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THE CASE FOR THE LINE-ITEM VETO

ALAN J. DIXON*

Federal spending is out of control. The federal budget has been balanced only once in the last 20 years.1 Deficits have risen from under $5 billion in fiscal year 1963 to over $195 billion in fiscal 1983.2 Fiscal year 1984 was only modestly better — a mere $185 billion3 — and, unfortunately, it does not signal any lasting trend towards lower deficits. Both the President's Office of Management and Budget and the Congressional Budget Office project deficits over the next years higher than $200 billion.4 It took this country over 190 years to reach the current accumulated national debt of over $1.4 trillion.5 The next trillion in debt, however, will accumulate in only seven years if there are no fundamental changes in federal budgetmaking.6

Unfortunately Congress and the President are not dealing effectively with the budget crisis. As the deficit projections indicate, the budget problems are not getting better, but worse. President Reagan was elected in 1980 on a promise to balance the budget by 1984. Instead, this conservative President has presided over the largest deficits in American history, and his fiscal 1984 budget indicated that a balanced budget would not be achieved in the foreseeable future.7

The reasons Congress and the President have failed to

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1. In 1969, the budget surplus was $3.2 billion. EXEC. OFF. OF MGMT. AND BUDGET, THE UNITED STATES BUDGET IN BRIEF, FY 1985, at 84 (1984) [hereinafter cited as BUDGET 1985]. Since 1969, deficits have averaged $35 billion annually. Taking into account all federal outlays (including those of off-budget entities). The average yearly deficit since fiscal year 1975 has been close to $60 billion. See also D. IPPOLITO, CONGRESSIONAL SPENDING 27-28 (1981).

2. BUDGET 1985, id., at 84.


5. BUDGET 1985, supra note 1, at 68.

6. See Id. at 84.

restrain the growth of federal spending and to reduce and finally eliminate federal budget deficits are numerous and complex. One main cause of the deficit problem, however, is the lack of appropriate institutional arrangements to restrain the growth of spending.

In order to build greater fiscal discipline into the federal budgeting process, I introduced Senate Joint Resolution 26,\(^8\) proposing a constitutional amendment authorizing the President to disapprove or reduce individual items of spending in appropriations bills, in other words, to provide the President with item veto authority.

S. J. Res. 26 builds on the President's existing veto power but differs in a very important way. While under the present veto provision, vetoes of an entire bill can be overridden only by a two-thirds vote of both the Senate and the House of Representatives,\(^9\) the veto of an individual item of appropriation could be overridden by a majority vote of each House.\(^10\)

Because of the majority override provision, this constitutional amendment differs from most of the proposals that have preceded it.\(^11\) It is designed to strike a balance between the need to provide additional control over spending and to restore the effectiveness of the President's veto power, on the one hand, with the need to preserve the balance of powers and the role of Congress in the legislative process on the other. While an item-veto may first appear to be a major departure from current legislative practice in the budgetary area, the proposal attempts to build on the roles the Constitution has assigned the President and the Congress, and to take into account existing budgetary realities.

Article I, Section 9, Clause 7 of the Constitution declares

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9. "Every Bill which shall have passed the House of Representatives and the senate shall, before it became a law, be presented to the President of the United States; If he approves he should sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a law." U.S. CONST., art. I, §7, cl. 2.
that "no money shall be drawn from the Treasury, but in consequence of appropriations made by law. . . ." Other constitutional provisions give Congress the power to tax,\(^\text{12}\) to borrow money,\(^\text{13}\) and to spend.\(^\text{14}\) Under the Constitution, therefore, Congress plays the preeminent role in the spending process.

During the early years of the Republic, Congress seemed to exercise budgetary control in the manner intended by the Framers. Presidents never even submitted a budget to Congress during the first 100 years, despite their power to do so.\(^\text{15}\) Congress asserted itself and sought decentralization of executive budgetary affairs. Budgetmaking was an almost exclusively legislative function.\(^\text{16}\)

The executive branch was not totally shut out of the spending decisionmaking process, however. The law establishing the Treasury Department required the Secretary of the Treasury "to prepare and report estimates of the public revenues, and the public expenditures."\(^\text{17}\) While there was substantial interest in public finance during this period and an appreciation of the need for balanced budgets, no formal budgetmaking process existed. Because revenues from tariffs and taxes during most of the nineteenth century covered all Congressionally-mandated spending,\(^\text{18}\) a formal budgetmaking process was unnecessary.

