaling approximately $4 million for each year in issue had HHS denied the state's waiver requests.[30] Section 4722(c) of the Balanced Budget Act of 1997 quashed this burden; however, the burden was reinstated when President Clinton "lined" it out of the Act.[31] The District Court ruled that the cancellation of the statutory relief of tax liability constituted sufficient injury to NYCHHC to give it Article III standing.[32]

Appellee Snake River Potato Growers, Inc. was formed to help Idaho potato farmers market their crops and stabilize prices by purchasing processing facilities so that the members of the cooperative could keep revenues otherwise payable to third party processors.[33] At the time of the veto, Snake River actively planned to take advantage of Congress' proposed amendment to § 1042 of the Internal Revenue Code.[34] In fact, Mike Cranney was engaged in negotiating the purchase of a processor that would have qualified under § 968 if the President had not cancelled it. Snake River was also actively considering other purchases

22. H.R. REP. NO. 105-148 pt. at 420 (1997).
23. TITLE XVII § 1701 (1997); *Clinton*, 524 U.S. at 425.
24. *Clinton*, 524 U.S. at 425.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 425-26.
30. *Id.* at 426; City of New York v. Clinton, 985 F. Supp. 168, 172 (D.D.C. 1998).
31. *Clinton*, 524 U.S. at 426.
32. *Id.*
33. *Id.*
34. *Id.*

in the event that the Court reversed the cancellation.[35] The district court held that the Snake River plaintiffs had suffered injury because they "lost the benefit of being on equal footing with their competitors and [would] likely have to pay more to purchase processing facilities now that the sellers [would] not be able to take advantage of [§] 968's tax breaks."[36]

Ultimately, the district court held that the President's use of the line item veto violated the Constitutional requirements for lawmaking in two respects.[37] First, the President's action resulted in two laws different from the laws originally passed by Congress.[38] Second, the President acted in direct violation of Article I "when he unilaterally canceled provisions of duly enacted statutes."[39] The district court also held that the Line Item Veto Act violated the separation of powers among the three branches of government.[40]

The parties petitioned the Supreme Court to expedite review under § 692(b) of the Act. This section authorized a direct appeal to the Supreme Court from any order of the district court.[41] The Court granted the motion of the parties to expedite review.[42]

## III. HISTORY OF THE APPLICABLE LAW

### *A. The Line Item Veto and the Line Item Veto Act*

Since 1870, many Presidents have requested that Congress grant them some type of line item veto power.[43] Several of these Presidents simply saw the line item veto as a method to shift the balance of power in spending decisions from Congress to the Executive.[44] In 1938, the House of Representatives actually voted to give line item veto authority to the President via federal statute; however, the line item veto provision was left out of the final version of the bill.[45] The line item veto buzz was revived in 1984 with the Senate's unsuccessful attempt to enact a statute requiring all appropriations bills to be broken down into separate bills covering individual items.[46]

Heightened interest in the line item veto existed through the 1980's, and into the 1990's, especially with the growing federal debt.[47] For example, the Ninety-ninth Congress proposed at least ten different constitutional amendments to grant line item veto authority to the President.[48] Those serving in the executive branch

35. *Id.* at 426-27.
36. *Id.* at 427 (quoting City of New York v. Clinton, 985 F. Supp. 168, 177 (D.D.C. 1998).
37. *Id.*
38. *City of New York*, 985 F. Supp. at 178.
39. *Id.* at 179.
40. *Id.*
41. 2 U.S.C. § 692(b).
42. Clinton v. City of New York, 524 U.S. 417 (1998).
43. Senator Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 HARV. J. ON LEGIS. 297, 326 (1998).
44. *Id.*
45. Michael G. Locklar, *Is the 1996 Line Item Veto Constitutional?*, 34 HOUS. L. REV. 1161, 1163-64 (1997) (citing Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto be Transferred to the President?*, 75 GEO. L.J. 159, 159-60 & n.4 (1986); 83 CONG. REC. 355-56 (1938).
46. Locklar, *supra* note 45, at 1164 (citing Fisher & Devins, *supra* note 45, at 159-60 & n.7).
47. Locklar, *supra* note 45, at 1164.
48. *Id.* at 1164-65 (citing Fisher & Devins, *supra* note 45, at 160 n.8).

during the eighties and nineties were great advocates of the line item veto.[49] The latest push for the line item veto began in 1993 through the efforts of several Senators who offered an amendment to the Impoundment Act, "[which proposed] to break provisions in appropriations bills into separate bills, one for each line item."[50]

