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Article 3

Line-Item Veto Amendment

J. Gregory Sidak

ESSAY

THE LINE-ITEM VETO AMENDMENT

J. Gregory Sidak†

One of the first orders of business for the 104th Congress was to introduce bills and proposed constitutional amendments that give the President a line-item veto. During the first two weeks of January 1995, proposed constitutional amendments were introduced by Senators Brown,[1] Thurmond,[2] and Simon.[3] Meanwhile, Senator Dole introduced S. 4, the Legislative Line Item Veto Act of 1995.[4] In this Essay, I first provide two arguments why, if Congress wants the President to have a line-item veto, a constitutional amendment is superior to a statute as the means of conferring that power on the Executive. I then explain how other constitutional provisions would implicitly limit the President's power under a line-item veto amendment.

I
THE DURABILITY OF REFORM

The debate over granting the President a line-item veto, like the debate over enacting a balanced-budget amendment, is usually cast in terms of a redefinition of the balance of power between the President and Congress. This portrayal, symptomatic of the inward focus of much policy debate in Washington, fails to appreciate that the larger issue posed by the line-item veto is intergenerational equity.[5]

The absence of a presidential line-item veto may have contributed to the seemingly irreversible growth of the federal government. When spending enlarges the government's debt, the government in effect shifts the obligation to pay for current programs to future gen-

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1 S.J. Res. 16, 104th Cong., 1st Sess., 141 CONG. REC. S900 (daily ed. Jan. 12, 1995).

2 S.J. Res. 2, 104th Cong., 1st Sess., 141 CONG. REC. S412 (daily ed. Jan. 4, 1995).

3 S.J. Res. 15, 104th Cong., 1st Sess., 141 CONG. REC. S806 (daily ed. Jan. 11, 1995).

4 S. 4, 104th Cong., 1st Sess., 141 CONG. REC. S97 (daily ed. Jan. 4, 1995).

5 Legal scholars have devoted remarkably little attention to issues of intergenerational equity outside the field of environmental regulation. For a notable exception, see Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 YALE L.J. 367 (1994).

erations, who by definition cannot vote today against the adoption of such programs. Moreover, if current government expenditures are made to finance present consumption rather than consumption over an extended period of time (as in the case of investment in a long-lived asset, such as an interstate highway), then current federal budget deficits represent a transfer of wealth from future generations of American taxpayers to subsidize the consumption of the current generation.[6] Government debt incurred to fund current consumption is a "negative bequest" to future generations.

Viewed in these terms, constitutional reforms like the balanced-budget amendment and the line-item veto are not mere structural modifications of the operation of the federal government. Rather, these reforms protect the liberty and property of future generations of American citizens. Therefore, one should regard the collection of constitutional amendments that would effect such fiscal reforms as the current generation's constitutional commitment not to employ the taxing and spending powers of the federal government to expropriate the property of future generations.

How credible is that commitment? Economic theory recognizes that commitments made in bargaining situations influence the behavior of other actors only to the extent that the person making such commitments is credibly bound (by himself or others) to honor them.[7] A statute and a constitutional amendment differ vastly in their likely efficacy in protecting future generations. What is to prevent the 105th Congress from enacting appropriations bills in 1997 that begin with the clause, "Notwithstanding any provision of the Legislative Line Item Veto Act of 1995"? Because the proposed legislation would be no more than an act of Congress, it could be made inapplicable to any piece of legislation that either the 104th Congress or a subsequent Congress desired.

An analogy is useful. Academicians have discussed the limits on one Congress's ability to commit future Congresses that arise under section 8(a) of the War Powers Resolution, which specifies the requisite form of congressional authorization of the President's use of military force[8]—the statute being incapable of amending the War Clause[9]

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6 *See, e.g.*, Alex Cukierman & Allan H. Meltzer, *A Political Theory of Government Debt and Deficits in a Neo-Ricardian Framework*, 79 AM. ECON. REV. 713 (1989).

7 *See, e.g.*, PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT 130-31 (1992); THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 22-28 (1960); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 167 (1985).

8 50 U.S.C. § 1547(a)(1) (1988).

