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## LINE ITEM VETO AND SEPARATION OF POWERS

*Leon Friedman\**

*Honorable Leon D. Lazer:*

Our next speaker is Professor Leon Friedman of Hofstra Law School. Professor Friedman was also associated with Kaye, Scholer, Fierman, Hays and Handler. He was Director of the Committee for Public Justice, staff attorney for the Civil Liberties Union and has written extensively on numerous Supreme Court issues of critical importance.

He traveled extensively with a Justice of the Supreme Court. Not many of us get a chance to do that. Also, we regard him as a profound authority on constitutional law. He will discuss separation of powers with an analysis of the line item veto case.<sup>1</sup>

*Professor Leon Friedman:*

Let me say one word about the *National Endowment for the Arts v. Finley*<sup>2</sup> case. When we started to put it together, we thought the vagueness issue was a better issue. There are no strict definitions for "common standards of decency." A vague standard would lead to selectivity on the part of the government selectors, and they could pick a grantee on the basis of who they like because the standard did not guide them very much. That issue had been sidetracked when it came before the Ninth Circuit. The court's focus was really on viewpoint discrimination. However, when it came before the Supreme Court, the issue disappeared because the standard does not mean anything. It was not viewpoint discrimination because it is hortatory. It is like a Valentine card,

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<sup>1</sup> *Raines v. Byrd*, 521 U.S. 811 (1997).

<sup>2</sup> 118 S. Ct. 2168 (1998).

the recipient can either believe those sentiments or not, but there is nothing really directing the reader to make a decision one way or the other.

I am going to discuss only one case, the line item veto case.<sup>3</sup> However, I thought I would use it as an opportunity to get into a subcurrent of Supreme Court decision making over the last five years. In this era of statistics, I do my best to keep up on how many laws the Supreme Court declared unconstitutional, specifically, how many federal laws have they declared unconstitutional.

Since *Marbury v. Madison*,<sup>4</sup> the Court has declared 146 laws unconstitutional. In the past five-year period we have seen 21 laws declared unconstitutional. Last year was the biggest and best year ever for declaring laws unconstitutional. Five federal laws were declared unconstitutional. Over the last four years they have declared seventeen laws unconstitutional. This is an average of 4.25 over the last four years. Why is the Supreme Court, which is very conservative, going crazy declaring federal laws unconstitutional? I thought the legislature was supposed to do that. I thought in the Republican era you could not be appointed a federal judge unless you answered the following question in the negative: "Are judges legislators and are they supposed to legislate?" If you answered in the affirmative, then you had no chance of being appointed a judge during the Republican era. Certainly, that was a very important issue.

The Supreme Court is declaring laws unconstitutional because it violates the structure of the Constitution. There are two big structures: there is the Tenth Amendment<sup>5</sup> and separation of powers structure. The former divides power between the state and federal government, and the latter divides power between the three branches of government. If you look over the reasoning why so many federal laws are being declared unconstitutional, it is because

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<sup>3</sup> *Clinton v. N.Y.*, 118 S. Ct. 2091 (1998).

<sup>4</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>5</sup> U.S. CONST. amend. X. The Tenth Amendment provides in pertinent part: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

this Supreme Court believes that Congress is violating structure. The word, structure, continues to be mentioned by the court.

It certainly comes up in the Tenth Amendment instances. The *Printz v. U.S.*<sup>6</sup> case involved the Brady Bill and getting the chief local law enforcement officer to do a five-day investigation in order to carry out a federal policy.<sup>7</sup> If you look at Justice Scalia's opinion, he never mentions the Tenth Amendment. Although it cannot be any other provision, Justice Scalia talks about structure.

Separation of powers is another structure. Jesse H. Choper, who was the Dean at Berkley, wrote a very famous law review article in which he said the Supreme Court should not declare laws unconstitutional where it is simply an allocation of power between one political body and another political body.<sup>8</sup> The Supreme Court should declare laws unconstitutional only if they infringe on individual rights. The states and federal government can fend for themselves, as can Congress and the executive departments; the Supreme Court should not act as an umpire between them. However, the Supreme Court has gone in exactly the opposite direction.