In 1921 Congress passed the Budget and Accounting Act,\(^\text{19}\) mandating the submission of an annual Presidential budget and creating the Bureau of the Budget, which is now the Office of Management and Budget. The landmark Employment Act of 1946\(^\text{20}\) required the Federal government to

\(^{12}\) U.S. Const. art. I, § 8, cl. 1.

\(^{13}\) Id., cl. 2.

\(^{14}\) Id., cl. 1.

\(^{15}\) L. Kimmel, Federal Budget and Fiscal Policy, 1789-1958, at 3 (1959) (quoting A. Buck, Public Budgeting 17 (1929)).

\(^{16}\) Id.


\(^{18}\) In the 112 peacetime years between 1791 and 1916, revenues from customs exceeded internal revenues in all but 12. Of these years, only three were prior to 1900: 1867, 1868, and 1894. Moreover, internal revenue exceeded customs in only five of the fourteen years prior to 1900 classified as was periods: 1864, 1865, 1866, 1898, and 1899. L. Kimmel, supra note 15, at 513 n. 3.


\(^{20}\) Pub. L. No. 79-304, 60 Stat. 23 (codified as amended at 15
promote maximum employment, production, and purchasing power, and required the President to send Congress an annual report on the economic outlook for the country, together with recommendations for measures to achieve greater employment and economic growth. This act has been reinforced and supplemented by the Full Employment and Balanced Growth Act of 1978, known as the Humphrey-Hawkins Act.

Congress took perhaps its most important step to limit apparently growing Presidential authority over the budgetmaking process by enacting the Congressional Budget and Impoundment Control Act of 1974. This act created a Congressional budget process. It was designed to allow the legislative branch to review the budget as a whole, rather than in piecemeal fashion. Prior to enactment of the Budget Act, there was no single legislative vehicle for considering overall budget spending levels and priorities. Instead, spending decisions were made through the 13 annual regular appropriations bills and the other bills that contained spending authority. The Budget Act allowed Congress to act on annual budget resolutions that would set spending targets and revenue requirements for the upcoming fiscal year and which could limit spending in appropriations bills, since they would have to conform with budget resolution guidelines. Significantly, the budget resolution is a purely Congressional process. Budget resolutions, unlike bills, are not submitted to the President and therefore cannot be vetoed.

If restraining the growth of federal spending and closing federal deficits are the criteria for judging whether the Budget Act is a success, the Act is a failure. Deficits are generally much larger than pre-1974, and the budgetary trend is towards further deficit growth.

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21. Id.
22. Id.
23. Id.
27. Id.
Passage of the Budget Act was preceded by problems with the appropriations process, which the Act was intended to help cure. Instead, the breakdown of the appropriations process has continued. Congress attempts to act on thirteen regular appropriations bills each year.\textsuperscript{30} In the last ten years, however, Congress has never completed action before the start of the fiscal year. In fact, in a number of years, Congress never completed action on all thirteen bills, passing instead a "continuing resolution,"\textsuperscript{31} a mechanism to allow spending to continue despite Congress' failure to act on the regular appropriations bill. Even the continuing resolution has grown beyond its original purpose of providing stopgap spending authority. It is now often used as a method of combining two or more appropriations bills into one giant legislative monster.

Although the breakdown in the spending process has caused renewed interest in the item veto, the idea itself is not new. The item veto first appeared in the Confederate Constitution.\textsuperscript{32} While the Confederacy did not catch on, the item veto did. Now 43 of the 50 states\textsuperscript{33} have item veto provisions in their constitutions, and none have ever acted to repeal them. The item veto spread most rapidly in the period before the turn of the century. Every state admitted to the Union after the Civil War included the item veto as part of its constitution. More recent state actions indicate continued support for the idea. For example, at its most recent state constitutional convention in 1970, Illinois drafted a new constitution\textsuperscript{34} which contained authority for the Governor to

\textsuperscript{30} F. Riddick, Senate Procedure (1981).
\textsuperscript{31} See Calendars of the U.S. House of Representatives and History of Legislation, Final Editions; 94th-98th Congresses.
\textsuperscript{32} "The President may veto any appropriation or appropriations and approve any other appropriation or appropriations in the same bill." C.S.A. Prov. Const. art. 1, §5 (1861). "The President may approve any appropriation and disapprove any other appropriation in the same bill, designate the appropriations disapproved, and shall return a copy of such appropriations with his objections to the house in which the bill originated and the same proceedings shall then be had as in case of other bills disapproved by the President," This item veto could be overridden by a two-thirds vote of the Congress C.S.A. Const. art. 1, § 7 (1861).
\textsuperscript{34} "The Governor may reduce or veto any item of appropriation in a bill presented to him. Portions of a bill not reduced as vetoed shall become law. An item vetoed shall be returned to the house in which it originated and may become law in the same manner as a vetoed bill. An item reduced in amount shall be returned to the house in which it
veto or reduce individual items of appropriations.

