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THE CASE AGAINST THE LINE-ITEM VETO

MICKEY EDWARDS*

I. THE PRESIDENT ASKS FOR NEW VETO AUTHORITY

On January 13, 1984 President Ronald Reagan announced that he would ask Congress to provide authority by which a President of the United States might exercise veto power over individual items contained within appropriations bills approved by Congress. Within the next two months, fourteen separate bills and joint resolutions were introduced in Congress to give the President such authority.1

II. A TOOL FOR FISCAL RESTRAINT

The line-item veto, which enables a chief executive to reject bits and pieces of spending bills without vetoing the entire appropriation, is a part of the package of powers exercised by the governors of forty-three of the fifty states. Proponents of a Presidential line-item veto argue that because governors have that power, and because governors sometimes use it as an effective restraint on state spending, the same power should be given to the President.

Because the line-item veto would give the President additional power to restrain federal spending and because any reduction in the size of the annual deficits would be welcome, if the line-item veto’s usefulness as a fiscal tool was the only issue involved, there would clearly be a great deal of merit in the proposal. But there is far more involved. The line-item veto raises transcendent and fundamental questions about the very nature of the American Experiment.

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2. These bills include S.1921 S.J. Res. 26, H.R. 470 and H.J. Res. 436. See AMERICAN ENTERPRISE INSTITUTE, PROPOSALS FOR LINE ITEM VETO AUTHORITY (Legislative Analysis No. 91, 1984).
III. A Threat to the Balance of Powers

The two most important principles embodied in the Constitution of the United States are the separation of powers, and the balance of powers, a system of checks and balances which ensures that none of the repositories of separated powers is able to achieve dominance over the others. The founders of this Republic intended to prevent the concentration of power in the hands of one or a few men, and the dominance of one branch of government over another. The separation of powers, both between the federal government and states, and between the branches of the federal government, is critically important to our form of government. But equally important, for it is the added ingredient that makes the separation meaningful, is the balance of powers available to the various centers of power. It is this balance which would be destroyed by the granting of significant new powers to the President.

IV. A Presidential Power That May Return to Haunt Its Advocates

Supporters of the line-item veto proposal argue that the veto would give the President additional power to reduce the level of federal spending, with the implicit assumption that the advocates of this new power would be in sympathy with the reductions thus made.

It is true that a President could use the line-item veto to hold down spending by marshalling the support of one-third of the members of Congress for a single spending reduction when he might not be able to get the same level of support if he were to veto an entire appropriation. President Carter learned that this was true when he attempted, in his first year in office, to veto a congressional appropriation for various water projects. Had he been able to veto only one or two of those projects, he might have received enough support in the Congress to sustain his veto. But because he had to veto the entire bill he was soundly defeated on the House floor.

Many conservatives express joy at the prospect of being

5. The President would need the support of two-thirds of the Congress to veto an entire appropriation since Congress can override a Presidential veto by a vote of two-thirds of its members. See U.S. Const. art. I, §7 cl. 2.
able to strike individual projects with the assistance of a sympathetic President. But powers created for the use of one President will remain to be used by others. When the Articles of Confederation were replaced by a new Constitution, which increased the power inherent in the Chief Executive, those who feared new concentrations of power found comfort in their awareness that George Washington was certain to become President and was unlikely to abuse such powers. But of course, George Washington did not remain President forever.

Conservatives, who are among the principal advocates of granting line-item veto authority to the President, should remember that at some point in the future a non-conservative President would be able to use the same power to strike projects those conservatives might choose to support. If the 1984 Democratic presidential candidate had been elected, for example, he would certainly have stricken the MX missile and the B-1 bomber from the defense appropriation, and would just as certainly have stricken military assistance to the government of El Salvador from the foreign assistance appropriation. In short, power given to a liberal President will remain to be used by a conservative President, and power given to a conservative President will remain to be used by a liberal President.

In addition, proponents of the presidential line-item veto overstate the good that could be done by even the most diligent President armed with such impressive new powers. Much of the federal budget, including some 100 entitlement programs which account for nearly 50 percent of all federal spending, and the interest payments on the national debt, which account for approximately 12 percent of federal spending, falls outside the scope of the appropriation process. Most federal spending would not be affected in any way by the use of a line-item veto of congressional appropriations. According to Senator Mark Hatfield of Oregon, the chairman of the Senate Appropriations Committee, "the

7. See The Federalist No. 40 (J. Madison).
10. See id. at 24-25.
President could veto each line-item in every appropriations bill and still end up with a deficit of well over $100 billion per year.12

At best, assuming maximum use of the veto power, i.e. that the President were to veto every single item of appropriation and, in the process, wipe out the FBI, Border Patrol, Legal Services Corporation, Public Broadcasting Corporation, and every other federal non-entitlement program, we would still have a massive federal deficit and a rapidly growing cumulative debt. To embrace such an awesome shift of power to the Presidency, one must ask whether the benefits are worth the risk. The sizable amount of federal spending left untouched makes such a proposition doubtful.