Senator Bob Dole made the final proposal for the line item veto, which was passed by Congress as a mechanism to control deficit spending.[51] Enacted into law on January 1, 1997, the Line Item Veto Act[52] was intended to amend and enhance Title X of the Impoundment Act, which authorized the President to defer spending appropriations during a fiscal year labeled by Congress as permissive rather than mandatory.[53]

The Line Item Veto Act[54] provided that the President could "cancel in whole," within five working days after signing a bill into law, "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."[55] The Act defined a "dollar amount of discretionary budget authority" as "the entire dollar amount of budget authority that is specified in the text of an appropriations law or found in tables, charts, or the explanatory text of statements or committee reports accompanying a bill."[56] The Act defined an "item of new direct spending" as "a provision that will result in an 'increase in budget authority or outlays' for entitlements, food stamps, or other specified programs."[57] The Act further defined a "limited tax benefit" as a "revenue losing provision that gives tax relief to 100 or fewer beneficiaries in any fiscal year, or a tax provision 'that provides temporary or permanent transitional relief for ten or fewer beneficiaries in any fiscal year.'"[58] An item of new direct spending or a limited tax benefit would have "no legal force or effect" if canceled via the line item veto.[59]

In order to exercise the veto, the Act required the President to submit a "special message" to Congress, within five calendar days after signing a bill, detailing the provision that had been cancelled out of the bill.[60] The Act only allowed the President to exercise his cancellation power if it would "(i) reduce the Federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest."[61] Upon Congress receiving the special message, a cancellation would go into effect.[62]

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49. Locklar, *supra* note 45, at 1165 (citing *President's Statement on Signing the Line Item Veto Act*, 32 WEEKLY COMP. PRES. DOC. 637 (Apr. 15, 1996) (noting the support of Presidents Grant, Reagan and Bush for the line item veto)).
50. Locklar, *supra* note 45, at 1166 (citing 139 CONG. REC. S7901 (daily ed. June 24, 1993)).
51. Locklar, *supra* note 45, at 1166.
52. 2 U.S.C. §§ 691-692 (1996).
53. 2 U.S.C. § 681 (1974); Clinton v. City of New York, 524 U.S. 417 (1998).
54. 2 U.S.C. §§ 691-692 (1996).
55. 2 U.S.C. § 691(a).
56. 2 U.S.C. § 691(e)(7); City of New York v. Clinton, 985 F. Supp. 168, 170 (D.D.C. 1998).
57. 2 U.S.C. §§ 691(e)(5), (e)(8); *City of New York*, 985 F. Supp. at 170.
58. 2 U.S.C. § 691(e)(9); *City of New York*, 985 F. Supp. at 170.
59. 2 U.S.C. § 691(e)(4)(B).
60. 2 U.S.C. § 691a(c)(1).
61. 2 U.S.C. § 691(a)(3)(A).
62. 2 U.S.C. § 691b(a).

To reinstate a canceled item, Congress could pass a "disapproval bill," which was not subject to the line item veto.[63] The Act stated, "[i]f a disapproval bill is enacted into law, the President's cancellation is nullified and the canceled item becomes effective."[64] However, the disapproval bill would have to comply with the Constitutional requirements of Article I, section 7.[65] If the President were to veto the disapproval bill, it would be sent back to Congress for a possible veto override, contingent upon a two-thirds majority vote in both Houses.[66]

### *B. The Presentment Clause and* Chadha

In the section commonly known as the Presentment Clause, the Constitution states,

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to the House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent . . . to the other House . . . and if approved by two thirds of that House, it shall become a Law.[67]

The leading case on the Supreme Court's interpretation of a violation of the Presentment Clause is *INS v. Chadha*.[68] In *Chadha*, the Court held that the House of Representatives' unilateral decision to veto the deportation of an illegal immigrant was unconstitutional because the House failed, as required by the Constitution, to submit the decision to the Senate or the President.[69] As the underlying principle for their decision that "repeal of statutes, no less than enactment, must comport with Article I,"[70] the Court stated, "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[71]

The *Chadha* Court noted that only four provisions in the Constitution give explicit authority for one House of Congress to act alone:

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63. *Id.*
64. *Id.*
65. City of New York v. Clinton, 985 F. Supp. 168, 171 (D.D.C. 1998).
66. Locklar, *supra* note 45, at 1175; *See* H.R. REP. No. 104-11, pt.1, at 8 (1995); U.S. CONST. art. I, § 7, cl. 2.
67. U.S. CONST. art. I, § 7, cl. 2.
68. 462 U.S. 919 (1983).
69. *See id.*
70. *Id.* at 954.
71. *Id.* at 959.

