1989

The Line Item Veto: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, One Hundred First Congress, First Session

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Repository Citation
Simon, Paul; Cantor, Arnold; Devins, Neal; and Fisher, Louis, "The Line Item Veto: Hearing before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate, One Hundred First Congress, First Session" (1989).
Congressional Testimony. Paper 1.
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THE LINE-ITEM VETO

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED FIRST CONGRESS
FIRST SESSION
ON
S.J. Res. 14
JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO ALLOW THE PRESIDENT TO VETO ITEMS OF APPROPRIATION

S.J. Res. 23 and S.J. Res. 31
JOINT RESOLUTIONS PROPOSING AN AMENDMENT TO THE CONSTITUTION AUTHORIZING THE PRESIDENT TO DISAPPROVE OR REDUCE AN ITEM OF APPROPRIATIONS

APRIL 11, 1989

Serial No. J-101-9

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1991

For sale by the Superintendent of Documents, Congressional Sales Office
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THE LINE-ITEM VETO

TUESDAY, APRIL 11, 1989

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Paul Simon (chairman of the subcommittee) presiding.
Also present: Senators Hatch and Specter.
Proposing an amendment to the Constitution of the United States to allow the President to veto items of appropriation.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. THURMOND (for himself, Mr. WALLOP, Mr. BAUCUS, Mr. D'AMATO, Mr. PRESSLER, Mr. BOND, Mr. GRASSLEY, Mr. MCCURBE, Mr. SYMMS, Mr. EXON, Mrs. KASSEBAUM, Mr. SIMPSON, Mr. NICKLES, Mr. BURDICK, Mr. CONRAD, Mr. DECONCINI, Mr. HARKIN, Mr. DANFORTH, Mr. DOLE, and Mr. LUGAR) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to allow the President to veto items of appropriation.

1 Resolved by the Senate and House of Representatives
2 of the United States of America in Congress assembled
3 (two-thirds of each House concurring therein), That the fol-
4 lowing article is proposed as an amendment to the Constitu-
5 tion, which shall be valid to all intents and purposes as part
6 of the Constitution when ratified by the legislatures of three-
7 fourths of the several States within seven years after the date
8 of its submission to the States for ratification:
[Recess.]

Senator Simon. I apologize. It has just been one of those days where things have not gone well timewise.

I am pleased to have you here, and let me call first on Mr. Arnold Cantor, the assistant director of the economic research department of the AFL-CIO.

Mr. Cantor.

PANEL CONSISTING OF ARNOLD CANTOR, ASSISTANT DIRECTOR, ECONOMIC RESEARCH DEPARTMENT, AFL-CIO; NEAL DEVINS, ASSISTANT PROFESSOR OF LAW, COLLEGE OF WILLIAM AND MARY; AND LOUIS FISHER, SENIOR AMERICAN SPECIALIST, GOVERNMENT DIVISION, CONGRESSIONAL RESEARCH SERVICE

STATEMENT OF ARNOLD CANTOR

Mr. Cantor. Thank you, Senator. I will kind of paraphrase. I assume the full statement will go in the record.

Senator Simon. We will put your full statements in the record.

Mr. Cantor. Thank you. On behalf of the AFL-CIO, we are appearing in opposition to both the measures. We would also oppose
establishing such authority through statute. We believe that the President has sufficient power and opportunity under existing law to assert his influence and control over the budget and appropriations processes, as well as on a program-by-program or line-by-line basis.

First, and perhaps of greatest importance, is the fact that a line-item veto goes far beyond budgetary matters and involves far more than a simple procedural change. We believe the line-item veto, in effect, would give the Executive powers to amend legislation, substitute his will for that of the Congress, and thereby substantially alter the present mix and balance of powers between the executive and legislative branches of government.

In terms of direct and specific line-item powers, under the Budget Control and Impoundment Act of 1974 the President can utilize the rescission process, and although both Houses must approve the rescission by a simple majority, the record clearly demonstrates that the President does get his way.

In addition, there are basic powers of the Executive to garner media coverage and get public attention focused on any line-item program he feels is not worthwhile. The President has the power to call Congress into special session as a means to assert his will and influence, and the present veto power of the President can and is used as a threat and a bargaining chip to influence the shape of any line item.

The President can also request supplemental appropriations, and the sequestration procedure provides additional opportunities for the administration to influence the funding of particular programs.

We also feel that the Congress, particularly as a result of the Balanced Budget and Emergency Deficit Control Act of 1985, has more than enough procedural constraints and limitations on its budgetary powers.

Line-item veto authority could complicate and politicize the budget process in a fashion that could be contrary to the national interest, and at the same time have, at best, a minuscule effect on the overall spending and revenue totals and the size of the deficit.

It is unlikely that line-item veto power would apply uniformly throughout the budget. Rather, for one reason or another, significant portions of the budget could or would not be subject to the veto power.

We also feel that the figures imply that the relatively few programs that are controllable would be disproportionately burdened. This, in our view, could lead to a counterproductive game of budgetary chicken between the White House and the Congress, with certain programs held hostage by the administration’s line-item veto power. Also, we feel there is the potential for a highly partisan White House to use the threat of veto power for electoral gain.

Thus, we do not feel that such circumstances would be conducive to the development of a budget that reflects the Nation’s priorities and spells out the manner in which those priorities will be financed, nor do we believe that the line-item veto accords with the Congress’ legislative authority as envisioned by the drafters of the Constitution.

Thank you.

[The prepared statement of Mr. Cantor follows:]
We are pleased to appear on behalf of the AFL-CIO in opposition to measures to expand the powers of the President through establishment of a line-item veto.

We are opposed to granting of such powers through the Constitutional amendment route as called for in S.J. 14 and S.J. 23, the two resolutions before this subcommittee, and we would also oppose establishing such authority by statute.

We believe that the President has sufficient power and opportunity under existing laws to assert his influence and control over the federal budget and appropriations process as well as on a program-by-program or line-by-line basis.