V. THE PROPER SOLUTION IS POLITICAL, NOT CONSTITUTIONAL

But it is not merely those pragmatic considerations which should be emphasized. Some conservatives see only that a line-item veto, if passed, would give Ronald Reagan a tool whereby he might increase his leverage on the spending process during his second term. That is, in my opinion, a dangerously cavalier attitude toward a change in the law which would seriously alter the basic structure of our federal government and increase the potential danger to our freedoms.

So the obvious question is whether the granting of more power to the President is the only means of dealing with the problem. It is not. The proper solution is not constitutional, but political. Some historians rightly tell us that the answer to such questions lies in the political process — that is, democracy depends on persuasion and consent.

The term of office for a United States Representative is limited to two years so the voters will have available to them a ready political solution if they are dissatisfied with their representative's performance.13 It takes great effort and a great expenditure of time and money and personal involvement to bring about change through the political process, but that is the system provided for in the Constitution. The major directional change which followed the election of President Reagan and additional Republican Representatives and Senators in 1980, and the subsequent modification in that directional change which followed the national elections of

1982, are clear proof that the system does work.

VI. LIMITING THE CONCENTRATION OF POWER

The American Constitution was drafted the way it was for a very good reason. Looking about us at the Soviet Union, at Poland, at Cuba, at Guatemala, at Iran, at China, we see very clearly that even today in many countries power remains concentrated in a few hands, and that in varying degrees individual freedoms have been constrained. The men who founded this country did not grow up in twentieth century America, with its understandable tendency to take its freedoms for granted. They had themselves experienced the diminutions of individual volition — the almost inevitable loss of freedom — in societies in which power was narrowly concentrated. They entered the framing of our constitutional system with a sharp awareness that concentration of power may lead to a reduction of citizen freedoms, and that citizen freedoms cannot be diminished absent concentration of state power in a few hands.

It has been argued that the body of men who were at the forefront in creating this new republic were as brilliant in statecraft as any group of men ever assembled. It is interesting, therefore, that the first system they devised, based on the Articles of Confederation, restricted the powers of the executive branch far more than they are restricted by the Constitution and far more than the system we live under today, which has broadly stretched the Constitution to accommodate an ever-stronger chief executive.

When it was determined that the Articles of Confederation were too restrictive of executive powers to be workable in a modern state, the Articles were scrapped and the Constitution drafted to take its place. The Constitution which now governs our political system, with its balancing of powers, its separation of powers, and its strict restrictions on federal and executive power, is a revised system which the nation's founders drafted to set the outer limits of acceptable concentrations of power.

Since the drafting of the Constitution, however, there

15. In fact, not even so much as an executive commission was established by the Articles of Confederation. Ross & Schwengel, An Item Veto for the President?, 12 PRESIDENTIAL STUD. Q. 66, 67 (1982).
16. Id. at 67.
17. See THE FEDERALIST, No 16 (A. Hamilton).
has been a significant increase in the de facto powers of the executive branch. It is that shift, and the dangers its extension might pose, rather than the size of the federal budget, which is the real issue at stake in consideration of the proposed line-item veto.

There are those who argue that it is the Congress which has infringed upon Presidential prerogatives by the use of non-germane amendments known as "riders," overly broad appropriations bills and "continuing resolutions," which lump together many of the spending bills for the federal government and thus make it virtually impossible for a President to exercise his veto over items he has the right under the Constitution to accept or reject.18

Those arguments are simply not valid: In the first place, riders are simply amendments: they do not fall from the sky, but are added to appropriations bills by a vote of the Congress. If a rider is added in one house of Congress, the other must concur before it can become law. Nothing is contained in any bill passed by Congress except with the consent of the majority of its members. The entire legislative authority of the federal government is vested by the Constitution in the Congress. 20 Thus, decisions to amend bills in this way are decisions which the Congress has the right to make.