> (a) The House of Representatives alone was given the power to initiate impeachment. Art. I, § 2, cl. 5;
>
> (b) The Senate alone was given the power to conduct trials following impeachment . . . and to convict following trial. Art. I, § 3, cl. 6;
>
> (c) The Senate alone was given final unreviewable power to approve or to disapprove Presidential appointments. Art. II, § 2, cl. 2;
>
> (d) The Senate alone was given unreviewable power to ratify treaties . . . . Art. II, § 2, cl. 2.[72]

Because the House's action was not authorized by any of the four provisions, the Court viewed it as subject to the Presentment Clause.[73] The Court recognized that the one-House veto was an easy shortcut, but stated, "it is crystal clear from the records of the Convention, contemporaneous writings, and debates that the Framers ranked other values higher than efficiency.[74] There is no support in the Constitution . . . for the proposition that . . . explicit constitutional standards may be avoided, either by the Congress or the President."[75]

### *C. Standing*

The Constitution permits the jurisdiction of the Supreme Court to extend only to actual "cases . . . and . . . controversies."[76] To meet this standard, a case must be justiciable, which requires that a plaintiff have standing to bring a suit before the Court. To have standing, Article III requires that a plaintiff suffer an injury in fact, that the injury is traceable to the defendant, and that the injury is likely to be redressed by a favorable action.[77]

*Simon v. Eastern Kentucky Welfare Rights Organization*[78] is a leading case on standing, in which the plaintiffs, indigent persons and an organization set up to help the poor, brought suit against the Internal Revenue Service (hereinafter "IRS") over a ruling that reduced the amount of charitable care that hospitals must provide in order to qualify for tax-exempt status.[79] Though the plaintiffs had applied for the benefit/service that was reduced by the IRS's ruling, the Court held that the indigent persons lacked standing.[80] In deciding that the plaintiffs lacked standing to challenge the governments' tax treatment of a third party, the Court reasoned, "[it is] purely speculative whether the denials of service . . . fairly can be traced to the [IRS's] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications, [and] equally

72. *Id.* at 955.
73. *Id.* at 956-57.
74. *Id.* at 958-59.
75. *Id.* at 959 (citation omitted).
76. U.S. CONST. art III, § 2, cl. 1.
77. *See* Whitmore v. Arkansas, 495 U.S. 149 (1990).
78. 426 U.S. 26 (1976).
79. Simon v. Eastern Ky. Welfare Rts. Org., 426 U.S. 26 (1976).
80. *Id.*
81. *Id.* at 42-43.

speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services."[81]

Similarly, in *Allen v. Wright*,[82] the Supreme Court denied standing to the parents of black public school children who challenged an IRS tax exemption aimed at racially discriminatory private schools.[83] The injury alleged by the parents involved easier access for white children to attend private schools thus making public schools less diverse. The Court held that the injury was not "fairly traceable" to the IRS's action.[84] Also, it was "entirely speculative" to conclude that discriminatory private schools would change their practices in response to the withdrawal of a tax exemption.[85]

The Supreme Court granted standing to the plaintiffs in *Bryant v. Yellen*,[86] a case that centered on whether the application of a rule that limited water deliveries from reclamation projects to only 160 acres under single ownership, applied to the considerably larger tracts of the Imperial Irrigation District in southeastern California.[87] Application of the rule would have given large landowners an incentive to sell any excess property at prices well below the fair market value for irrigated land.[88] Farmers who had planned to buy the excess land appealed the decision of the district court, holding that the rule did not apply, to the Supreme Court.[89] The Court said that even if it decided to reverse the judgment of the lower court, the farmers "could not with certainty establish that they would be able to purchase excess lands."[90] Nevertheless, the Court granted standing because of the likelihood that "excess lands would become available at less than market prices."[91]

*Raines v. Byrd*[92] was the first Supreme Court challenge to the line item veto and is one of the more recent Supreme Court cases to have been dismissed based on a lack of standing.[93] Acting under the authority granted by §§ 692(a)(1) through 692(b) of the Line Item Veto Act,[94] four Senators and two House members filed suit alleging that the line item veto was unconstitutional.[95] The district court agreed,[96] but the Supreme Court overruled and declined to reach the merits of the case. The Court held instead that the plaintiffs lacked standing to challenge the Act.[97] Standing was denied because "the plaintiffs did not allege a sufficiently concrete injury." The Court found that the plaintiffs "alleged no injury to themselves as individuals," and "the institutional injury alleged [was] wholly abstract and widely dispersed."[98]