First, and of perhaps greatest importance is the fact that a line-item veto goes far beyond budgetary matters and involves far more than a simple procedural change. We believe the line-item veto in effect would give the executive powers to amend legislation, substitute his will for that of the Congress and thereby substantially alter the present mix and balance of powers between the executive and legislative branches of government.

Under current budget procedures the President's powers are formidable. It is first of all the President who is empowered to take the initiative by developing a detailed comprehensive budget and submitting his budget to the Congress. It is the President's budget that establishes the overall framework and the context within which compromises are made and a federal budget is ultimately developed.

Moreover in terms of direct and specific line-item powers, under the Budget Control and Impoundment Act of 1974 the President can utilize the rescission process. Although
both houses must approve of the rescission by simple majority the record clearly demonstrates that the President gets his way. In the first two years of the Reagan Administration, for example, Congress approved 80 percent of the rescission requests, and during the past eight years, 32 percent of the number of rescissions were approved representing 95 percent of the dollar cuts recommended ($43.8 billion).

In addition of course:

1. there are basic powers of the Executive to garner media coverage and get public attention focussed on any line-item program he feels is not worthwhile;

2. the President has the power to call Congress into special session as a means to assert his will and influence; and

3. the present veto power of the President can, and is used as a threat and a bargaining chip to influence the shape of any "line-item." The President can also request supplemental appropriations and the sequestration procedure provides additional opportunities for the Administration to influence the funding of particular programs.

We also feel the Congress, particularly as a result of the Balanced Budget and Emergency Deficit Control Act of 1985, has more than enough procedural constraints and limitations on its budgetary powers.

Line-item veto authority could complicate and politicize the budget process in a fashion that could be contrary to the national interest and at the same time have at best a miniscule effect on the overall spending and revenue totals and the size of the deficit. It is unlikely that line-item veto power would apply uniformly throughout the budget. Rather, for one reason or another, significant portions of the budget could or would not be subject to the veto power. Interest on the national debt, a large ($170 billion) and fast growing line-item, could not be subjected to a veto. Social security, medicare, unemployment assistance and the like are all mandatory entitlements and substantial portions of the outlays for otherwise "discretionary" programs and categories reflect contractual expenditures from prior year authorizations and could not be subject to a veto.
The Budget for fiscal 1990, for example, categorizes $902.3 billion in outlays—78.4 percent of the total budget—as "relatively uncontrollable" (page 10-26).

Although some of these programs perhaps are less "uncontrollable" than others, the figures indicate clearly that the veto as a deficit reduction measure could have a very small impact. These figures also imply that the relatively few programs that are controllable would be disproportionately burdened. This in our view could lead to a counter productive game of budgetary "chicken" between the White House and the Congress with certain programs held hostage by the Administration's veto power. Also, there is the potential for a highly partisan White House to use the threat of veto power for electoral gain.

We do not feel that such circumstances would be conducive to the development of a budget that reflects the nation's priorities and spells out the manner in which those priorities will be financed. Nor do we believe that the line-item veto accords with the Congress' legislative authority as envisioned by the drafters of the Constitution.
Second, even if an item is returned to Congress for override, it is possible—quite possible, I think—that the Congress is going to be reluctant to use its override power. The item veto, in a sense, presumes that the President knows better when it comes to fiscal policy, and I think symbolically, Congress is going to be hesitant, even with respect to a simple majority, to override those Presidential decisions.

Finally, on the balance of power issue, I don't think the item veto restores the President's power. With respect to budgetary power, the President does not have the vested right to have his budget dominate the Government. The budget power for the President originates through the 1921 act, and that act clearly shows that the Congress' budget priorities take precedence over that of the President.

Moreover, with respect to omnibus measures, I think it is frequently misperceived that omnibus measures hurt the President and help Congress. President Reagan's legislative master stroke, in fact, was the 1981 Omnibus Act. There, he was a strong advocate of omnibus measures as a way to eliminate waste in an efficient manner.

Another example of omnibus measures expanding Presidential power is the fiscal year 1988 continuing resolution. There, the President was quite successful, having Congress concede with respect to Contra aid and the fairness doctrine, by threatening to use his veto power.

I would like to now move quickly to the question of judicial interpretation. As I said, words like "item" and words like "appropriation" may make perfect sense to you and I. But since the Constitution does not distinguish the authorization process from the appropriations process, there are going to be many problems of interpretation.

For example, is a condition on spending, such a limitation rider, an appropriation? It is part of an appropriation bill. What about budgetary matters contained in authorizations? They concern the budget, but are they an appropriation or not? You know, for example, Congress can place its appropriations in authorizations measures. Does that protect the Congress from an item veto?

These matters are going to be subject to interpretation by the courts and, as the States' experience demonstrates, we are going to get conflicting interpretations. Therefore, you simply don't know what you get with the item veto.

For these reasons, I think the item veto is a dangerous constitutional experiment.

[The prepared statement of Mr. Devins follows:]
Senator Simon. Thank you very much.

Prof. Neal Devins, Marshall-Wythe School of Law, College of William and Mary. We are happy to have you with us, Professor Devins.

STATEMENT OF NEAL DEVINS

Mr. Devins. Thank you, Senator Simon. I appreciate the opportunity. There are four principal objections to the item veto, some of which have been said before; a couple, I will add.

First, as Senators Byrd and Hatfield have noted, the States' experience with the item veto is a mixed experience and has clearly not been uniformly positive, especially with respect to partisan politics playing a large role.

Second, even if the States' experience was uniformly positive, as was mentioned before by Senator Hatfield, from the States you cannot analogize to the Federal budget process. There are simply too many differences between the State and the Federal systems.

Third, with respect to the balance of power, and there has been some discussion of this before as well, the item veto, even with the simple majority override proposed through Senate Joint Resolution 23, will dramatically alter the balance between the President and Congress in a manner that favors the President.

