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LESSONS FROM A LINE ITEM VETO LAW

Lawrence Lessig[†]

Professor Devins offers a careful analysis of an important piece of the 104th Congress's work—the Line Item Veto Act.¹ His conclusion is that we really can't know whether this legislation will have any effect. On the way to that result, however, he makes an assumption that I believe we should question. He assumes that this statute will pass constitutional review. I think it won't.² My aim in this short essay is to sketch why. It's an argument, I think, that doesn't need much more than a sketch.

I then consider a Line Item Veto law that wouldn't raise a constitutional question—namely, a constitutional amendment. Various amendments have been proposed to remedy the perceived “crisis” of responsibility within the budgeting process. Among these are the Line Item Veto Amendment and the Balanced Budget Amendment. I think both would be a mistake. But I want to argue that an even greater mistake would be to pass either without the other. I offer here an argument for a combined Line Item Veto and Balanced Budget Amendment. If an amendment is needed, my claim is that only these two together would do any good.

[†] Professor of Law, University of Chicago Law School; Fellow in the Program in Ethics and the Professions, Harvard University. I would like to thank Elizabeth Garrett for helpful comments on an earlier draft.

1. See Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RES. L. REV. 1605 (1997) (discussing the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996)).

2. As of this writing, one court has struck the statute down on constitutional grounds, see *Byrd v. Raines*, 956 F. Supp. 25 (D. D.C. 1997), and the Supreme Court has noted probable jurisdiction, 1997 U.S. LEXIS 2659 (1997).

I. IF THE ACT ACTUALLY WORKS

The Line Item Veto Act will either alter the balance of power between the branches, or it will not. These are the possibilities, but we don't know enough, Devins tells us, to know which will be true.³ In either case, in my view, the Act is unconstitutional. I consider each alternative in turn.

In a little known provision of Article I, section 8, the Constitution provides that Congress has the power to declare war.⁴ It's an old document, and sometimes inconvenient to carry around, but trust me—the text is quite clear. It's odd that originalists have, in the main, forgotten this bit of Constitutional text. For all their thrashing about unenumerated rights, here at least is something the Framers were quite clear about, yet something that we collectively have forgotten. Or ignored. Take your pick. In any case, the original meaning, and original intent, and original understanding, were all quite clear: Congress, not the President, was to have the power to declare war.⁵

For obvious reasons, however, there is great incentive for Congress to duck this responsibility.⁶ Wars are dangerous games, politically speaking. They don't choreograph well. One can't tell *ex ante* how they will turn out, and it is hard *ex post* to pretend that a declaration was in fact not a declaration. Dick Morris, advising a

3. Other commentators are also in conflict about this. Compare Lee Sheppard, *Line Item Veto—Pointless When it Comes to Tax Law*, 74 TAX NOTES 127 (1997) and Richard Hohlt & Paul Hewitt, *Line-Item Hostages*, 74 TAX NOTES 227 (1997) with Gene Steuerle, *An A- for the Line Item Veto*, 71 TAX NOTES 255 (1996) and Rick Grafmeyer & Bob Bennett, *How the Line Item Veto Affects the Tax Legislative Process*, 71 TAX NOTES 689 (1996). See also Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995).

4. U.S. CONST. art. I, § 8, cl. 11.

5. See Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1237-39 (1997).

6. These reasons were obvious to the Framers as well, which is why they worked to constitutionalize this allocation, rather than (as they did for most other provisions) allow it to be negotiated between the President and Congress. See GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD 45-67* (1997). For this reason, I disagree with John McGinnis' argument that we ought to allow powers between the branches to be negotiated over time, in a common law manner. See John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317 (1997). For the very idea of constitutionalizing certain relations is about resisting what would otherwise become the negotiated settlement. In the main, McGinnis is right. Very little about the executive power was constitutionalized. But some things were constitutionalized, and War was among those things.

Congress, would be against them. If it could have its way then, and it essentially has, Congress would prefer to declare war in the way that most of us would prefer to buy flight insurance—after the fact, when we know who has won (or in the case of flight insurance, who has lost).

Imagine, however, that a Congress decided that it was time to reclaim this constitutional responsibility. Imagine that it passed a law to reclaim its authority from a tradition of presidential expansionism. Let's call it the War Power Veto Act, short title, "Nevermind." The act provides as follows: The President shall have the right to declare war if, after signing a resolution passed by Congress declining to declare war, he attaches a note with the word "Not." So if Congress passes a resolution, "America shall not declare war on Libya," the President can append, "Not." In the parlance of modern American slang, the meaning would be this: America shall declare war on Libya.