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82. 468 U.S. 737 (1984).
83. *Id.*
84. *Id.* at 757.
85. *Id.* at 758.
86. 447 U.S. 352 (1980).
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 367.
91. *Id.* at 368.
92. 521 U.S. 811 (1997).
93. *Id.*
94. 2 U.S.C. §§ 691-692 (1996).
95. Byrd v. Raines, 956 F. Supp. 25, 27 (D.D.C. 1997).
96. *Byrd*, 956 F. Supp. at 38.
97. *Byrd*, 521 U.S. at 830.
98. *Id.* at 829.

### *D. Constitutionality of Congress' Delegation of "Cancellation" Authority to the President*

In *Field v. Clark*,[99] the Supreme Court held the Tariff Act of 1890 to be in compliance with the Constitution.[100] The Act set out a list of nearly 300 specific articles to be exempted from import duties "unless otherwise specifically provided for."[101] Section 3 of the Act authorized the President to suspend the exemption for coffee, tea, sugar, molasses and hides "'whenever, and so often' as he should be satisfied that any country producing and exporting those products imposed duties on the agricultural products of the United States that he deemed to be 'reciprocally unequal and unreasonable.'"[102] In holding that the Act was not an unconstitutional delegation of legislative power to the President in violation of the Presentment Clause, the Court explained that

> [n]othing involving the expediency or the just operation of such legislation was left to the determination of the President. [W]hen he ascertained the fact that [unreasonable] duties were imposed [on] the products of the United States by a country. . . it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. He had no discretion . . . except in respect to the duration of the suspension so ordered. As the suspension was absolutely required when the President ascertained the existence of a particular fact . . . in obedience to the legislative will.[103]

Nearly a century later, the Court's decision in *Train v. City of New York*[104] "implicitly confirmed that Congress may confer discretion upon the executive to withhold appropriated funds, even funds appropriated for a specific purpose."[105] *Train* dealt with a statute that permitted spending "not to exceed" specific sums for certain projects of the Environmental Protection Agency (hereinafter "EPA").[106] The President instructed the EPA's director to allot only a portion of the full amount authorized for the EPA projects covered in the statute, rather than the full amount authorized.[107] However, the Court held that the statue required the allotment of the full amount authorized to the projects and did not give the President express discretion to withhold any portion of the designated funds.[108]

The Court examined the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985[109] in *Bowsher v. Synar*.[110] This Act authorized the President to cancel certain items of spending and required the President to issue a sequestration order mandating spending reductions if the fed-

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99. 143 U.S. 649 (1892).
100. 26 STAT. 567 (1890).
101. 26 STAT. 567, 602.
102. 26 STAT. 567, 612; Clinton v. City of New York, 524 U.S. 417 (1998) (quoting *Field*, 143 U.S. at 680).
103. *Field*, 143 U.S. at 693.
104. 420 U.S. 35 (1975).
105. *Clinton*, 524 U.S. at 468.
106. 33 U.S.C. § 1285 (1976).
107. *Train*, 420 U.S. at 40.
108. *Id.* at 44-47.
109. 2 U.S.C. §§ 901-902 (Supp. III 1982).
110. 478 U.S. 714 (1986).

eral budget deficit exceeded a certain amount, a determination that was to be made by the Comptroller General, an executive branch officer.[111] The sequestration order was to have the effect of permanently canceling certain budget amounts.[112] The Court, though, held the Act unconstitutional because the Comptroller General, whom Congress had the power to remove, had the "ultimate authority to determine the budget cuts to be made," not because the delegation of legislative power to the President was ill-founded.[113] Further, "the *Bowsher* Court did not hold that vesting such power in an executive officer was unconstitutional as such."[114] On the contrary, the Court held that the Comptroller General could not constitutionally exercise this power because the Comptroller General was not executive enough.[115] The *Bowsher* decision "almost conclusively stands for the proposition that a statute delegating discretionary budget cutting authority delegates executive powers."[116]