Moreover, the complaint that omnibus bills hurt the President, is misplaced. The President frequently benefits from omnibus bills, even with respect to preserving his veto power.

Fourth, and finally, the item veto will be subject to judicial interpretation. While it might be clear in the minds of yourself and other sponsors what words like "item" and "appropriation" mean, it is probably not so clear in the eyes of the courts. The experience of the State courts in determining the sweep of gubernatorial item-veto authority bears this out.

I would like to focus on my second two comments, the balance of power concern and the concern over judicial interpretation.

With respect to the balance of power, it seems to me that when the Congress and the President are of different parties, the likelihood for conflict with respect to the item veto is particularly acute. The States' experience does bear this out. When Governor and State legislature are of different parties, there are many item veto conflicts.

Congress' override cannot protect against this phenomenon. I have heard you and some of the other sponsors mention today that, it is only a simple majority override, and therefore the override will protect legislative prerogatives.

But it is important to keep two things in mind. First, the President controls that which is subject to being overridden in the first place. Consequently, if the President favors a wasteful program, it is not subject to item veto at all because he keeps it and does not veto it. It is only that which he feels he affirmatively vetoes that is presented to the Congress for possible override.

This, of course, will preserve his priorities. It may also protect the priorities of powerful legislators that the President does not want to upset through the use of his item-veto power.
STATEMENT OF NEAL DEVINS, ASSISTANT PROFESSOR OF LAW,
COLLEGE OF WILLIAM AND MARY

Chairman Simon and Members of the Committee:

Thank you for the opportunity to discuss proposed constitutional amendments to authorize an item veto for the President. My remarks will focus on S.J. Res. 14 — authorizing the President to "disapprove any item of appropriation" subject to traditional two-thirds override — and S.J.Res. 23 — empowering the President to "reduce or disapprove any item of appropriation" subject to majority override.

Sponsor statements in support of these proposals are drawn by two impulses. First, Congress lacks sufficient "fiscal discipline" to significantly reduce the federal deficit. Reliance on "staff, and the knowledge, character, and ability of the subcommittee chairman and ranking Members" has proven inadequate. Gramm-Rudman-Hollings, at present, appears little more than "blue smoke and mirrors." President Bush, moreover, has suggested numerous costly initiatives. Immediate action is therefore necessary. While the item veto is not a panacea, it is a necessary forward step. Forty-three states have it and "it works." Furthermore, Congressional approval of the item veto sends "a clear message to the American public that we are making a serious effort to get our fiscal house in order." Second, the increasing use of omnibus legislation has weakened the President's veto. The item veto therefore "helps restore" the appropriate balance of power between President and Congress. At the same time, in the case of S.J. Res. 23, concern over the possible "creation of an imperial presidency" cautions against a super-majority override and in favor of override by a "simple constitutional majority."

"Stated another way," S.J. Res. 23 sees the item veto as a mechanism to ensure that a majority of legislators actually supports items in previously enacted bills.

An examination of state experiences with the item veto and President Reagan's experiences with omnibus legislation raises doubts about both propositions. Problems of judicial interpretation and escalating interbranch conflict likewise cautions against these proposals.
1. The Item Veto and the Fisc

Proponents of a presidential item veto as a tool to redress the chronic inability of the federal government to control spending and budget deficits point to the fact that most governors have this authority. Yet, state experience with the item veto has been unquestionably mixed.

The item veto has a reputation for saving money and some evidence supports this characterization. Several studies, however, call into question the item veto’s effectiveness for reducing expenditures. As Senator Mark Hatfield, who was governor of Oregon from 1958-1966, testified before this Committee in 1984:

Legislators in states which have the line-item veto routinely "pad" their budgets. It is a wonderful way for a Democratic-controlled legislature to put a Republican Governor on the spot: Let him be the one to line-item these issues that were either politically popular, or very emotional.

Studies from Pennsylvania and Michigan support this conclusion.

Available evidence, moreover, suggests that the item veto often functions as a partisan political tool and causes strife between the executive and legislative branches in state government. A 1995 study comparing 28 states found the item veto more likely to be used in states where the legislature and governor were from opposing parties. A 1986 Wisconsin study likewise concluded that the item veto has been used primarily as a tool of policy making and partisan politics. A 1985 review of Illinois Governor Thompson’s use of the item veto concluded that the veto triggered numerous political battles. Finally, a 1984 review by the House Budget Committee concluded that "(the power of the line-item veto on the states has given rise to significant political strife which has, at times, threatened the shutdown of Government services and withholding of payments."
from lump sum funding to single item funding. Such a change would eliminate existing advantages to Congress and executive agencies associated with lump sum funding.

Preexisting budgetary demands also speak against a presidential item veto. Half of all federal outlays are not contained in appropriations. Entitlements such as Social Security and Medicare as well as interest on the national debt are all within the jurisdiction of the tax committees. Moreover, appropriations which further presidential priorities are effectively veto proof. For example, in light of President Reagan's commitment to maintaining defense spending, a Reagan administration item veto—at best—would have applied to less than fifteen percent of the budget. Indeed, the President's 1985 Economic Report bluntly proclaimed that the item veto "may not have a substantial effect on total federal expenditures" but may be used by the President "to change the composition of federal expenditures—from activities preferred by the Congress to activities preferred by the President."¹¹

A Bush-era item veto might well operate much the same way. As Senator Dixon recognized: "Let us not forget a number of costly initiatives have been discussed by President Bush. Where does the money come for these initiatives when the deficit continues to eat away at our ability to meet the needs of the country."