Would this statute be constitutional?

The question raises a problem for the non-delegation doctrine. There are many, of course, who would insist that the non-delegation doctrine is dead.⁷ I think that's too quick. I don't think the Court likes to kill long-standing doctrines like non-delegation. What the Court likes is an easy case in which to apply it. And that's just what my War Powers Veto Act case is: It is an opportunity for the Court to articulate values that are hard to vindicate in the ordinary case, but important, and foundational, nonetheless.

For the essence of the non-delegation doctrine is something like this: So long as there is an "intelligible principle" linking the ends that Congress selects and the means it has given the President, then this delegation of power to the President will be constitutional.⁸ The doctrine tests whether Congress has set the policy, which the President has been given power to carry out. And while

7. See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 10, 21 (1994); THEODORE LOWI, *THE END OF LIBERALISM* (2d ed. 1977); Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

8. The Court has described this test:

So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Touby v. U.S., 500 U.S. 160 (1991) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). The Court has acknowledged that it has "upheld, without exception, delegations under standards phrased in sweeping terms." *Loving v. United States*, 116 S. Ct. 1737, 1750 (1996).

it may be hard at times to see how the President's policy relates to Congress's,⁹ ordinarily a link can be drawn. To require a tighter link would ordinarily require the Court to say something about policy. And from policy that smells like policy, courts like to steer clear.¹⁰

Now what's nice about the example that I have drawn is that it presents quite directly perhaps the only case that is an easy case under the non-delegation doctrine. However loose the test might be between ends and means, there is something special about the example that I've offered: Its relation is *negation*. However loose the test is in general, the test cannot include negation. Whatever else might fail the ends-means test, negation certainly must.

It seems to me that the Line Item Veto Act is just the same. Congress says "Spend \$50 million on pork." The President says, "Not." Congress says, "Give this important interest group a tax break." The President says "Not." In my view, in no sense of the concept of ends and means can "Not" be said to advance the choice that Congress has made. In no sense can it be said to pass non-delegation's test.¹¹

Supporters of the act might respond that I've mistaken the end to which the President's veto is a means—that the end is not the policy, "Give this important interest group a tax break," but rather "Reduce the deficit."¹² That, after all, is what the statute says the end is; and that is the reason the President articulates, mantra-like, when he strikes a spending or tax provision.

The problem with this is that the very clarity of the provision that the President strikes belies this gloss. Congress has not identi-

9. A favorite is *AFL-CIO v. Kahn*, 618 F.2d 784 (D. D.C. 1979), where President Carter was allowed to impose price controls on governmental contractors through a provision in a procurement statute that permitted regulations for purposes of "efficiency."

10. Elsewhere I have called this the *Erie*-effect. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 426-38 (1995).

11. The statute gives the President the power to "cancel" (1) "any dollar amount of discretionary budget authority"; (2) "any item of new direct spending"; or (3) "any limited tax benefit." Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (1996). Of the three, the first part is least problematic, fitting within a long tradition of executive impoundment. Though there are differences, it is the second two parts that are most plainly unconstitutional. For them, the policy choice between the President and Congress most plainly conflicts.

12. The statute allows canceling if the President determines that such cancellation will: (1) reduce the Federal budget deficit; (2) not impair any essential Government functions; and, (3) not harm the national interest. See § 1021. But these are not guides for the President's policy choice. They are boundaries within which he is allowed to disagree with Congress's policy choices.

fied an independent or overlaying policy that might be said, because of changed circumstances, to override policy choices that it previously made. The statute simply gives the President a handy way to express a contrary policy judgment. In my view, among the legitimate intervening events that might justify a President's altering Congress's policy choice, disagreement is not one. The statute enhances the efficiency of the President's contrary policy will. This the constitution cannot allow. This is a statute designed simply to increase presidential control over the legislative process. Like the attempt to increase congressional control over the legislative process,¹³ it should be unconstitutional.