Aside from the fact that "continuing resolutions," by their scope and their "Christmas-tree" nature, invite Presidential vetoes more than they discourage them, it is essential to remember that the right the founding fathers sought to protect was the right of Congress to determine policy, not the right of the President to challenge it.21

A recent American Enterprise Institute study emphasized that the founding fathers did not intend to authorize a presidential line-item veto: "Delegates to the Constitutional Convention in Philadelphia in 1787 concluded only reluctantly that the executive should possess a limited veto authority . . . . the President was limited to approval or rejection of a bill in its entirety, and the Congress could override a Presidential veto . . . . these two limitations on the veto power were part of the 'original understanding that the veto

20. U.S. Const. art. I, §7, cl. 2; §9, cl. 7.
would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch . . . ' the question of giving the executive the power to veto only portions of a bill . . . was not discussed . . .'. 22

Thus, Presidents were meant to have only limited influence over legislation, primarily to protect against Congressional infringement on the independence of the Chief Executive. All legislative power is given by the Constitution to the Congress, whether exercised through bills, germane amendments, riders, continuing resolutions or any other means. In fact, prohibitions, sometimes ignored, against legislating in an appropriations bill are merely part of the myriad of rules which the Congress has imposed upon itself in choosing independently how to best exercise the power that properly belongs to it. 23

Rather than the increase in the level of federal spending, the real issue here is the expansion of the powers of the presidency. Before we agree to such a change we should be certain that we are willing to accept its consequences.

VII. THE POTENTIAL THREAT TO INDIVIDUAL LIBERTY

What would be the effect of giving to the President the additional power of the line-item veto? Under the current system, a majority of the members of Congress may determine the spending priorities for the nation; 24 that is, the majority of the members of Congress may determine, at least on all domestic issues, what national policy shall be, since the power to appropriate is effective control over policy.

That is how the nation's founders wanted it. They gave the President great powers in foreign policy and military affairs, 25 and gave him the veto power to give him a limited voice in other matters as well. 26 But the setting of the national priorities was to be left in the hands of a Congress of men and women directly representative of the people.

Not only was the initiative in the appropriation of money to be left to the legislative branch, it was also specifically delegated to the House of Representatives, that legislative branch of government in which power is the least concentrated. It is

22. See AMERICAN ENTERPRISE INSTITUTE, PROPOSALS FOR LINE ITEM VETO AUTHORITY (Legislative Analysis No. 91, 1984).
26. Id.
the branch in which power is shared by the largest number of people, 435, and in which the interests which influence those powers are the most diffuse. Each member of the House of Representatives is concerned primarily with the interests and forces within a single one of 435 districts. Legislation is accepted only when those men and women who represent a majority of the congressional districts in the United States, and therefore a majority of the population of the United States, conclude that a majority of the people they represent would desire such legislation.

This diffusion of power is in sharp contrast with the executive branch, in which ultimate power resides in a single individual, in which secondary and derivative power is divided among some half a dozen, or fewer, principal assistants, and in which tertiary power is divided among another twenty or so persons who form the cabinet. The executive branch is a very large pyramid, but its peak is very narrow, and power resides ultimately in the hands of a single individual.

It is my premise — and I believe it was the premise of the founders of the Republic — that the concentration of power in a few hands is the single greatest threat to individual liberty. Concentration of power is not inherently evil, but it makes the perpetration of evil much easier.

VIII. Transfer of Power to the President

Having concluded that the concentration of power is to be avoided, and having also asserted that the power to control appropriations is the power to determine policy, let me suggest that the adoption of the line-item veto as a tool in the hands of the Chief Executive effectively transfers control of federal policy from the Congress to the President. It is simply a matter of arithmetic. Under the current system, if 218 members of the House and 51 members of the Senate are in accord on the matter of any policy, forming a Legal Services Corporation, for example, or establishing a Food Stamp Program, or agreeing to build and deploy the B-1 bomber, then that will be the law.27 The President may choose to exercise his veto, but by a vote of two-thirds of its members, the Congress may reaffirm its previous decision.28 Given the general nature of appropriations legislation — all defense spending is

27. 218 and 51 members constitute majorities of the House of Representatives and the Senate respectively.
incorporated in a single bill, for example, and all programs for the Department of Health and Human Services are contained in another single bill — and because each program has its own constituency, it is frequently possible to accumulate enough votes in the Congress to override a Presidential veto.29

But if the President is given the power of the line-item veto, the initiative on spending will move to the President, because the Congress will need to come up with the two-thirds vote of each House required to override a veto in order to ensure that any of these programs will become law.30 Instead of the Congress making law by majority vote, it will now be required to come up with a two-thirds vote of each House, and the President would need only to gather the support of one-third of the members of one House of Congress to permit him to set the legislative agenda. For example, the President, with the assistance of one-third of one House of the Congress, could kill the B-1 bomber or food stamps. Today, if 65 percent of the Congress favors an individual program within an appropriation bill, it will become law. With the line-item veto, if all the members of one House and 65 percent of the other House favored a program, but the President did not, it would not become law. The President would simply take over the role of the Congress. A small minority of the Congress, with the aid of a sympathetic President, would become a majority on every single spending decision, and, thus, every single priority decision currently vested by the Constitution in the majority of Congress. While it is true that some proposals would require only a majority vote to override a presidential line-item veto, most of the bills and resolutions call for a two-thirds majority.