2. The Item Veto and the Balance of Power

The item veto's role as fiscal salvo tells only part of the proponent's story. Proponents also argue that the item veto restores—in the face of veto-proof omnibus legislation—essential presidential power. Irrespective of whether the framers would approve of a presidential item veto,¹² I find this argument shortsighted. Omnibus legislation has not proven the downfall of either the presidency or the veto power.¹³

President Reagan, for example, was well served by the 1981 Omnibus Reconciliation Act. According to Louis Fisher, "the omnibus nature of the bill was championed by the White House and presidential supporters as the only way to make cuts in popular programs."¹⁴ Reagan-era omnibus continuing resolutions, moreover, did not
More significant, even if the states' experiences with the item veto were uniformly positive, state governments are too different from the federal government to serve as useful models for a presidential item veto. Unlike state constitutions, which have a strong antilegislative bias, a balanced budget requirement, and specific controls on the process of authorizing and appropriating funds, the federal Constitution contains few limitations on the spending power and is silent on the procedures to be adopted by Congress to authorize and appropriate funds.\(^8\)

Congress may today appropriate by tax committees, legislative committees, and appropriations committees. If Congress chose to do so, it could place substantive legislation in appropriations bills and allow authorization committees to fund programs directly through the use of "backdoor spending." These matters are left exclusively to House and Senate rules and to Congress' interpretation and execution of its rules. Unlike states that include specifications for the style and format of appropriations bills, Congress may decide to appropriate only in large, lump sum amounts, eliminating from the bill specific projects and activities that the President hoped to veto. In fact, Congress and the executive agencies both prefer lump sum funding to accommodate the need for administrative discretion.\(^9\) To protect its interests, Congress relies to a large extent on nonstatutory controls, specifying the allocation of lump sum amounts in such places as committee reports.\(^10\) Unless Congress substantially alters the structure of appropriations bills, the item veto would give the President little additional control over individual projects, programs, or activities.

Item reduction power would strengthen the President's hand in this regard. Presumably, the President could eliminate unnecessary pork from omnibus "items." There are two problems here. First, the President is under no obligation to expend a "reduced" appropriation in a manner which Congress approves. The reduced appropriation simply means that some approved expenditures will not go forward. Second, in order to exercise meaningful control, Congress may be forced to move away
from lump sum funding to single item funding. Such a change would eliminate existing advantages to Congress and executive agencies associated with lump sum funding.

Preexisting budgetary demands also speak against a presidential item veto. Half of all federal outlays are not contained in appropriations. Entitlements such as Social Security and Medicare as well as interest on the national debt are all within the jurisdiction of the tax committees. Moreover, appropriations which further presidential priorities are effectively veto proof. For example, in light of President Reagan's commitment to maintaining defense spending, a Reagan administration item veto—at best—would have applied to less than fifteen percent of the budget. Indeed, the President's 1985 Economic Report bluntly proclaimed that the item veto "may not have a substantial effect on total federal expenditures" but may be used by the President "to change the composition of federal expenditures—from activities preferred by the Congress to activities preferred by the President."11

A Bush-era item veto might well operate much the same way. As Senator Dixon recognized: "Let us not forget a number of costly initiatives have been discussed by President Bush. Where does the money come for these initiatives when the deficit continues to eat away at our ability to meet the needs of the country."

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President Reagan, for example, was well served by the 1981 Omnibus Reconciliation Act. According to Louis Fisher, "the omnibus nature of the bill was championed by the White House and presidential supporters as the only way to make cuts in popular programs."14 Reagan-era omnibus continuing resolutions, moreover, did not
undermine the veto power. Although omnibus legislation changes the nature of the exchange between the White House and Congress, the veto still functions as a mediating device. For example, with respect to the FY 88 continuing resolution, the White House and Congress undertook extensive negotiations to ensure that the bill was satisfactory to both sides. In the end, Congress abandoned the fairness doctrine and included Contra aid to stave off a threatened veto. If anything, such legislative compromises reveal that a President who is willing to use his veto wields enormous power in such negotiations.

The vitality of the veto power therefore cannot be measured by its exercise. Rather, the effectiveness of the veto power must be measured by its impact on the political process. The "all or nothing" stakes of omnibus legislation enabled President Reagan to enhance his veto power through a threatened exercise. As a matter of simple mathematics, frequency of use is also a poor measure of the veto power's impact. Prior to the present era of omnibus legislation, the presidential veto has been infrequently used. Washington vetoed only two bills. Seven presidents never used the power. Two presidents (Roosevelt and Cleveland) account for roughly half of all vetoes. In short, while the veto power may be underutilized, the advent of omnibus legislation is not the cause of infrequent use.

The item veto, moreover, cannot be understood as a mechanism to restore essential presidential prerogatives in the budget process. Prior to 1921, the President had no final budgetary responsibilities. The Budget Act of 1921 required the President to submit a formal budget. At the same time, Congress was free to do with the budget as it saw fit. The 1974 Budget Act, while setting explicit limits on the President's impoundment authority, did not alter this basic relationship. Item veto and reduction, however, will alter this basic relationship. As Louis Fisher observed in prior testimony on the item veto: "The final size and shape of the budget will resemble to a much greater degree what the President submitted."
S. J. Res. 23 proponents say fear not; Congress's simple majority override will preserve legislative priorities. Specifically, S.J. Res. 23 envisions the item veto as a check on items which are not supported by a majority of either House. While it is undoubtedly true that a byproduct of legislative compromise is the enactment of items that do not stand on their own, the creation of a "super Congress" in the Oval Office is surprising.

Bicameralism and presentment presume that a majority in both [Houses] think it better to vote in favor of a bill than against it. While another enactment might be more pleasing, all bills presumably further Congress's will. In contrast, S.J. Res. 23, recognizing the realities of legislative delegation and horse trading, views many provisions as inconsistent with the legislative will. On a provision by provision basis, there is little doubt that this contention is true. Yet, when one views the legislative work product as a conglomeration of enactments, the delegation of authority to committee heads and the striking of compromises may well further congressional objectives. The item veto will undoubtedly affect this dynamic.