My claim is not that there isn't a way to write an opinion that would find this a fair delegation. One might well say that what the Congress does is pass a budget *in toto*, and leaves to the President the chance to proofread its work. The statute directs the President to make his vetoes only where it is in the public interest; so that at least is the end to which the President selects an appropriate means. And in other cases, Congress has done something quite similar, Gramm-Rudman¹⁴ being the closest example, but impoundment as well.¹⁵

But I don't think the Court will write that opinion. Every once in a while, it likes to find a way to enforce underenforced constitutional norms.¹⁶ And where, as here, Congress has so plainly liquidated its policy choice, and empowered the President plainly to negate it, the fudge of "public interest" will not cover the real structure of this statute: A fundamental policy choice, constitutionally vested in Congress, is being passed to the President. This kind of delegation, it seems to me, pushes delegation too far.¹⁷

II. IF THE ACT ACTUALLY DOES NOTHING

The other alternative, of course, is that the Act does nothing at all. For all the reasons that Professor Devins outlines, Congress

13. See *INS v. Chadha*, 462 U.S. 919 (1983).

14. See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038; see also Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hillings*, 76 CAL. L. REV. 593 (1988).

15. Congress regulates impoundment through the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 681 (1995).

16. Cf. Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

17. An alternative way to sustain the constitutional choice would be to require heightened scrutiny for delegations involving choice about spending.

has the power to evade the Act. The most obvious way, of course, is for Congress just to say the Act doesn't apply. Congress could pass a statute that says, for example, "Notwithstanding the provisions of the Line Item Veto Act." This obvious technique, plus the non-obvious paths that Devins describes, suggests that in reality, this statute doesn't reduce Congress's power.¹⁸ And if so, then it isn't a fundamental restructuring of power either.

If that's so, one might wonder why Congress would pass such a thing. Why would it pass a useless act? Devins points to an obvious reason—political gain without fiscal cost. Citing empirical evidence from State veto provisions, as well as an obvious strategic point, Devins maps out how a congressperson can now pass whatever she wants, knowing that the President will veto it, but gaining from the relevant interest group the political capital that she needs.¹⁹

There may be reasons to question whether indeed, this would be the response. But imagine that it is. If it is—if the act does nothing except permit Congress yet another way to deceive—then I suggest this as well should be a sufficient reason to strike it down.

The reason is a corollary to the most important principle of modern presidentialism, a principle I would call the Scalia Theorem,²⁰ but which is supported by much more than Scalia's writing.²¹ The principle is this: If there is the exercise of what people view as political power, then it must be exercised by an agent democratically responsible to the people.²² In the context of presidential power, this principle directs courts to interpret statutes to give the President control over agencies exercising power viewed as political.²³ In the context of congressional power, the principle should direct courts to interpret statutes to promote transparency. A law whose sole effect was to facilitate opaqueness should, under this principle, fail.

The Line Item Veto Act allows Congress to hide behind obscurity. While it increases the President's responsibility, it decreases the clarity with which Congress's decisions can be seen. It is a

18. See Devins, *supra* note 1, at 1625-28.

19. See *id.* at 1629-31.

20. The principle is drawn from then-Judge Scalia's opinion in *Synar v. United States*, 626 F. Supp. 1374, 1398 (D.D.C. 1986) (*per curiam*).

21. See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 101-02 (1994).

22. See *id.*

23. See *id.* at 108-09.

technique of deception, a device of opaqueness. And the Court should strike the statute if this is the only end that it serves.

In both the presidential and congressional context, the principle is motivated by a very Ely-esque idea²⁴—that the aim of constitutional interpretive practice is to increase democratic accountability and transparency. This same idea, it seems to me, cuts against the Line Item Veto Act. The Court should strike down a statute whose sole effect is to cloud the relationship between actions and political consequences. And that is what this statute would do.

III. THE DIFFERENCE BETWEEN STATUTES AND CONSTITUTIONS

These complaints about the Line Item Veto Act are arguments against a statute. So too is Devins' analysis an analysis of a statute. Both leave open the question about a constitutional amendment.²⁵ In this last section, I consider a few arguments that might be raised about it.

Amendments are different, and our thinking about them should be different. In thinking about them, we should break away from backward-looking constitutionalism. With amendments at least, we should be able to step beyond what the Framers actually said. The question should be what makes sense; it needn't be, as most of constitutional law is, what would the Framers have thought made sense.²⁶ Dead-handism is a big enough problem²⁷ without it binding our amendments as well as our law.

This is especially so in cases like this, where the problems we face are in part the product of mistakes that the Framers made. Here's just one mistake: The Framers thought that institutions like Congress would jealously guard their institutional power—that just

24. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

25. See *The Line Item Veto: A Constitutional Approach*, Hearing Before the Constitutional Subcomm. of the Senate Judiciary Comm., 104th Cong., 1st Sess., 67 (1996) (testimony of Gregory Sidak); see also Gregory Sidak, *The Line-Item Veto Amendment*, 80 CORNELL L. REV. 1498 (1995).