Since *Immigration and Naturalization Service v. Chadha*,<sup>9</sup> the Supreme Court has declared five federal laws unconstitutional on separation of powers grounds. Following *Chadha*, the one House veto case, was *Bowsher*, involving The Budget Reduction Act giving the controller of the currency the power to make executive decisions relating to spending.<sup>10</sup> In *Morrison v. Olsen*<sup>11</sup> the court did not declare the Independent Counsel Act unconstitutional over a brilliant dissent by that great civil libertarian Antonin Scalia.

The irony of all this is that when Ken Starr started "going crazy," if I am permitted to phrase it in those terms, the Clinton White House relied on the Scalia dissent in *Morrison*.<sup>12</sup> The opinion delineates what happens if there is a power hungry prosecutor who is determined to bring down the President. The case reads like a

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<sup>6</sup> 521 U.S. 98 (1997).

<sup>7</sup> *Id.*

<sup>8</sup> Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994).

<sup>9</sup> *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

<sup>10</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>11</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>12</sup> *Id.* at 697 (Scalia, J., dissenting).

manifesto for Kenneth Starr's office. It is all in Scalia's dissent in *Morrison*.<sup>13</sup> The act was upheld eight to one with Scalia writing the only dissent.<sup>14</sup>

A year later we had the sentencing guidelines case<sup>15</sup> in which the Sentencing Guidelines Board decides the limits on how an individual will be sentenced. The decision of the Supreme Court turned out to be seven to one. *Morrison*<sup>16</sup> was seven to one, *Mistretta*<sup>17</sup> was eight to one. Again, Antonin Scalia was the great civil libertarian who thought this law was unconstitutional for violating separation of powers because a nonlegislative body was performing legislative functions.<sup>18</sup>

Some time ago, I taught a course with Justice Scalia in Nice. The course was on constitutional law and I asked him how we should split the material. He stated that I could do whatever pleased me because he wanted to talk for two weeks about separation of powers. This was Justice Scalia's favorite topic. Justice Scalia began his lecture by saying, "Let me tell you the secret to human freedom, structure is everything." Scalia's point was, if you really believe in the framers, divide power and make sure that people do not take power from another branch of government. That is the best way to ensure that no one branch of government can misuse its allotted power. This is not a bad argument.

Indeed, if you look at what has happened since the drafting of the constitution, separation of powers has become increasingly important in examining much of the legislation passed by Congress. Separation of powers has also been used to strike down a number of federal laws. The final irony is that Justice Scalia dissented in the line item veto. He believed that the line item veto was a very good law with no separation of powers flaws. He thought there was nothing wrong with the line item veto.

Well, let me just go through a couple of other separation of powers arguments. *Mistretta* was upheld.<sup>19</sup> The sentencing

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<sup>13</sup> *Id.* at 701 (Scalia, J., dissenting).

<sup>14</sup> *Id.* at 697 (Scalia, J., dissenting).

<sup>15</sup> *Mistretta v. U.S.*, 488 U.S. 361 (1989).

<sup>16</sup> *Morrison*, 487 U.S. at 658.

<sup>17</sup> *Mistretta*, 488 U.S. 361.

<sup>18</sup> *Id.* at 413.

<sup>19</sup> *Id.* at 361.

guidelines system was upheld despite Justice Scalia's dissent noting that Congress was delegating legislative authority to a board who was not a legislative board.<sup>20</sup> About the same time, they had a case called *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*<sup>21</sup> This case was about a board of review set up by Congress to oversee the Washington Airport Authority.

This case involved a separate authority established by Virginia and the District of Columbia to run the airports.<sup>22</sup> The congressmen did not want planes diverted from the Metropolitan Airport to another airport. The residents in the area did not want their parking lot taken away from them. The lot was right next to the airport and they wanted to have continuous control over the activities of the Metropolitan Airport Authority. Therefore, they set up a board of review of nine Representatives, acting in their individual capacity, to check up on all activities performed by the Washington Airport Authority.

It was a perfectly plausible law, but the problem existed with the board of review. The board is composed of nine legislators.<sup>23</sup> The Supreme Court had no trouble at all saying that the body created an unconstitutional separation of powers. This is a nonlegislative body performing legislative functions, that is to say passing laws, reviewing what another body does. Only a legislative body can do that.