More significant, the President has his own agenda and presumably will use the item veto to superimpose his priorities upon Congress. Granted, under S.J. Res. 23, a simple majority override is available. Congress, however, may hesitate before it acts against ostensible fiscal restraint by the President. Furthermore, the President decides which items are subject to override. Since personal taste and partisan politics will preserve some programs at least as wasteful as those item vetoed, the item veto is a boon to presidential prerogatives. Needless to say, the two-thirds override required by S.J. Res. 14 is an even greater expansion of executive power.17

This expansion of presidential power is likely to encourage political conflict. The item veto invites the President to resist compromises and negotiations with Congress. Symbolically, the item veto presumes that the "President knows better" when it comes to budgetary matters. The President also expends little political capital when he exercises
this power. Consequently, the President is likely to make use of this budgetary tool.\textsuperscript{18} Since ideology and partisanship will influence his use of the item veto, conflicts between the branches—as the states' experiences reveal—are likely to arise. This conflict may well result in substantial delays in the enactment of appropriations bills and uncertainty on the part of agencies, state governments, and private citizens regarding their funding levels.

3. The Item Veto and the Courts

The item veto, of course, will be subject to judicial interpretation and hence some attention should be paid to the interpretation controversies surrounding the gubernatorial item veto.\textsuperscript{19}

S.J. Res. 14 and S.J.Res. 23 both envision the item veto as extending to "any item of appropriation." But what is an "item"?

Must it be a sentence or a clause or a word? Must it be a section, or any part of a section, that may meet with executive disapproval? May a conditional or a contingent appropriation be transformed into an absolute one, in disregard and defiance of the legislative will?\textsuperscript{20}

By the same token, what is an "appropriation"? Is it any matter in an appropriation bill or is it any fiscal matter in any bill?

The range of approaches taken by state judges illustrates the possible reach of judicial authority in interpreting these terms. State court interpretations differ on several fundamental issues. Some courts emphasize legislative prerogatives, others stress gubernatorial authority. Some courts are literalists in their interpretation of this power, others consider the context in which the governor exercises item veto power.

State courts also differ in their understanding of whether the exercise of item veto authority is a positive or negative act. Furthermore, these courts are often unable to understand the complexities of the budgetary process. Questions concerning spending
that occurs outside the appropriations process. For example, have frustrated several state courts.

Because the courts of different states have adopted different perspectives, identical item veto provisions have received quite different interpretations. If the President is granted item veto authority, the federal judiciary will be embroiled in some of the same issues presented in state courts. Federal budgetary decisions are frequently made outside the appropriations process. Moreover, Congress often attaches conditions to appropriations bills.21 For example, Congress has attached riders to appropriations bills that have prohibited federal funding of abortion, restricted American military activity during the Vietnam War, and limited efforts by the Internal Revenue Service to ensure that private school operations are nondiscriminatory.

Because so many aspects of the federal lawmaking process are incompatible with the item veto, such presidential authority would be subject to more extensive and more complicated litigation than the gubernatorial item veto. Federal appropriations bills do not currently contain specific items. Additionally, because the federal Constitution does not distinguish between appropriations and authorizations, Congress may seek to limit a presidential item veto by funding projects either through the authorization process or indirectly through tax laws. The federal courts would inevitably be called upon to resolve these ambiguities by drawing discrete lines of power between the President and Congress.

In the states, court rulings have been instrumental in establishing the scope of the gubernatorial item veto. Federal court rulings, undoubtedly, would play an equally significant role in determining the reach of the President's item veto authority. The federal judiciary might insist that congressional intent be preserved, thus limiting the item veto to dollar amounts. On the other hand, courts might view the item veto as a repository of vast executive power and allow the President to veto conditions on appropriations. Under either scenario, the delicate balance of power between the President and Congress could easily be disrupted by judicial [interpretation].
Conclusion

Item veto proponents do not pretend that this deficit reduction tool will remedy this nation's fiscal woes. Nonetheless, proponents are too optimistic in their rosy assessment of both the states' experience and the President's ability to serve as nonpartisan deficit reduction czar. Proponents also overstate the damage caused to the President's veto by megabills. Finally, proponents have not considered the judiciary's role in defining the item veto power.

Great uncertainty surrounds the item veto. A constitutional amendment—which presumably will grant the President item veto power now and forever more—is a poor device for an item veto experiment.
FOOTNOTES


9. Agency officials want the latitude and flexibility associated with lump sum funding. Members of Congress also benefit from lump sum appropriations, for the only way to adjust statutory details to unexpected developments is to pass another public law.


11. R. Reagan, Economic Report of the President 96 (February 1985). For this reason, I disagree with Professor Glen Robinson's argument that the item veto enables
the President to veto "private good" pork while preserving valuable "public good" features of legislation. Robinson, Public Choice Speculations on the Item Veto, 74 Va. L.Rev. 403 (1988). Evidence from the states and the frank admissions of the Reagan administration suggests that partisan politics will be the animating force behind item veto decisionmaking.


18. In contrast, through 1980, Presidents have vetoed less than three percent of the bills presented to them. Copeland, When Congress and the President Collide, 45 J. Pol. 696, 697 (1988).


STATEMENT OF LOUIS FISHER

Mr. Fisher. Thank you. I wanted to focus on the question you and others have raised of how much would be saved by an item veto given to the President. Would it be 10 percent, or $30 billion, or what? And what about the State analogy?

I think a very concrete example of what might be saved was prepared by the Office of Management and Budget last year. If you remember, in December 1987, President Reagan signed a monster continuing resolution, and what he did in March was to send back to Congress a document that stated that if I had the item veto power at the time the CR came to me, this is what I would item veto.

It is very clearly stated in here. Someone in OMB went through the CR and, with a black pen, boxed out what Reagan would have item vetoed. There are several things interesting here.

First of all, that huge continuing resolution contained about $600 billion, and we know the budget for that year was about $1 trillion. So it means that more than 40 percent of what is appropriated every year bypasses the President because it is in permanent appropriation, requiring no annual action. So that part of the picture is simply never going to be subject to a President's item veto.