Historically, the first Line Item Veto provisions appeared in the Constitution of the Confederacy of 1861. Jefferson Davis never executed the provision, but it was later copied in the Constitution of Georgia (1865) and Texas (1866). See Gordon Wells, *The Item Veto and State Budget Reforms*, 18 AM. POL. SCI. REV. 782, 783 (1924). See generally CHESTER JAMES ANTIEAU, *THE EXECUTIVE VETO* §§ 16-19 (1988).

26. See Symposium: *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997).

27. See Michael J. Klarman, *Anti-fidelity*, 44 UCLA L. REV. XX (1997).

as the President has vigorously defended his power to remove executive officers,²⁸ so too would Congress defend its power to, say, declare war. But history and public choice theory have taught us that the Framers were wrong. Congress has not jealously guarded its power; it has not taken steps to assure that it make the difficult policy choices that budgeting (or war) requires. Instead it has been happy to let the tough work be passed to the President, so long as it can preserve to itself some of the glory. Congress defends its powers only where it pays. But where it pays *it* may be different from where it would pay the *Republic*.

What we need is a compensating structure. We need a constitutional structure that will give Congress the incentive to accept institutional responsibility for its policy making judgments. This the Constitution, as it is just now, doesn't do. The question is whether we can change it so that it will.

Here I suggest we should turn toward the experience of other constitutional democracies. We should be comparative rather than parochial. This is an odd idea in American constitutional law, I understand. But our narrowness is unhealthy. There is much we might learn from comparative studies—from Europe at least. And even from Russia.

The Russian constitution gives legislative power to both the President (through the power of decrees) and Congress (called the Duma, through lawmaking power).²⁹ Many (and I was one) thought this arrangement quite silly, since this unclear allocation would only induce inter-branch battles, which in the early days of a republic may be deadly. But one consequence of the structure was not obvious at first. Because the Constitution gives the President the power to legislate only where the Duma has not, the exercise by the President of decree power signals to the republic that the Duma has failed. Each act of his is a correction of them. And thus the Duma has an incentive to resist the President's sanction by wresting back from the President its natural or presumptive power. The President is like a court supervising a company in

28. See, e.g., Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451 (1997).

29. For a careful analysis of the Russian constitutional structure, reaching, however, different conclusions about what to expect, see Amy Weisman, *Separation of Powers in Post Communist Government: A Constitutional Case Study of the Russian Federation*, 10 AM. U. J. INT'L L. & POL'Y 1365 (1995).

receivership; its acts are a continuing push for the company to get out from under the President's control.

We are not Russia, no doubt. But the example suggests an idea. It suggests a model for establishing institutional accountability, and a clue to how a constitutional amendment might support it.

The two major proposals for regulating Congress that have been bouncing around the political field have been the Line Item Veto Amendment, and a Balanced Budget Amendment. The question for each is just this: Would either change separately have the effect of making Congress think institutionally—to defend and execute its role as primary policy maker in the realm of the budget?

My view is that each alone would not. The Line Item Veto Amendment would not, for the very same reasons that Devins outlines about the statute. Like the statute, the Amendment would either simply create the incentives for Congress to act irresponsibly, or simply shift an important constitutional power to the President. The Amendment is either a game, or avoidance of the problem. Congress is not made more responsible; the President is just given more power. This is not a solution to the original problem; this is a new conception of policy making responsibility. It is the South Americanization of American budget law.

Neither would the Balanced Budget Amendment do any better. No doubt it would enjoin Congress to act responsibly (assuming that balanced budgets are responsibility); but it would do little to create the incentives for Congress to act responsibly. The duty to balance the budget is a difficult one. Congress will most likely fail. But its failure does not impose a significant political cost on Congress. For its failure does not yet show that anyone else (namely, the President) could have done better. The meaninglessness of the requirement is thus translated into a muddy political message. No clear responsibility for the failure would exist.

Worse, if there were clear responsibility built into the Amendment, then it would have to be responsibility enforced by a Court. But the decisions here are so inherently political that they are inappropriate for a court. If a court took them on, then their political nature would taint the court; if a court avoided them, then the amendment would seem as the amendment would be: meaningless.

Neither amendment alone, then, would do much to create an institutional interest in Congress. But now consider them together. Imagine an amendment that first gave Congress the duty to balance

the budget, but if it failed,³⁰ then gave the President the power to modify Congress's budget through the line item veto.

