



Whose Line is it Anyway: Could Congress Give the President a Line-Item Veto?

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In announcing his intention to sign [H.R. 1625](#), the “Consolidated Appropriations Act, 2018,” President Trump, noting his concerns over the fiscal size of the bill, [called](#) on Congress to provide him with a “line-item veto for all government spending bills.” Two days later, the Secretary of the Treasury, Steven Mnuchin, similarly [maintained](#) that Congress “should give the president a line-item veto.” These remarks resulted in immediate rebukes by [several commentators](#), who, citing the Supreme Court’s 1998 ruling in [Clinton v. City of New York](#), argued that the Court already resolved the legality of the line-item veto by striking down such a provision in a [1996 law](#). At the same time, the Trump Administration’s calls for a line-item veto echo those of [other Presidents](#) who sought such authority *even after City of New York*, under the premise that the invalidated law could be revised to address the Court’s objections. Because Congress has not enacted any such proposals, the question remains whether the High Court’s 1998 ruling wholly forecloses Congress’s ability to authorize the President’s veto of individual provisions of spending legislation. This Sidebar provides an overview of the Court’s decision in *City of New York* and examines what (if any) possibility exists for a constitutional, line-item veto authority for the President.

Clinton v. City of New York addressed the constitutionality of the Line Item Veto Act of 1996, which [authorized](#) the President to “cancel” an “item of new direct spending” upon a finding that the cancellation will reduce the federal deficit, not impair any “essential governmental functions,” and not harm the

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“national interest.” The law also required the President to notify Congress of any such cancellation, and, upon notification, the cancellation would “take effect.” (Congress [retained](#) the authority to enact legislation disapproving of a particular cancellation on an expedited basis, which, upon enactment, would render the cancellation null and void). Following passage of the Line Item Veto Act, President Clinton [reportedly](#) invoked the power to cancel eighty-two spending items from eleven different laws. In turn, several lawsuits were filed by those allegedly injured by such cancellations, arguing that the 1996 law, by allowing the President to alter spending legislation unilaterally, violated [Article I](#) of the Constitution. At the center of the litigation were the Constitution’s [Bicameralism and Presentment Clauses](#), which generally [require](#) legislative proposals to be approved by both houses of Congress in identical form and be presented to the President for signature in order to have the force of law.

The litigation over the Line Item Veto Act ultimately culminated in *Clinton v. City of New York*, where the Court, by a 6-3 margin, struck down the law as violating the legislative procedural requirements of Article I. Writing for the majority, Justice John Paul Stevens concluded that the law, in both “[legal and practical effect](#),” allowed the President to amend an act of Congress by repealing a portion of it. Noting that statutory repeals must conform with Article I’s requirements, the Court [concluded](#) that the “truncated” version of the law that resulted from the President’s exercise of the cancellation authority was not the product of the “finely wrought” procedures that the Constitution’s Framers designed for bills to have legal effect. In so concluding, the Court distinguished the Line Item Veto Act from a [previously upheld](#) trade law that provided the President with the power to suspend import duty exemptions upon particular factual findings. Specifically, Justice Stevens highlighted the [uniqueness](#) of the 1996 law, in that it allowed the President to alter federal law *unilaterally* based upon a discretionary assessment of certain conditions that *predated* the enactment of the law. In this vein, the Court viewed the Line Item Veto Act as authorizing the President to effect a repeal of the laws for his own policy reasons without observing the procedures set forth in Article I. Moreover, the Court [distinguished](#) between the authority provided by the 1996 law and the President’s “traditional authority” to decline to spend appropriated funds, in that the latter did not provide the President with unilateral authority to alter the “text of duly enacted statutes.”

The logic of *City of New York* suggests at least four ways in which Congress might attempt to effectuate the goals of the Line Item Veto Act without violating Article I:

- First, a more limited line-item veto provision allowing for presidential cancellation of a particular spending item to take effect only upon the *approval* of Congress would be more likely to comply with Article I and the 1998 ruling. Currently, under the [Impoundment Control Act of 1974](#), the President is permitted to submit proposals to permanently cancel or temporarily delay the availability of funds. However, Congress must affirmatively approve of such changes before they have a permanent effect on discretionary spending authority already enacted into law. Additionally, [several proposals in past](#) Congresses would have, in various ways, amended this law to (1) allow the President to propose rescissions of spending provisions already enacted into law; (2) provide a fast-track procedure requiring Congress to vote on the President’s proposed rescission in an expedited fashion; and (3) temporarily allow the President to suspend items that were the subject of the proposed rescission for additional periods of time.
- Second, a restricted line-item veto authority could, akin to the provisions in the trade law distinguished by the *City of New York* Court, *require* the President to cancel particular spending items based on certain events arising *after* the passage of the discretionary spending legislation. Such a proposal raises several questions, such as whether a narrower authority would effectuate the goals of having a line-item spending authority and whether *requiring* presidential cancellation upon some contingency occurring—a contingency that presumably the President must interpret to have occurred—is [wholly distinguishable](#) from the 1996 law. More broadly, it is an [open question](#) whether laws concerning foreign

trade and foreign affairs, where the President has traditionally been allotted considerable authority, are distinguishable from a line-item veto law.

- Third, Congress could potentially provide the President with more leeway, allowing the Executive to decline to spend certain appropriated funds at his discretion or to reallocate funds from one program to another. The majority opinion in *City of New York* noted that, in a tradition dating back to the First Congress, the legislature has previously “given the Executive broad discretion over the expenditure of appropriated funds.” Relying on this tradition, Justice Antonin Scalia, in a [partial dissent](#) in *City of New York*, argued Congress can “confer discretion upon the executive to withhold appropriated funds, even funds appropriated for a specific purpose.” In a slightly different vein, where Congress has provided money for multiple activities or purposes in a single lump-sum appropriation, the Supreme Court has [held](#) that this permissibly confers upon the Executive the discretion to decide how much to spend on one program or another including deciding whether there are sufficient resources to fund a program at all. Providing the President with additional leeway with respect to his authority over discretionary spending would be distinguishable from the line-item veto authority at issue in *City of New York* in that such a law would not authorize the President to alter the text of an enacted statute. Nonetheless, [uncertainties](#) associated with the existence, nature, and scope of presidential impoundment [authority](#) would suggest that such an expansion of the President’s authority—even through an express congressional delegation—may raise [legal](#) and [policy](#) concerns as to whether such a law would afford the President too much power over discretionary spending.
- Finally, and perhaps most obviously, as noted in the close of Justice Stevens’ [opinion](#) in *City of New York*, an amendment to the Constitution through Article V’s arduous amendment process could rectify the constitutional infirmities with the 1996 law. In this vein, a [host of proposals](#) to amend the Constitution to allow for line-item veto authority have been introduced in Congress since 1998.

Even if new legislation avoided the specific constitutional pitfalls that befell the Line Item Veto Act (i.e., Article I’s procedural requirements for legislation), there could be *different* constitutional challenges posed by a modified line-item veto that is not explicitly sanctioned by a constitutional amendment. For instance, in the lower court opinion that the Supreme Court affirmed in its 1998 ruling, the [district court held](#), in the alternative, that the Line Item Veto Act “crosse[d] the line between acceptable delegations of the rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation.” Whether this logic could apply to alternatives to the Line Item Veto Act remains to be seen. While the *City of New York* Court [declined](#) to either endorse or reject the lower court’s alternative holding, the Supreme Court has been [markedly hesitant](#) to enforce the general prohibition against Congress delegating its legislative authority to the President. Unless and until new legislation is enacted providing for some variation on the line-item veto, the various legal questions raised by *City of New York* will remain unanswered.