Now, in the $600 billion, the OMB was able to find $1.5 billion that he would have liked to veto. That is really not an answer for budget deficits, and even the $1.5 is very overstated because half of that amount consists not dollars in the appropriation bill, but of legislative language, particularly for the Small Business Administration. That is a question that you can consider. Do you want a President to item veto not just dollar amounts or also legislative language?

Another interesting point in this document is that someone in OMB went through the continuing resolution and struck not the dollar amounts, but the proviso, because Congress frequently says here is money provided that it is spent in this way. This has caused tremendous confusion in the State courts. Can a Governor accept an appropriation that has a condition attached to it, keep the money, and cut off the condition? Can the Governor take a conditional appropriation and convert it into an unconditional appropriation? Is that an executive act? Or is it a legislative act, because he is creating something that the legislative body never imagined?

I have read probably 120, 130 decisions by State judges on the item veto, and they have never been able to map out any sort of coherent theory on how to cabin the Governors' item-veto authority.

So I would underscore what Professor Devins said, that even though there is constitutional language, it is a free for all once it is exercised by an ambitious executive, and the scope of item-veto authority is resolved fairly much in the courts. I don't think Federal
judges will be any more successful than State judges in being able to come up with some principled way to interpret item-veto power.

What about allowing the President to cut provisos and qualifications? As you know, to get a bill through, you have to agree to various compromises, and only then can it leave the legislative body and go to the President.

I suggest two examples. One would interest a conservative; the second would interest a liberal. At the present time, we appropriate money for Medicaid and there is a proviso and a condition that it not be spent for abortion, with some conditions.

Could a President receive money for Medicaid—say, a liberal President—and cut off that proviso and use it for abortion? With regard to conservatives, the only way in recent years you have been able to provide money for the Contras is to provide certain conditions that it not be used for lethal aid, that it be for humanitarian purposes.

Could a President receive $50 million, $100 million for the Contras, on the condition that it not be used for lethal aid, and strike out that proviso? This is a power that goes far beyond the question of cutting money and saving money and addressing the deficit. This goes to the whole arrangement by which we make laws in Congress.

Thank you very much.

[The prepared statement of Mr. Fisher follows:]
Mr. Chairman, I appreciate the opportunity today to discuss the issue of giving the President the power to delete individual items from appropriations bills. My remarks will focus on the constitutional amendment you have cosponsored with Senator Dixon (S.J. Res. 23). I will also look more broadly at the effect of an item veto on budget deficits, executive-legislative relations, congressional spending prerogatives, the budget process, and the new duties that would be placed on federal courts.

First, I think the item veto is oversold as a weapon against the current level of budget deficits. Evidence for my statement comes from documents prepared by the Reagan administration. On March 14, 1988, President Reagan sent to Congress a list of "wasteful, unnecessary, or low priority spending projects" in the continuing resolution for fiscal 1988 (P.L. 100-202). He claimed that he would have deleted those projects "if I were able to exercise line item veto authority." 1

This document therefore provides a very tangible measure of potential savings from the item veto. The continuing resolution contained $603.9 billion in budget authority, translating to about $593.2 billion in outlays. (The balance of the trillion dollar budget for fiscal 1988 was funded through permanent appropriations, requiring no action through

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annual bills). The list of spending cuts proposed by Reagan, to be achieved through the item veto, came only to $969.6 million in budget authority and $1.540 billion in outlays.

Even this $1.5 billion in potential savings is exaggerated. Almost half would have resulted from deleting legislative language for the Small Business Administration, cutting outlays by $728 million. Does the item veto permit deletion not only of appropriations (dollar amounts) but legislative language as well? I will turn to that point later, but if the item veto applies only to appropriated amounts, the potential savings would probably be substantially less than a billion. That is not an answer to budget deficits in the range of $150 billion a year.

The item veto might even increase spending. In order to attract sufficient votes to support a costly presidential initiative, OMB and White House aides could inform Senators and Representatives that particular projects in their states or districts are candidates for the item veto. At the same time, with a subtlety that would escape no one, these executive officials could then inquire into the intentions of the legislators when the President’s program is being voted on the next week. A quid pro quo could be established, resulting in the retention of the legislators’ projects and also passage of the President’s program. Under those pressures the cost of government would go up. Presidents could also use item-veto power as extra leverage for getting treaties and nominees through the Senate and pursuing other White House objectives.

This brings me into the area of executive-legislative relations. I think the net effect of item-veto power will not be budget savings but rather a preference for executive spending priorities over legislative spending priorities. I call your attention to a candid appraisal in the Economic Report in 1985, which concluded that the item veto “may not
have a substantial effect on total Federal expenditures" but may be used by the President "to change the composition of Federal expenditures -- from activities preferred by the Congress to activities preferred by the President." Administration officials have been equally forthright in the past, explaining that the item veto would be aimed at amounts that Congress had added to the President's budget.

The same conclusion is reached by studies at the state level. The item veto is wielded not as an instrument for fiscal restraint but to further the spending goals of the executive branch. Of course the record varies from state to state, depending on unique circumstances in their economies, politics, and public laws. However, the general picture does not support the use of the item veto for budget savings. It is used instead for political and partisan advantages.

If 43 states have adopted the item veto, why doesn't the Federal Government follow their lead? Part of the answer, I believe, comes from the special significance of "power of the purse" at the national level. The framers recognized that the long struggle for representative government in England evolved from Parliament gaining the power of the purse. In making the President Commander in Chief, the framers deliberately separated the power of the sword from the power of the purse. The fusion of those two powers at

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the national level represents a much greater threat to individual liberties than at the state level. There are other reasons why the Federal Government has not adopted the item veto, and I will detail some of those later.