There are both static and structural advantages to such a combined amendment, which I consider here in turn. From a static perspective, some advantages are clear: Unlike the balanced budget amendment, this amendment has an enforcement mechanism—the President. Unlike a court, this enforcement mechanism is efficient, and by its nature, political. And, unlike the balanced budget amendment, this enforcer could legitimately decide not to balance the budget, if times suggested that was wise. Of course, that decision would be political and would have political costs, but if there were good reason for it—a recession, or war, for example—then it may have political benefits as well. Politics would help guide the decision to balance, in a given context; it would give the safety valve that such a system needs.

The structural advantages are, however, more important. They hang upon a contingency that the framers didn't imagine (the party system, and in particular, a tradition of divided government). And they track the same reasons that might account for the institutional loyalty created in the Russian Duma.

For in the structure that I have just sketched, Congress's failure is a signal. It says: Congress has failed to do its duty. This signal gives the President (usually of a different party) significant constitutional and political power—constitutionally, through the line item veto, and politically, by being able to point to Congress as the reason for his new power. The amendment sets up sides in a political battle and an umpire who keeps score.

Congress will know this, and the party that controls Congress will want to avoid it. The governmental shut down of 1996 is a lesson to account: When the people can see clearly, and transparently, who's to blame, they are quick to blame. This combined amendment would then build into the political field a clearly visible score board. The structure would create a way to keep score of success, and thus create as well a way to compete.

30. I don't try here to sketch what such an amendment would say. The hole in the idea is obviously, who gets to say the budget is unbalanced. The solution to this might be a constitutionally independent budgeting office, that made projections based on proposed budgets. OMB and CBO might be too institutionally identified for this task. Conceivably the power could be vested in a branch of the Federal Reserve, though the amendment would then have to resolve the constitutional status of the Federal Reserve.

In the end, no structure guarantees its own success, and this could easily fall prey to some of the problems that Devins outlines with the veto statute. But one thing that distinguishes this structure from that is the clarity that it gives to Congress's failure. If Congress fails, then everyone sees it. And in a divided party government, this failure is easy political prey. The structure gives Congress all the reason in the world not to fail, and it gives the President all the reason in the world to act if in fact they do fail. It thus uses the budget to induce institutional responsibility—a responsibility that Congress has to date given away, but a responsibility the framers clearly wanted Congress to exercise.

This combined amendment would represent an important change in philosophy about the structure of the American government. The assumption of the Framers was to give departments the power to resist encroachment; it was not to make one department responsible for another. This amendment would, however, make the President in part responsible for the failures of Congress. Article II, section 3, gives him a similar power.³¹ But the power envisioned here is much more active and regular. It is the use of the executive to induce the legislative branch to function—a use common in continental constitutional systems, and perhaps useful in ours as well.

IV. CONCLUSION

There is an important sense of futility in these questions—these questions of how to restructure government to make it work. The problem is Coasian—the interests are so well entrenched, and the players so well ensconced, that there is little reason to believe that any change in structure could not be bargained around by the interested parties. To the outside world, these changes look real, but inside the beltway, they are mere appearance. Cataloging this futility has been the work of many legal and political scholars.³²

31. It provides: “[In] Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper. . . .” U.S. CONST. art. II, § 3.

32. See Michael A. Fitts, *The Paradox of Power in the Modern State*, 144 U. PA. L. REV. 827 (1996); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623 (1996). Garrett states:

As long as the relevant parties in the legislative process—representatives, senators, and interest groups—wish to preserve the benefits of the status quo, they

We might then ask what it would take to get out of this Coasian trap—how could we break up the bargaining? I am of the school that thinks that nothing can be done, but that's an uninteresting view. One point, however, does seem clear—that if the allocations of the Constitution are to be maintained, then an actor not within this bargain must enforce the divisions.

In principle, there are two such actors—the People and the Court. But in practice, these actors don't offer much hope. The People have other things to think about, and the Court may not yet have sufficient institutional strength to enforce a consistent policy against the two political branches. With no enforcer on the scene, our Coasian Constitution will continue, structural amendments notwithstanding. That is the real problem, and the problem that promises the least chance of solution.

will adopt rules and reshape political institutions to serve their purposes. . . . If the political scene can be reconfigured to offset the changes in the nature of legislative office caused by shorter tenure, then the adoption of term limits may have very little effect on Congress.

Id. at 659. She continues:

Given the players' control over the rules of the game, however, term limits may not result in the sort of sweeping structural changes envisioned by supporters. Many features of Congress and of the political arena are endogenous; thus, self-interested legislators can alter these structures to enable them to continue to meet many of their objectives.

Id. at 694-95.