## IV. INSTANT CASE

### *A. Justice Stevens' Majority Opinion (joined by Rehnquist, C.J., Kennedy, Souter, Thomas and Ginsburg, JJ.)*

#### 1. Standing

Justice Stevens, writing for the majority, discounted the government's argument that both groups of plaintiffs in the case lacked standing to challenge the Line Item Veto Act because they were not sufficiently and actually injured.[117] The injury to the New York plaintiffs, despite the fact that HHS had not acted on the state's waiver requests, was not speculative because the President's action left them with a multi-billion dollar contingent liability and deprived them of the benefits of § 4722(c) of the Balanced Budget Act.[118] The majority stated that "[t]he revival of a substantial contingent liability immediately and directly affects the borrowing power, financial strength, and fiscal planning of the potential obligor."[119]

On the same note, the majority articulated three points in support of the immediate injury to the Snake River plaintiffs as a result of the President's cancellation of § 968 of the Taxpayer Relief Act.[120] First, § 968 was designed to benefit a specific group of potential purchasers of a defined category of assets.[121] Second, the

111. 2 U.S.C. § 902.
112. 2 U.S.C. § 902(a)(4).
113. *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).
114. H. Jefferson Powell & Jed Rubenfeld, *Laying It on the Line: A Dialogue on the Line Item Vetoes and Separation of Powers*, 47 DUKE L.J. 1171, 1198 (1998).
115. *Id.*
116. *Id.*
117. Clinton v. City of New York, 524 U.S. 417, 430 (1998).
118. *Id.* at 430-31.
119. *Id.* at 431.
120. *Id.* at 432.
121. *Id.*

President's cancellation of § 968 eliminated a statutory bargaining chip.[122] Third, the Snake River plaintiffs had actively prepared to take advantage of the provision canceled by the President and would have done so upon reversal of the cancellation.[123] In sum, the majority stated that "[b]y depriving them of their statutory bargaining chip, the cancellation inflicted a sufficient likelihood of economic injury to establish standing under our precedents."[124] The majority also determined that the Snake River plaintiffs suffered an injury "at least as concrete" as the one found in *Bryant v. Yellen*.[125]

2. The Constitutionality of the Line Item Veto Act

In the most important part of its decision, the majority held that the Line Item Veto Act was unconstitutional. The majority determined that both of President Clinton's cancellations had the effect of amending two statutes by eliminating a section of each, which in the majority's view was a clear violation the express language of the Presentment Clause and the Court's holding in *Chadha*.[126] In making this determination, Justice Stevens stressed the important difference between the President's "return" of a bill, stipulated in Article I, and the power of "cancellation" under the Line Item Veto Act.[127] Justice Stevens stated that "[t]he constitutional return takes place before the bill becomes a law; the statutory cancellation occurs after the bill becomes a law. The constitutional return is of the entire bill; the statutory cancellation is of only a part."[128]

The government proposed two arguments in support of its position that the President's use of the cancellation power provided in the Act did not violate Article I of the Constitution.[129] First, the government contended that the President only exercised discretionary authority, granted to him by Congress, by using the veto.[130] Second, the government contended that the President's cancellation power equaled the authority to decline the implementation of tax measures or the spending of specified amounts of money, such as was discussed in *Clark*.[131] The majority rejected these arguments, however, and Justice Stevens countered saying, "whenever the President cancels an item of new direct spending or a limited tax benefit he is rejecting the policy judgment made by Congress and relying on his own judgment."[132] With regard to *Clark*, Justice Stevens remarked,

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122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 433.
126. *Id.* at 438.
127. *Id.* at 439.
128. *Id.*
129. *Id.* at 442.
130. *Id.*
131. *Id.*
132. *Id.* at 444.

> Congress itself made the decision to suspend or repeal the particular provisions at issue upon the occurrence of particular events subsequent to enactment, and it left only the determination of whether such events occurred up to the President. The Line Item Veto Act authorizes the President himself to effect the repeal of laws, for his own policy reasons without observing the procedures set out in Article I, § 7.[133]

The majority expressed further displeasure with the Act because of the unilateral power it gave to the President to alter legislation;[134] however, they declined to consider the district court's holding that the Act violated the separation of powers.[135] As a final point, Justice Stevens stressed that the majority's opinion rested on the "narrow ground" that Article I does not authorize the provisions of the Line Item Veto Act,[136] and that Congress must amend the Constitution via Article V if it wants to change the President's role in enacting laws.[137]