The question of subordinating Congress to the President's budget has been addressed many times. When the Budget and Accounting Act of 1921 was being drafted, some reformers recommended that Congress be prohibited from adding to the President's budget. Others proposed that Congress would have to seek the approval of the Secretary of the Treasury, or muster a two-thirds majority in each House, in order to add to the President's budget.6

Congress rejected all of those proposals. The budget submitted by the President pursuant to the Budget and Accounting Act was executive only in the sense that the President was responsible for the estimates. Thereafter it became a legislative budget, with Congress given full power to increase or reduce his estimates. Increases could be made in committee or on the floor by simple majority vote. The act did not contemplate in any fashion the surrender of congressional power. It did not make Congress subordinate to the President's spending plan.6

This drama was replayed when President Nixon resorted to unprecedented use of the power to impound funds. The message from the White House came across without equivocation: congressional add-ons to the President's budget were irresponsible and wholly lacking in merit. Through impoundment, programs were either cut back to the

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6 L. Fisher, Constitutional Conflicts between Congress and the President 233 (1985).

6 H. Rept. No. 14, 67th Cong., 1st Sess. 6-7 (1921).
President's request or, in some cases, terminated and dismantled. This theory of presidential power was repudiated in almost every case decided by federal judges.

Congress responded by passing the Impoundment Control Act of 1974. Some legislators thought that the President's impoundment should remain in effect unless one House, or both Houses, acted to disapprove. For example, in 1973 the House of Representatives considered legislation to require both Houses within 60 days to disapprove an impoundment. As reported and passed by the House, disapproval required disapproval only by a single chamber. However, the Senate insisted that the President obtain the approval of both Houses. Placing the burden on the President was crucial. Senator Sam Ervin argued that it would have been demeaning to Congress as an institution to act three times to impose its spending priorities: passing an initial bill, overturning the President's veto of that bill, and acting a third time to overturn an impoundment proposal.

These experiences in 1921 and 1974 bear on the item-veto power. The struggle for spending priorities takes place throughout the process of passing appropriation, authorization, and revenue bills. At each stage of that process the executive and legislative branches compete for what is added and what is deleted. At some point a compromise product is presented to the President, who may either sign or veto the bill. Each branch, in that process, has the opportunity to influence the content of the bill.

Permitting the President to item veto the finished bill gives the executive branch a decided advantage. Even if the override requires only a simply majority, as with S.J.

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Res. 23, it is highly unlikely that Congress can prevail in these conflicts. The past two centuries demonstrate that overrides are exceptionally difficult and generally occur when the President vetoes a general bill, not a specific bill.⁸

Following this analogy, an item veto of a specific program would be less likely to precipitate a congressional override. Members of Congress from the smaller states would find it especially difficult to attract the votes of colleagues to override the President. The states with only one or two members in the House of Representatives would have little chance of achieving an override of a vetoed item, even with a simple majority.

These remarks suggest that the item veto might be an effective way to eliminate "wasteful" items added by Congress. Part of the motivation for the item veto comes from the belief that Congress irresponsibly adds unwanted riders and amendments to the President's requests. Only with the item veto, it is argued, can the President protect his proposed budget from these extraneous add-ons.

How this works out in practice is difficult to predict. I think that the availability of an item veto might well make Congress less responsible. Under the present system, members of Congress are restrained in adding to a bill because they know, at some point, that add-ons will invite a presidential veto. With an item veto, however, the restraint would be less. To satisfy constituent demands, each member could add extraneous material to a bill with the understanding among all members that the President is free to strike the offending amendment. Why challenge these add-ons in committee or on the

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floor? Why not shift the responsibility to the President and his budget advisers? Instead of adopting a reform to control logrolling, the item veto might encourage this practice.

Third, let me turn to some other implications for the budget process. It makes no sense to give the President an item veto if there are no items in the bills he receives. Unlike the states, which itemize their appropriations bills in great detail (descending to such amounts as $2500 for the governor to veto), the spending bills presented to the President contain lump sums. As an example, take a look at the general construction account of the Corps of Engineers, which is regularly accused of promoting "pork-barrel" projects. The Energy and Water Development Appropriations Act for fiscal 1989 provides $1,066,735,000 for river and harbor, flood control, shore protection, and related projects.9 To determine how that lump sum is to be spent, one must turn to the conference report, which spells out in painstaking detail the amounts that go to individual projects in each state. These amounts range from a low of $49,000 to a high of $60,000,000.10

The point is that none of those projects (which number almost 200) would be subject to the President's item veto. They appear in the conference report, not the bill.

The misconceptions in this area are immense. In January 1988, in his State of the Union Message, President Reagan claimed that with the item veto he could have "pared away the waste" in the omnibus appropriation bill he received the previous December. To illustrate the programs he would have item-vetoed, he gave four examples: cranberry

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10 H. Rept. No. 100-724, 100th Cong., 2d Sess. 21-24 (1988). This table lists $118,000,000 for the Red River Waterway project in Louisiana, but that amount is provided for separately in the appropriations bill and is not part of the $1,066,735,000.
research, blueberry research, the study of crawfish, and the commercialization of wildflowers. The simple fact is that he could not have item-vetoed any of the programs he mentioned. They were all in the conference report.

Of course it is possible for Congress to take the detail in the conference report and place it in the bills presented to the President. To that extent we could copy the example of the states. There would be two drawbacks. If Presidents complain about the size of appropriations bills they receive today, the problem would be magnified many times over by including the detailed tables that appear in conference reports. More importantly, adding such details to the bill that becomes a public law would rigidify the administrative process. This point deserves some elaboration.

Lump-sum funding offers many advantages to executive agencies. By receiving a lump sum of one billion dollars for construction projects, the Corps of Engineers gains valuable flexibility in expending those funds throughout the fiscal year. If one project is slowed and another encounters unexpected expenses, funds can be "reprogrammed" within the account to meet these needs. Itemization would lock these details into public law. Funds could not be moved from one project to another without passing another public law. Neither branch wants that rigidity. Congress has enough problems passing public laws as it is.