Finally, in another case, the Supreme Court says there is a uniform federal statute of limitations in securities fraud cases and it is very short.<sup>24</sup> There were many cases that were pending, which were dismissed upon the basis of the *Lampf* decision, because the Supreme Court had shortened the statute of limitations.

The plaintiffs in this case had relied on what they thought was a longer statute of limitations, had waited a while, and then the time had passed according to the *Lampf* decision. Well, Congress did not like that. As a result of the *Lampf* decision, Congress

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<sup>20</sup> *Id.* at 414-15 (Scalia, J., dissenting).

<sup>21</sup> 501 U.S. 252 (1991).

<sup>22</sup> *Id.* at 254.

<sup>23</sup> *Id.*

<sup>24</sup> *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

established a uniform four-year statute of limitations rule for all federal claims.<sup>25</sup> All of those claims that were dismissed as a result of *Lampf* are hereby resurrected; the Phoenix provision of the Securities and Exchange Act. Well, what is wrong with that? The problem is Congress is invading not an executive branch function, but they are invading a judicial branch function. Congress is dictating that the courts come to a particular result in a particular case. The Court held this to be a violation of the separation of powers.<sup>26</sup>

I am ready to discuss the line item veto case.<sup>27</sup> We have line item veto here in New York, do we not? Governor Pataki has the right to discard some budget items he does not like. Line item vetoes may be part of the democratic system because many states have it and nothing in their state constitutions prohibits it and there is nothing in the federal Constitution that prohibits it. The line item veto exists in Massachusetts, New York, and some other states. It was an ongoing fight between the Republicans and the Democrats in a period of time when the Democrats were the big spenders, the Republicans were all in favor of a Republican president being able to knock out items in a federal budget.

If you think of the model of the federal government as a Democratic-spending Congress, and once in a while we get a Republican fiscally-conservative president, then a line item veto appears to be a good thing. Indeed, the Republicans for many years were all for it. Eventually, the Democrats were against it and it never passed. Today, we have a Republican Congress and a Democratic President. A Democratic President who came from a state that has line item veto. The pressure in favor of the bill was irresistible and Congress in turn passed the Line Item Veto Act.<sup>28</sup>

The Act allowed the President to cancel one of three things. Congress passes a law and there are budget authorities, spending and tax benefits. The Act gives the President the authority to cancel an item of discretionary budget authority, an item of new direct spending, or a limited tax benefit.<sup>29</sup> If Congress passes a law

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<sup>25</sup> 15 U.S.C.A. § 78j(b).

<sup>26</sup> *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995).

<sup>27</sup> *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

<sup>28</sup> 2 U.S.C.A. § 691 (1998).

<sup>29</sup> *See id.* § 691(a)(1).

concerning one of these three categories, then the President can cancel particular items if he makes certain findings, namely, that the savings will be used to reduce the budget deficit, it will not impair an essential government function, and it will not harm the national interests. He must act within five days of getting the enactment from Congress.<sup>30</sup> The President can then pass the ball back to Congress. Congress may then pass a disapproval bill which is obtained by majority vote which reinstates the spending. At this time, the President can veto the disapproval bill. If the President vetoes the disapproval bill then Congress is free to overrule his veto, but only by the normal two-thirds vote. Eventually, there is a two-thirds veto built into the structure, but it only relates to individual items and only after we have gone through this other two-step operation of a disapproval bill veto and overruling of the disapproval bill. The law had a very quick review procedure that was brought in District Court in the District of Columbia and an immediate appeal was taken to the Supreme Court.

A year ago, six legislators, immediately after the law was passed, brought a case challenging the law on the ground that their power as legislators was somehow diminished by the Line Item Veto Act.<sup>31</sup> That is to say that the normal legislative process of take it or leave it was now severely changed. However, there are good and bad elements in the same bill and there is pressure to get the President to uphold it, and the right to vote for a whole bill is somehow undermined. When the case got to the Supreme Court with *Raines v. Byrd*,<sup>32</sup> the Supreme Court said legislators have no standing.<sup>33</sup> Therefore, we will never get to the merits of the bill.