Instead of the Congress calling the legislative shots, with the President only occasionally being able to veto something, the President will be calling the shots. That is the opposite of what the founding fathers clearly intended. A veto is, by definition, a negative action, a device to stop something. It was never intended that the President, who is given by the Constitution only this one legislative weapon, should in fact de-


30. Some line-item veto proposals would require only a majority vote to override a presidential veto, but twelve of the fourteen bills and resolutions introduced as of March, 1984 call for a two-thirds majority override.
termine national legislative policy.\textsuperscript{31}

The President, one man, is Commander-in-Chief of the armed forces,\textsuperscript{32} dominates foreign policy, and needs only a bare majority of the members present and voting in the smallest house of Congress to appoint the members of the Supreme Court, all of the Cabinet and the heads of all federal agencies.\textsuperscript{33} To give him effective control over all domestic programs and all federal spending as well, is to effectively change our entire system of government and to grant to the Chief Executive considerably more power than the awesome power which he possesses today.

While the line-item veto is one weapon which could be brought to bear on current budget problems, the disadvantages it presents are so far-reaching and so traumatic to our system of government that its price is simply too high to pay. In this regard, William Howard Taft, who served both as President and as Chief Justice of the Supreme Court,\textsuperscript{34} warned of the potential danger of the line-item veto. "It is better to trust to the action of the people (through the political process)," he said, "than to give, in such a powerful instrument (the line-item veto) . . . a temptation to its sinister use."\textsuperscript{35}

One such potential "sinister use" has been suggested by former Congressman Elliott Levitas of Georgia, who points out that a President could use the power of the line-item veto to force a member of Congress to support a Presidential program for fear of losing a project or legislation important to the Congressman's constituents. A President could say, for example, to Congressman A, that if the Congressman does not support the President's position on the sale of the AWACS airplane to Saudi Arabia, or a reduction in the funding for food stamps, or cancellation of the Clinch River reactor project, the President will strike from the next transportation appropriation the money for a highway in Congressman A's district. Today the Administration can withdraw its support from a project, but a majority of the

\footnotesize

32. U.S. Const. art. II, §2, cl. 2
33. Taft (1857-1930) was president from 1909 to 1913 and Chief Justice during the years 1921 through 1930.
Congress may decide to support it anyway. With the line-item veto, Congressman A would have to win the support of two-thirds of his colleagues and the President would, in fact, be able to deliver on his threat. We would have regressed from a system of Presidential arm-twisting — "strong" persuasion — to a system of blackmail.

It is not accurate, incidentally, to suggest that all highways are simply wasteful "pork barrel" projects; it is the constitutional responsibility of the federal government to build roads and highways, and each will have to be built in some Congressman's district. If Congressman A's constituents need a new road or highway repairs for safety or commerce, the project should not depend on the Congressman's willingness to surrender his obligation to deliberate on matters of national policy.

IX. States are Not Small Federal Governments

What about the argument that this concentration of power does, in fact, exist today in a number of states in which governors maintain line-item veto authority?

In some states, chief executives have used this power to help restrain spending by the legislative branch. That fact is, however, irrelevant to a discussion of the merits of establishing a presidential line-item veto. It suggests that state governments are like the federal government, only smaller. While the comparison is a handy tool for teaching governmental theory, in truth there is no valid parallel. Only the federal government has the power to affect our relationships with our allies or the Soviet Union. Only the federal government is responsible for maintaining the capacity to defend the country, and only the federal government can involve us in war. Only the federal government is responsible for maintaining the capability to alert us to dangers from foreign powers. Only the federal government deals with questions of life or death for the nation as a whole.

Powers may be concentrated in the hands of a governor of a state, even a large state, such as California or New York,

37. See An Appraisal, supra note 3, at 13-14.
38. Id. at 17.
39. U.S. Const. art. I, §8, cl. 3; §10, cl. 3.
40. Id. See also art. I, §7 cl. 11-15.
41. Id.
but the federal government's potential for causing benefit or harm is immensely greater, and the concentration of powers at the federal level is therefore immensely more dangerous.