### *B. Justice Kennedy's Concurrence*

Justice Kennedy agreed completely with the reasons given by Justice Stevens for holding the Line Item Veto Act unconstitutional.[138] His concurring opinion served as a response to and an expression of disagreement with a statement made in Justice Breyer's dissent. In his dissent, Justice Breyer stated that the Act did not threaten individual liberties.[139] Justice Kennedy believed that the Act disrupted the separation of powers and noted that personal liberty is at stake any time one branch of government attempts to violate the separation of powers.[140]

Justice Kennedy wrote that the Act created a new process by which the President could hurt one group in order to disfavor that group or to extract further concessions from Congress, thereby increasing presidential power beyond what the Framers intended.[141] In his opinion, the fact that Congress voluntarily granted its authority to the President created no justification for the Act.[142] Rather, "[b]y increasing the power of the President beyond what the Framers envisioned, the statute compromis[ed] the political liberty of [the] citizens, liberty which the separation of powers [sought] to secure."[143]

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133. *Id.* at 445.
134. *Id.* at 447.
135. *Id.* at 448.
136. *Id.*
137. *See id.* at 448-49; *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 837 (1995) (holding that "[i]f 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 a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution").
138. *Clinton*, 524 U.S. at 449.
139. *Id.* Justice Kennedy responded to Justice Breyer's statement found at page 469.
140. *Id.* at 450.
141. *Id.* at 450-51.
142. *Id.* at 451.
143. *Id.* at 452.

### *C. Justice Scalia's Concurrence in Part and Dissent in Part (joined by O'Connor and Breyer, JJ., as to Part III)*

1. Standing

In Part II of his opinion, Justice Scalia discussed his finding that the Snake River plaintiffs lacked standing. He discounted the majority's view that the Snake River plaintiffs had suffered an injury in that the veto deprived them of a statutory bargaining chip. Justice Scalia stated, "I know of no case outside the equal protection field in which the mere detriment to one's 'bargaining position,' as opposed to a demonstrated loss of some bargain, has been held to confer standing."[144] Justice Scalia found no evidence to support Snake River's contention that it actually engaged in bargaining that was hampered by the President's veto.[145] He likened the Court's holding in *Simon* and *Allen* to the injury asserted by Snake River, explaining that "it is purely speculative whether a tax-deferral would have prompted any sale [to Snake River]."[146] Distinguishing the *Bryant* case, Justice Scalia found no reason to believe that financing would be available for Snake River to purchase any processing facilities. He also found no evidence that the processors in question would have been sold absent the President's cancellation, and said that *Bryant* represented a "crabbed view" of the standing doctrine.[147] In Justice Scalia's view, the Snake River plaintiffs did not establish an injury in fact, and consequently, the Court should not have addressed the merits of their claim.[148]

2. Constitutionality of the Line Item Veto Act

In Part III of his opinion, Justice Scalia agreed with the majority that the New York plaintiffs had standing but asserted his belief that the President's exercise of the line item veto did not violate the Constitution.[149] He pointed out that, in his view, the President used his line item veto power only after the Presentment Clause had been satisfied with the passage of the Balanced Budget Act.[150] Justice Scalia remarked that "the Court's problem with the Act is not that it authorizes the President to veto parts of a bill . . . but rather that it authorizes him to 'cancel'—prevent from 'having legal force or effect'—certain parts of duly enacted statutes."[151]

Justice Scalia wrote that the doctrine of unconstitutional delegation of legislative authority, not the Presentment Clause, was the real issue the Court faced with the Line Item Veto Act.[152] In sum, Justice Scalia contended that if the Line Item Veto Act had authorized the President to "decline to spend," similar to the legis-

144. *Id.* at 457.
145. *Id.* at 458.
146. *Id.* at 460-61.
147. *Id.* at 462.
148. *Id.* at 463.
149. *Id.*
150. *Id.*
151. *Id.* at 463-64.
152. *Id.* at 465.

lation considered in *Clark* and *Bowsher*, such an authorization would surely have been constitutional.[153] The Line Item Veto Act gave the President authority to "cancel," but according to Justice Scalia, this was a technical difference not related to the Presentment Clause.[154] With regard to the doctrine of unconstitutional delegation of legislative authority, Justice Scalia believed that the real issue presented by the case was not a doctrine of technicalities,[155] and that the title of the Line Item Veto Act had succeeded in "faking out the Supreme Court."[156] In closing his opinion, Justice Scalia opined that "[t]he President's action . . . is not a line item veto and thus does not offend Article I, [section] 7."[157]

*D. Justice Breyer's Dissent (joined by O'Connor and Scalia, JJ., as to Part III)*