9 U.S. CONST. art. I, § 8, cl. 11.

or the Commander-in-Chief Clause[10] of the Constitution.[11] Perhaps more to the point, the 99th Congress that enacted the Gramm-Rudman-Hollings Act[12] in 1985 could not bind subsequent Congresses to abide by the deficit-reduction framework of that bipartisan legislation.

Given these analogies, it is not clear why the American electorate should have any greater reason to believe in the durability—and hence the efficacy—of a statute purporting to give the President a line-item veto. The 104th Congress simply cannot credibly commit future Congresses to forbear from exercising their discretion to repeal, suspend, or otherwise circumscribe line-item veto authority conferred to the President by statute. Even if voters at large would not realize this to be the state of affairs, surely the international financial community would recognize immediately that the statute could not credibly commit future Congresses. The financial markets in New York, London, Tokyo, and Frankfurt would accordingly discount the likelihood that the line-item veto could serve any useful purpose in preventing logrolling, reducing federal spending, or reducing the debt of the United States government.

II

AVERTING CONSTITUTIONAL LITIGATION

One would presume that the 104th Congress is currently considering constitutional amendments and proposed legislation to create a line-item veto because the Legislature actually wishes the President to be able to exercise such authority in the near future. A statute purporting to give the President a line-item veto, however, would immediately be challenged in court as a violation of the Presentment Clause.[13]

The dispute might not necessarily arise only between a congressional opponent of the line-item veto and the President; a private citizen affected by the veto of a line item of federal spending also might sue. By analogy, riders in appropriations bills that prohibit, for the fiscal year, certain items of spending by the Executive Branch or an independent agency have given rise to private litigation.[14] Litigation would shroud the statutory line-item veto in legal uncertainty for years and thus ensure that a President would refrain from vigorously using this authority until the litigation was resolved.

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10 *Id.*, art. II, § 2, cl. 1.

11 *Compare* JOHN HART ELY, WAR AND RESPONSIBILITY 128–30 (1993) *and* John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1418–19 (1988), *with* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 110–13 (1991).

12 Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99–177, 99 Stat. 1038 (1985).

13 U.S. CONST. art. I, §7, cl. 2. *See also id.* at cl. 3.

14 *E.g.*, News Am. Publishing, Inc. v. FCC, 844 F.2d 800 (D.C. Cir. 1988).

The desire to avert protracted litigation, however, is not the dispositive reason for Congress to choose a constitutional amendment over a statute. The more important reason is that the Supreme Court would likely rule that a line-item veto statute, if it truly conferred new powers on the President, is unconstitutional. The Court would have to consider whether Congress has the power, under the Necessary and Proper Clause[15] and possibly under other textual provisions, to give the President greater discretion to veto legislation than the text of the Presentment Clause currently provides.

Ironically, a line-item veto purportedly conferred by statute is likely to survive attack on Presentment Clause grounds *only* if it creates no legal authority that the President does not already possess under the Constitution. The Court might conclude, as I have previously argued,[16] that Article I, section 7, clauses 2 and 3 *already* confer on the President the implicit power to exercise an itemized veto over individual bills, orders, resolutions, or votes requiring the concurrence of the House and Senate. In such a case, the line-item veto statute would have the same legal force as a statute giving the President the power to nominate Justices to the Supreme Court or to command the armed forces. Because the Constitution already confers such power on the President, a statute purporting to do so would be nothing more than an innocuous, if presumptuous, curiosity.

Given the probable constitutional infirmity of a line-item veto statute, it would be better for Congress to pass a joint resolution urging the President to exercise an "inherent" line-item veto and thereby create a test case for the Supreme Court to resolve. Senator Dole made this proposal in 1989[17] and Senator Specter made it in January 1995.[18]

If the President does not already have an inherent line-item veto, and thus if a line-item veto statute purported to give him powers that he does not now possess, then litigation over that statute would present the question of whether Congress had unlawfully delegated its legislative powers to the Executive. That question would raise significant issues under the separation of powers doctrine.

Conventionally, nonconsensual transfers (or diminutions) of constitutional responsibilities are thought to violate the principle of separation of powers. These transfers, embodying "the encroaching spirit

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15 U.S. CONST. art. I, § 8, cl. 18.