This is one important difference between the Federal Government and the states. We don't itemize appropriations bills; states do. I see no compelling case to imitate the states in this regard. But there are other fundamental differences between the Federal Government and the states, all of which have been spelled out in some detail in an article
that Neal Devins and I did for the *Georgetown Law Journal* in 1986. Copies of that article have been made available to your Subcommittee.

I will close with some observations about the possible impact of the item veto on the federal courts. S.J. Res. 23 would give the President authority to "reduce or disapprove any item of appropriation in any Act or joint resolution, except any item of appropriation for the legislative branch of the Government." I don't have space here to detail the difficulties that state courts have encountered in trying to define "item" and "appropriation." Part of the problems have been explained in our article for the *Georgetown Law Journal*. A few observations will suggest the dimensions of the problem.

What is an "appropriation"? Does it include alternative methods of funding a federal program, such as a bond authorization or a system of generating revenues that are used to finance a program? How much could Congress bypass the President's item veto by creating a variety of special funds and accounts? Such questions have required state courts to examine budgetary issues of excruciating complexity, taxing the competence of judges and thrusting them often in the middle of legislative-executive confrontations.

What is an "item"? Is it only the dollar amount or also a word? The problems here have been legion, with governors deleting individual words and even separate letters. The result has been the creation of statutory language never intended by the legislature. Can the executive delete language, including conditions attached to an appropriation? Probably no issue has confused the state courts more. Through the use of the item veto

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11 Fisher & Devins, "How Successfully Can the States' Item Veto Be Transferred to the President?,” 75 Geo. L. J. 159 (1986).
can a governor convert a conditional appropriation into an unconditional appropriation? Is that an "executive" act or does it more closely resemble a "legislative" act, producing in effect a new law?

State courts, after struggling with these questions for the last century, have yet to discover a set of coherent principles to guide their decisions. Many state judges recognize that their efforts in defining the scope of the item veto have been largely subjective, ad hoc, and idiosyncratic. There is little reason to think that federal judges will be more successful. Federal courts will be drawn increasingly into budgetary disputes between Congress and the President. Moreover, the scope of the item veto will be defined not by constitutional language but by an uncertain and fluctuating combination of presidential initiatives and judicial rulings.
Senator Simon. Thank you. Just for the record, so there is no question about our intent, we are not talking about the President vetoing legislative language or changing the intent by vetoing provisos. We are talking only about dollar amounts.

Let me just ask one question of all of you because, clearly, we face a major problem. My friend from the AFL-CIO joins me in wanting to have more money for education, more money for health care, and so forth. But I see interest growing just—you know, the fastest growing item in the budget is interest.

The gross interest expenditure growth in fiscal year 1990 over fiscal year 1989 will be greater than the total amount that we spend on all of our education programs, if you exclude the School Lunch Program. You know, we are not meeting the kinds of needs that we ought to be meeting.

Have any of you thought at all about strengthening the rescission powers that the President has, and would you be in favor of anything that would in any way strengthen that at all, if I may ask all three of you that?

Mr. Cantor. I really haven't thought about it, quite frankly. It seems to me that the current rescission powers of the President are adequate, and I would be remiss, Senator, if I didn't get on the record that I am a little troubled by the entire hearing's exclusive emphasis on the spending side of the equation every time the issue of how this can help on the deficit comes up.

You know, as you articulated, we certainly share your feelings about education and training and public investment programs. I don't see how a measure geared to budget deficit reduction could help in those areas, if any money that is saved is used to reduce the deficit. You are certainly not putting the expenditures in other places.

I was kind of disturbed that the revenue side of the budget hasn't been mentioned at all in this.

Senatory Simon. Well, I am one who is on the Budget Committee; I have been clear. I think we have to have additional revenue, but it is tied in with the deficit. You reduce a $2.7 trillion indebtedness, and you reduce interest rates 1 percent.

Mr. Cantor. Sure.

Senator Simon. While the first year you don't save $27 billion, you will ultimately save $27 billion a year, plus. And if you use one-half of that to reduce the deficit and the other one-half for programs that this country needs, we would be infinitely better off all the way around, in addition to the very fact that reducing interest rates would stimulate the economy.

Any comments by either of you on the rescission?

Mr. Devins. Assuming that it is the proposal now before Congress in which the burden is placed on both Houses of Congress to override a rescission, you are going to face many of the same problems that you do with the item veto. Take the problem of the President exercising his priorities over those of Congress. Even assuming that is a simple majority override, it will be difficult for Congress to strike back at the President. First, the President controls that which is rescinded and, second, Congress will have difficulty being able to even muster a simple majority override.
Problems on the item-veto side of the equation are not solved by utilizing an enhanced rescission mechanism.

Senator Simon. Dr. Fisher.

Mr. Fisher. I would be concerned about enhanced rescission. Right now the way the process works, legislators get a chance to have their priorities in the bill, the executive branch has a chance, and a bargain has been struck and it goes up to the President. If he doesn't like it, then he can veto the whole thing.

To have the burden reversed so that he can propose certain rescissions and the burden is placed on both Houses to act within a certain time to disapprove—and if they disapprove, of course, it would have to be in a bill or joint resolution, which would go back to the President and he could veto that. Now they need a two-thirds to maintain their priorities.

I talk about that a little in my paper, and I think that is a very ill advised process where Congress, in order to protect its priorities, needs an extraordinary majority, a two-thirds in each House. Otherwise, the President's priorities prevail.

That was debated in 1921 on the Budget and Accounting Act; it was debated again in 1974 with the Budget Act. Congress every time has always insisted that it act just through majority vote unless the President exercised a regular veto.

Senator Simon. I thank you very, very much for your testimony. Our hearing stands adjourned.
[Whereupon, at 1:21 p.m., the subcommittee was adjourned.]