Justice Breyer agreed with the majority's view that both groups of plaintiffs had standing. He did not, however, think that the Act violated the text of Article I or the separation of powers.[158]

1. Constitutionality of the Line Item Veto Act

Justice Breyer, in Section III of his dissent, criticized the majority for using a "purely literal analysis" to deal with the case.[159] He believed that the President's literal action was not to repeal or amend anything, but was, rather, an execution of power given to him by Congress through a law that was enacted in strict compliance with the Constitution.[160] He likened this delegation of power to the power of choosing one legal path instead of another, such as the power to appoint.[161] Justice Breyer felt that the government had a valid argument in that the Act did not grant the President actual power to cancel a line item expenditure, even though the Act's key verb was "cancel."[162] Justice Breyer reasoned that the Act contained a "lockbox" provision giving legal significance to a particular statutory appropriation even if, and even after, the President had canceled it.[163] To Justice Breyer, the Act only delegated the power to decide how to spend the money designated for an appropriation, whether for that appropriation's specific purpose, or for general deficit reduction under the "lockbox" provision.[164] Justice Breyer found that

153. *Id.* at 455-56.
154. *Id.* at 469.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.* at 469-70.
159. *Id.* at 475.
160. *Id.*
161. *Id.* at 476.
162. *See* 2 U.S.C. § 691(c).
163. *Clinton*, 524 U.S. at 479.
164. *Id.*

> [b]ecause one cannot say that the President's exercise of the power the Act grants is, literally speaking, a 'repeal' or 'amendment,' the fact that the Act's procedures differ from the Constitution's exclusive procedures for enacting (or repealing) legislation is beside the point. The Act itself was enacted in accordance with these procedures, and its failure to require the President to satisfy those procedures does not make the Act unconstitutional.[165]

2. Separation of Powers

Justice Breyer dealt with the separation of powers issue in Part IV of his dissent. This section centered on Congress' delegation of legislative power to the Executive. He stated that a finding of a separation of powers violation must be based upon an important conflict between the Act and a significant objective of the separation of powers. He reasoned specifically that the Act achieved no violation of Congressional power since Congress, in the Line Item Veto Act, retained the power to insert into any piece of an appropriations statute a provision saying that the Act would not apply,[166] and, further, that Congress retained the power to "'disapprov[e]' and thereby reinstate any of the President's cancellations."[167]

Like Justice Scalia, Justice Breyer did not feel that the President's power to prevent spending items from taking effect, granted by Congress in the Act, violated the "nondelegation doctrine."[168] He noted that the Act was "limited to one area of [g]overnment, the budget, and it [sought] to give the President the power, in one portion of that budget, to tailor spending and special tax relief to what he conclude[d were] the demands of fiscal responsibility."[169] Breyer further concluded that the Act posed no serious risk of "arbitrary Presidential decision making."[170]

## V. ANALYSIS

With its decision in *Clinton v. New York*,[171] it is obvious that a majority of the Supreme Court believed that the line item veto seriously threatened and undermined time honored and constitutionally mandated principles of making and enacting laws. Traditionally, the Court often prefers to take other available avenues in denying judicial legitimacy to acts of Congress that it considers constitutionally impermissible, rather than declaring them wholly unconstitutional. As such, the Court's decision sent a clear message of finality for any future use of the line item veto.

In order to render its decision, the majority first determined that both groups of plaintiffs in the case had standing under the Constitution to challenge the Line Item Veto Act. With regard to the New York plaintiffs, this positive determina-

165. *Id.* at 479-80.
166. *Id.* at 482; 2 U.S.C. § 691f(c)(1) (Supp. II 1994); *Byrd v. Raines*, 521 U.S. 816, 824 (1997) (stating Congress can "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act").
167. *Clinton*, 524 U.S. at 482; 2 U.S.C. § 691b(a).
168. *Clinton*, 524 U.S. at 490.
169. *Id.* at 486.
170. *Id.* at 495.
171. *Id.*

tion by the majority was not disputed, as is evidenced by the dissenters' agreement. Though Justice Scalia argued strongly against granting standing to the Snake River plaintiffs, the majority made a more viable argument in favor of standing, which is true for two reasons: (1) because Snake River suffered a narrow, personal, and future affecting injury and (2) because of the precedental weight of the Court's grant of standing in *Bryant v. Yellen*.[172]

In declaring the Act unconstitutional, the majority relied on a strict interpretation, or literal textual reading, of the Presentment Clause found in Article I. Simply put, the majority believed that the use of the line item veto was a procedure that directly violated the express intent of the Constitution's framers for the enactment of legislation.