Now the whole question of legislative standing has been around for a long time. Can a legislator who says my right to vote is impaired by a particular law have the right to bring an action on his or her own behalf? The Supreme Court has upheld legislative standing only in a very old case, *Coleman v. Miller*,<sup>34</sup> involving the ratification of the Twentieth Amendment where the Kansas

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<sup>30</sup> 118 S. Ct. 2091, 2102 (1998).

<sup>31</sup> See *Clinton v. City of New York*, 118 S. Ct. 2091 (1998).

<sup>32</sup> 117 S. Ct. 2313 (1997).

<sup>33</sup> *Id.* at 2322.

<sup>34</sup> 307 U.S. 433 (1939).

legislature was split twenty to twenty on ratifying an amendment, and the lieutenant governor voted in favor of the amendment. Under Kansas law, he did not have the power to break a vote in that situation. The twenty legislators said that allowing the lieutenant governor to vote under these circumstances undermines the value of the vote we took, which blocked gratification of the amendment.<sup>35</sup>

The case goes to the Supreme Court.<sup>36</sup> The court says, “yes you have standing, but you lose the case.”<sup>37</sup> They did grant legislative standing to all of the legislators, the whole body. The whole group whose votes would be vitiated took a vote and that vote was vitiated by the act of the lieutenant governor voting the other way.

Since that time lower courts have said, “oh, yeah, legislators have standing.” I remember Ted Kennedy brought a case in the D.C. Circuit involving the pocket veto.<sup>38</sup> For those who have a little daily Constitution, if Congress is not in session and ten days have passed, then the President may, without vetoing the law, pocket veto the law by simply not signing it. Yet, if Congress is not in session the law is invalidated.

Now the question arises, when Congress takes a recess as opposed to an adjournment, does the “Congress’ not in session” provision apply? When Kennedy said I want to vote on this law, my vote in favor of the law was vitiated because Congress was not in session, the President relying on his pocket veto power wiped out my ability to overrule his veto.<sup>39</sup> The D.C. Circuit granted him standing because it was not a particular vote on a particular case.<sup>40</sup> Consequently, his right to overrule, his right to vote on something was undermined. He did not take a vote that was undermined, but he was not allowed by the law or by the President’s action to express himself. The lower courts granted legislative standing.

When Joel Gora and I were at the ACLU, we had a case called *Holtzman v. Schlesinger*.<sup>41</sup> Liz Holtzman did not vote to declare

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<sup>35</sup> *Id.* at 438.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 437.

<sup>38</sup> *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

<sup>39</sup> *Id.* at 435.

<sup>40</sup> *Id.* at 434.

<sup>41</sup> *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

war on Vietnam. We claimed she had standing to complain because her right to vote on the war in Vietnam was taken away by presidential action in both Cambodia and Vietnam, and therefore she had standing. The Second Circuit said she had no standing.<sup>42</sup> We also had a couple of fliers indicating that they were actually bombing Cambodia at the time, so the issue of standing did not really come up.

The Supreme Court in *Raines* says nothing at all about lower court cases dealing with legislative standing, and they limit legislative standing to a situation where, in effect, a legislator's vote is vitiated entirely.<sup>43</sup> So, the issue of line item veto went back to District Court. Now there are two new plaintiffs and one is the City of New York.

There is a very complicated procedure under the Medicaid Act. The federal government gives states and cities an enormous amount of money for Medicaid, but the Department of Health and Human Services (hereinafter HHS) can offset federal grants to Medicaid by taxes on health care providers. If a state taxes a health care provider and receives money, then the federal government says "use that for Medicaid, we do not have to pay you for that because that fits right into the whole program. The Secretary of HHS can waive the offset." The City of New York went to Congress and pleaded that they did not want HHS to have the opportunity to waive the offset and requested that Congress provide that there be a waiver in this case. Subsequently, Congress passed a law saying that, in this particular case, HHS must provide a waiver and, therefore, there is no offset. Clinton cancelled that provision. At that point, HHS could or could not have given the waiver. I mean there was no guarantee they would give the waiver, there was no guarantee they would not give the waiver. New York lost something that it had before the cancellation, namely, the requirement that the waiver must be given. Therefore, it suffered concrete injury even though it did not lose the money. It did not get the money and it may have received the money anyway, but it lost a legal weapon that would have been very

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<sup>42</sup> *Id.* at 1315.