X. A Pattern of Shifting Power

I do not suggest that the line-item veto is such a power that in itself it will transform the presidency from benign to malignant. But so many other powers have been shifted from the legislative to the executive branch, including the enormous delegations of power to executive branch agencies and the surrender to the presidency of the power to initiate the setting of the budget, that the line-item veto cannot be looked at as a single legislative proposal. It must be viewed as another step in a series of changes which has led to the accrual of significant new powers in the presidency.

Despite the clear separation of powers implied in the Constitution, there has been a de facto overlapping of responsibilities and potential for initiative. To a large extent the powers of the presidency have depended on the persuasive powers and aggressive or passive nature of the President. The availability of new means of mass communication has greatly magnified the persuasive authority of activist Presidents without any malicious attempts by the occupants of the White House to usurp powers otherwise reserved to other branches of the government.

Other factors, too, have increased the weight of presidential authority. The Supreme Court, in striking down the congressional power of legislative veto,42 has permitted a much freer rein to executive branch agencies. While the line-item veto would shift control of policy from the legislative branch to the executive branch, the loss of the legislative veto removes any effective control by the Congress over the actions of Presidential appointees. Without the legislative veto, Congress has lost part of its power to control the implementation of its policies. With a line-item veto the Congress would lose even the power to determine policy.

The Congress itself is responsible for some of the accumulation of presidential powers, both through almost unrestricted delegation to executive branch agencies, and through legislation which has specifically transferred responsibility to the Chief Executive. The Budget and Accounting

Act of 1921, for example, required for the first time, that the President prepare a proposed budget.\textsuperscript{43}

To a very large extent, the President's party in the Congress has been reduced to an extension of the White House, laboring under an assumed obligation to enact the President's legislative proposals. It is not unusual to hear members of Congress talk of casting votes for programs they would otherwise oppose because the programs are a part of the legislative agenda of "their" President. Presidents today frequently determine the agenda for congressional debate and presidential assistants actively lobby members of Congress, stand in the halls outside the voting chambers to signal what vote the President wants, participate actively in committee deliberations, prepare proposed legislation, and even participate in meetings of the leadership of the President's party in the House and Senate.

XI. DEBATING THE REAL ISSUE

Finally, I contend that because the line-item veto effectively transfers control over federal spending, and therefore over domestic policy setting, from the Congress to the President, it would greatly narrow the separation of powers and sharply disturb the balance of powers.

That being the case, I would argue that valid political deliberation requires that the question be debated not on the narrower basis of whether a line-item veto would provide additional controls over federal spending, but in a far broader context, whether we shall restructure the federal government and change the balance of powers in order to give the President — not this President, but any President — greater power and to decrease the power of our directly elected representatives to determine the national priorities. That is a far more accurate description of the question.

I do not contend that the answer to that question is self-evident. Many people would argue, as I do, that the concentration of power is an enormous threat to civil liberties. Others would probably argue that the protection of civil liberties is less important than creating the potential for greater fiscal restraint. But those are the arguments that ought to be weighed in this debate. James Madison and Alexander Hamilton made clear in the Federalist Papers that in a republic

such as ours, it is the Congress which is to be the predominant branch of government. It is, in my opinion, a dangerous thing for a nation to ponder significant changes in its governmental system without addressing the basic and fundamental questions and the ramifications of the various options.

Control of the spending process should remain with the branch of government most directly responsive to the public and most consistent with the balancing of powers envisioned by the authors of the Constitution.

Fiscal conservatives, including a large and growing percentage of the American public, are understandably frustrated by the growing federal deficit and the failure of the Congress to act decisively to bring federal spending under control. But the failures of the Congress to act as those fiscal conservatives desire does not prove that the Congress is unresponsive; it proves the opposite. There remains a great constituency for additional public spending. Many of those who are most concerned and most conservative want spending to be reduced in a great many portions of the public domain but increased in a selected few of their own preference. The Congress is giving the people the government which most Americans want. I therefore suggest that the solution to the problem is political. Rather than radically restructuring the federal government, we must persuade enough of the people to vote for candidates committed to a reduced federal role.

Admittedly, the political solution will take hard work, and it will take time. When frustration is great, it is tempting to look for shortcuts. But James Madison warned that "[t]he accumulation of all powers . . . in the same hands . . . whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."44 Increasing the powers of a single man, creating a "national leader" with dominance over all aspects of the federal government, will create an imperial presidency and threaten the very foundation of our government.

It would be tragic if we were to heedlessly, and in the name of short-term expediency, begin to dismantle those separations and balancings of power which are our greatest protection against the potential dangers inherent in the concentration of power in too few hands.

Such a major change in our basic form of government should not be dealt with in a cavalier manner, nor be too

44. The Federalist No. 47, at 301 (J. Madison).
quickly embraced as a convenient solution to contemporary frustration.