16 *The Line Item Veto and the Constitution: Hearings before the Subcomm. on the Constitution of the Sen. Judiciary Comm.*, 103d Cong., 2d Sess. (June 15, 1994) (statement of J. Gregory Sidak); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437 (1990); *see also* J. Gregory Sidak & Thomas A. Smith, *Why Did President Bush Repudiate the "Inherent" Line-Item Veto?*, 9 J.L. & POL. 39 (1992).

17 Robert Dole, *Bush Can Draw the Line*, WALL ST. J., Jan. 25, 1989, at A21.

18 141 CONG. REC. S179 (daily ed. Jan. 4, 1995).

of power" of which Madison spoke,[19] evoke analogies to trespass, misappropriation, or monopolization: One branch usurps the prerogatives initially assigned to another,[20] or interferes with the other branch's ability to discharge duties or exercise prerogatives that the Constitution textually assigns to it.[21] The result is, in Madison's words, a "gradual concentration of the several powers in the same department."[22] When Congress commits such a usurpation, one common symptom is the enactment, by override of a veto, of a "framework" statute redefining the allocation of critical decisionmaking responsibility between Congress and the President. Framework statutes enacted by congressional override include two notorious laws of enduring controversy—the Congressional Budget and Impoundment Control Act[23] and the War Powers Resolution.[24]

The separation of powers can be violated in another way that is more relevant to the constitutionality of a line-item veto statute: The Executive and the Legislature can agree to exchange or commingle their duties and prerogatives. The Constitution assigns duties and prerogatives concerning different governmental functions—such as making new laws, judging cases, and executing the existing laws. As in private life, public actors will bargain around legal rules or property rights in creative ways to reach desired results.[25] Obviously, any bill that the President signs into law may be considered the result of voluntary exchange between the Executive and Legislative Branches. However, by making formality an element of political legitimacy, the Framers raised the costs of deciding political questions through means other than the highly visible processes textually specified in the Constitution, such as the process envisioned by the Presentment Clause.[26] This formality discourages ad hoc bargains between the branches and makes it more likely that a given political decision ultimately will be made through the process and by the actors originally prescribed by the Framers. As Justice Scalia has noted, "the Constitution guarantees not merely that no Branch will be forced by one of

19 THE FEDERALIST No. 48, at 332, 333 (James Madison) (Jacob E. Cooke ed., 1961).

20 *See* Freytag v. Commissioner, 501 U.S. 868, 878 (1991); Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 274 (1991); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856 (1986); Bowsher v. Synar, 478 U.S. 714, 722 (1986).

21 *See* Morrison v. Olson, 487 U.S. 654, 695 (1988). On the trespass analogy, see Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, SOC. PHIL. & POL'Y, Spring 1991, at 196, 201-02; J. Gregory Sidak, *The Inverse Coase Theorem and Declarations of War*, 41 DUKE L.J. 325, 327 (1991). On the monopoly analogy, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 618–19 (4th ed. 1992).

22 THE FEDERALIST No. 51, at 347, 349 (James Madison) (Jacob E. Cooke ed., 1961).

23 Pub. L. No. 93–344, 88 Stat. 297 (1974) (codified at 2 U.S.C. §§ 601–688).

24 Pub. L. No. 93–148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548).

25 *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

26 INS v. Chadha, 462 U.S. 919, 959 (1983).

the *other* Branches to let someone else exercise its assigned powers—but that none of the Branches will *itself* alienate its assigned powers."[27] A line-item veto statute would be highly vulnerable to this type of constitutional attack.

Congress could avoid the controversy of constitutional litigation, and the attendant delay in the President's use of the line-item veto, by conferring such authority by a constitutional amendment rather than by a statute. To be sure, even a line-item veto amendment may present disputes necessitating the Supreme Court's interpretation. Although we cannot anticipate the nature of all such disputes, one is entirely foreseeable: Are cases arising under the line-item veto amendment nonjusticiable "political questions," or are they legal questions that the Judiciary is empowered to decide?[28] The more Congress can say about justiciability now, the greater the certainty it can create concerning the functioning of the President's line-item veto, if and when the states ratify the amendment.