<sup>43</sup> *Raines v. Byrd*, 117 S. Ct. 2312 (1997).

important in ensuring receipt of funds. Thus, the Supreme Court says you have standing in this case.<sup>44</sup>

There is also something called a Snake River Cooperative.<sup>45</sup> Well, this involves a special tax benefit to a farmers' cooperative. Every time I see tax, my mind glazes over. Basically, there are certain kinds of corporate takeovers in which the tax may be deferred, any tax gain may be deferred. But it does not apply to farmers' cooperatives because they are all shareholders and, for some reason, normal tax rules do not allow them to take advantage of this tax deferral.

Clinton and Congress came along and said farmers' cooperatives can take advantage of this tax deferral and Clinton cancelled the law giving them the benefit. Well, they had standing.

When the Supreme Court finally got to the merits of whether the line item veto was unconstitutional, it took them two pages to say it is unconstitutional.<sup>46</sup> It was a six to three decision, and again, it is a funny lineup because the majority is written by Stevens, Rehnquist, Kennedy, Souter, Thomas and Ginsburg, and a dissent by Justice Scalia, who thought the law was perfectly all right.<sup>47</sup>

The key really goes back to *Chadha*.<sup>48</sup> If you are very literal about the Presentment Clause,<sup>49</sup> the Presentment Clause talks

<sup>44</sup> Clinton v. City of New York, 118 S. Ct. 2091 (1998).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See *supra* note 9.

<sup>49</sup> U.S. CONST. art. 1, § 7, cl.2 provides in pertinent part:

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 that 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, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such cases the votes of both Houses shall be determined by yeas and Nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it,

about a bill presented to the President. If he approves it, it becomes law. However, if he disapproves it, it then goes back to the legislature. Moreover, if the Senate and the House of Representatives by two-thirds vote overrule it, then the bill becomes law.

The Constitution means what it says which I think would have appealed to Justice Scalia, but he was not that liberal on this.<sup>50</sup> The court said on one level it is a very sophisticated analysis of how the legislative process works because there is no veto provision. Remember, the President cancels some spending. Congress passes a disapproval bill. He then vetoes the disapproval bill. Then, Congress, by two-thirds vote, can overrule it. That is the functional equivalent of what happens in every veto, but when the Supreme Court says 'no', it is different.

There are important differences between the President's return of a bill pursuant to Article I, Section 7, which is the Presentment Clause I just mentioned, and the exercise of the President's cancellation authority under the Line Item Veto Act. The constitutional return takes place before the bill becomes law. It is not a law if he vetoes it. The bill becomes a law only when the two-thirds vote happens.

By contrast, the statutory cancellation occurs after the bill becomes law. The bill is a law and then the President comes along and cancels a provision of an existing law.

That gets a little literal, and Justice Scalia says there is not a dime's worth of difference between this provision and the normal impoundment or deferring of spending that the President does all the time.<sup>51</sup> There is a little more sophisticated business if you go back to the way the normal legislative log rolling occurs. If you put all kinds of goodies in a bill and also some things that you want, and you present the whole thing as a package to the President, and the President must take it or leave it in that form, then the legislative process is different than if he can cancel a particular item and then you fight only over that item. As a matter

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unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

*Id.*

<sup>50</sup> *Clinton*, 118 S. Ct. at 2110.

<sup>51</sup> *Id.* at 2116.

of practical politics, there is a difference between those two. The games have been played for a very long time.

The action the Supreme Court took in striking down the Line Item Veto Act was very literal by parsing the language of the Act. There is the indication that in one case there is not a complete bill, and it does not become a law unless a veto is overridden, and on the other hand, there is a law and then the President cancels it. Presidents cannot cancel laws, all they can do is veto bills. It is clear that there is a rather sophisticated analysis of how the entire legislative process goes.

So once again, here is this very conservative Supreme Court exercising this umpire structural method of looking at congressional enactments and striking down a very wide variety of congressional bills.