In his dissent, Justice Scalia, straying somewhat from his usual strict constructionist approach, presented a very creative argument for the constitutionality of the line item veto by stressing that the President's act of cancellation would only occur after satisfaction of the Presentment Clause. With this argument, Scalia tried to shift the focus away from whether the wording of the Constitution was complied with, to whether there was, in fact, a proper delegation of authority—the power to cancel a provision in an enacted statute—from Congress to the President. Viewed narrowly, Justice Scalia's argument is enticing; however, when viewed broadly, the real issue to be contemplated is whether the President's use of the line item veto has a direct effect, be it positive or negative, on the process by which acts of Congress are enacted into law and whether this effect is authorized, *i.e.*, spelled out, by the language of the Constitution. For the majority, it had a negative and unconstitutional impact on the law making process.

The most intriguing point of Justice Scalia's dissent, and possibly of the entire opinion, is that the Supreme Court was "faked out" by the title and wording of the Line Item Veto Act. It is certainly reasonable to believe that had the Act used the phrase "decline to spend," rather than "cancel," it could have passed constitutional muster. As one author stated,

> according to the actual language of the Act, the President's line item "veto" does not prevent the cancelled provisions from ever becoming law. It rescinds them. It terminates or nullifies the legal effect that they obtained when he signed the bill into law . . . . [I]t would follow that Congress could constitutionally pass a new line item veto act tomorrow. The new act could be identical to the old one in every substantive respect, so long as it had a new name, expressly stated that the signed bill shall be law, called for the publication of the entire signed bill in the United States Code—and provided that the President may nonetheless "terminate" (or "suspend") certain of the bill's provisions through the designated cancellation process.[173]

Perhaps, then, the Act, through its wording, caused its own death.

Opponents of the line item veto advocate three major critiques of the line item veto, which legitimize the Court's decision in *Clinton*. First, the line item veto in

172. *See* Bryant v. Yellen, 447 U.S. 352 (1984).
173. Powell & Rubenfield, *supra* note 114, at 1181.

effect shifts the "power of the purse," which is safer in the hands of a representative body, to a centralized executive. Second, the line item veto allows the President to unilaterally carry out his own agenda. Third, the line item veto creates a legislative/executive "quid pro quo." For example, a legislator might promise to support a Presidential nominee to the Supreme Court in return for the assurance that the millions of dollars in highway repair funds designated for that legislator's state will not be lined out of an appropriations bill.[174]

The chief argument in favor of the line item veto is that it would provide the President with a way to prevent excessive spending. However, this argument is not substantial enough, nor is the need great enough, to justify a change in the constitutionally mandated procedures on which we have always relied for the promulgation of the laws that govern, provide for, and protect us.

The paramount principle that emanates from the Court's holding in *Clinton* is that the time honored institution of constitutional law making and enactment is not to be disturbed, at least not without a specific amendment to the Constitution. Obviously, if Congress wants in the future to provide the President with a greater check on congressional spending, without fear of its being struck down, it will have to find a new way. Possibly, that new way could be taken from an old suggestion.[175] Congress could start sending the President a separate bill for every individual item of spending it passes each year. This process, along with the President's decision to sign or veto each bill, would certainly comport with the Presentment Clause, but in this day and age, such a practice is seemingly irrational and would prove to be untimely.

## VI. CONCLUSION

In order to preserve the true character of the Presentment Clause, the Supreme Court had no choice but to declare the Line Item Veto Act unconstitutional. In light of this decision, Congress, as well as the general public, should take heed that today's Court is satisfied with the President's role in enacting legislation as it is expressed in the Constitution. Furthermore, as written by Senator Robert Byrd,

> there is still a lesson that the item veto experience should teach us; namely, to beware of quick fixes to perceived institutional problems. The institutional machinery devised by the Framers can be inefficient and frustrating, but there is much wisdom in its design. By tinkering so cavalierly with a system that was produced through diligence and careful consideration, we run the risk of throwing the entire constitutional apparatus into disarray. If we are to take upon ourselves the awesome responsibility of improving upon the Framers' work—as we must, from time to time—we should at least accompany our efforts with the same degree of hard work and serious thought that the Constitution memorializes.[176]

174. Byrd, *supra* note 43, at 324-31.
175. *See* Locklar, *supra* note 45, at 1163-64; 83 CONG. REC. 355-56 (1938).
176. Byrd, *supra* note 43, at 332.