III

IMPLICIT LIMITS ON A LINE-ITEM VETO AMENDMENT

It should go without saying that the President could not exercise the line-item veto in a manner that would prevent Congress from discharging the duties or exercising the prerogatives that Article I textually assigns to it. An analogous argument is now recognized with regard to Congress using its appropriations power to deny the President funding to perform the duties and exercise the prerogatives that Article II textually assigns to him.[29] The same reasoning should apply to the greater powers over fiscal affairs that the President would exercise after the ratification of a line-item veto amendment.

As an extreme example, the President could not wield his line-item veto power to deny Congress the funding necessary to convene and conduct business, for this action would violate Congress's duty to "assemble at least once in every Year."[30] Nor, obviously, could the President line-item veto the payment of salaries to members of Congress.[31] Senator Simon may have had such concerns in mind when

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27 Peretz v. United States, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting).

28 *See* Goldwater v. Carter, 444 U.S. 996 (1979); Baker v. Carr, 369 U.S. 186, 217 (1962).

29 J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1213–14; J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2100–03 (1989); J. Gregory Sidak, *Spending Riders Would Unhorse the Executive*, WALL ST. J., Nov. 2, 1989, at A18. *Accord*, Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 YALE L.J. 51, 113–14 (1994).

30 U.S. CONST. art. I, § 4, cl. 2.

31 *See id.*, § 6, cl. 1 ("The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States.").

providing, in his proposed constitutional amendment, that the President's line-item veto would not extend to "any item of appropriation for the Congress."[32]

Senator Simon's language, however, could sweep too broadly. For example, it could be read to preclude the President from reducing the appropriations for a new congressional office building that he regarded as extravagant or unnecessary. Congress could avoid future controversy on this point by, instead of adopting Senator Simon's broad language, stating explicitly in the amendment that the President could not deny Congress the funding necessary for it to discharge the duties and exercise the prerogatives that Article I textually assigns to the Legislative Branch.

Likewise, the President could not defund the Judiciary's ability to discharge the duties or exercise the prerogatives that Article III textually assigns to it. For example, the President clearly could not use the line-item veto to reduce the salaries of federal judges.[33] Moreover, in some instances, the Judiciary's right to be funded might flow from textual provisions outside Article III. For example, the President surely could not deny the funding necessary for the Chief Justice to preside over that President's impeachment trial in the Senate, as Article I provides.[34]

CONCLUSION

Some individuals consider it radical to amend the Constitution to mandate a balanced budget or to give the President a line-item veto. That view is curious. The Constitution of 1787 obviously had its weaknesses.[35] Moreover, the Framers expressly provided in Article V two separate means of amending the Constitution.[36] With few exceptions, the Framers did not attempt to foreclose subsequent generations from adopting particular policies; rather, they created a process of supermajority votes in both houses of Congress and among the states to enable the people to decide whether or not a particular constitutional amendment would serve the common good. It is hard to take seriously the advice that Congress should avoid the solemn business of amending the Constitution when those dispensing such advice are content to have an unelected Judiciary interpret a "living" or "unwrit-

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32 S.J. Res. 15, 104th Cong., 1st Sess., 141 CONG. REC. S806 (daily ed. Jan. 11, 1995).

33 U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

34 *Id.*, art. I, § 3, cl. 6.

35 Common examples include the continuation of slavery, the counting of a slave as three-fifths of a person, and the absence of the vote for women.

36 U.S. CONST. art. V.

ten" Constitution to grant new rights where its text is silent and obliterate old rights where its text is manifest.[37]

The line-item veto is a reform that will restore equity across generations of American taxpayers by reducing the likelihood that the federal government will set a current level of public consumption that diminishes the standard of living of future citizens. If the experiment with the line-item veto fails, Article V provides the formal means to reverse course. But to conduct a fair test of whether the line-item veto can restore fiscal responsibility to the federal government, Congress must confer that power on the President by constitutional amendment rather than by statute. The line-item veto will be credible only if Congress cannot withdraw it whenever doing so would suit the Legislature's ephemeral purposes.

37 *E.g.*, *Not So Fast on the Line Item Veto*, WASH. POST, Jan. 16, 1995, at A22.

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