While the widespread acceptance of the item veto in the states indicates its merit at the state level, the idea has never been considered seriously at the federal level. Over 140 item veto proposals have been introduced in Congress since Congressman Faulkner of West Virginia proposed the first one in 1876.55 At least seven different Presidents, including Grant, Hayes, Arthur, Franklin D. Roosevelt, Truman, Eisenhower, and Reagan, have expressed their support for the item veto.

Most item veto proposals, however, were buried in the Judiciary Committees of the Senate and the House of Representatives. A few were reported adversely.56 Only once, on April 21, 1884, was an item veto proposal ever reported favorably by the Senate Judiciary Committee,57 and that proposal, was not acted on by the full Senate, however.

The House of Representatives indicated its support for the item veto at least once in the last century. In 1883, the House moved to suspend its rules and discharge its Judiciary Committee from further consideration of an item veto proposal. Although the vote was 101-for to 58-against, the motion failed because a two-thirds votes was needed.58 The House Judiciary Committee has held hearings on item veto proposals on three different occasions: September 9, 1913,59 February 2, 1938,60 and May 27, 1957.61 The Senate Judici-

originated and may be restored to its original amount in the same manner as a vetoed bill except that the required record vote shall be a majority of the members elected to each house. If a reduced item is not so restored, it shall become law in the reduced amount.” ILL. CONST. art. 4, § 9, cl. (d) (1970).

35. Faulkner’s proposal was restricted to the deletion of items from appropriation bills. H.R. 46, 44th Cong., 1st sess., CONG. REC. 500 (1876). Most of the other proposals also limited the exercise of the veto power to appropriations bills without granting authority to reduce an item. Ross & Schwengel, An Item Veto for the President? 12 PRES. STUD. Q. 66 (1982).

36. Senator McMillan of Minnesota and Senator Morgan of Alabama introduced S.R. 4 and 21 on March 21 and April 14, 1879, respectively. These resolutions were adversely reported by the Senate Judiciary Committee on February 9, 1880. Consideration was later postponed indefinitely. S.R. 4, S.R. 21, 46th Cong., 2d Sess., CONG. REC. 751 (1880).


38. H.R. 267, 47th Cong., 2d Sess., CONG. REC. 3611 (1883). This resolution, introduced by Rep. Flower of New York, was the only one subjected to a vote in either House.


40. Item Veto: Hearings Before the House Judiciary Comm. on H.J.R. 72,
ary Committee has held only two hearings: May 13, 1954, and April 9, 1984. Lack of federal support for the item veto is not due to a lack of effectiveness at the state level, however. While there has been no comprehensive study done on the economic effects of the item veto in the states, there is a fair amount of evidence indicating that the item veto will restrain spending. For example, at the 1954 Senate hearing on the item veto, Representative Bennett of Florida testified that twelve states achieved substantial savings through use of the item veto. Governor Adlai Stevenson also testified that "it has enabled me to veto more appropriations, involving more money, than any Governor in Illinois history."

More recently, Illinois Governor Thompson has been able to cut about 3% off appropriations bills each year. As Governor of California, President Reagan used the item veto to reduce spending by an average of 2% per year. In 1983, Illinois saved $174.7 million using the item veto, and an additional $26 million using the reduction veto; 24 of the 58 state departments and agencies had their budgets vetoed or cut. In the same year, California Governor Deukmejian line-item vetoed $1.2 billion in spending.

196, 469, 470, 515, and 555, 75th Cong., 3d Sess. (1938).
44. Rep. Bennett reported on figures from his informal poll of governors: S. Carolina, 4 vetoes, $958,261; Florida, "about a dozen", "several million dollars"; N. Mexico, 4 vetoes, $364, 727; Texas, 2 of 3, amount unknown; Louisiana, 4 $3,025,000; N. Dakota, S, $200,000, S. Dakota, 2, $50,000; Utah, 27, $4,157,803; Washington, 82, $11,863,486; Colorado, 2, $75,866; Michigan, 1, $340, 000; California, 10, $56,532,500. Hearings, supra note 42, at 4. See generally, Hearings, supra note 41, at 78-92 (statement of Frank Prescott, Professor, Univ. of Chattanooga).
47. Id.
49. Palffy, Line-Item Veto: Trimming the Pork, supra note 46 at 8.
The success of the item veto at the state level provides some insight into what it could achieve at the federal level. It has been calculated that if the item veto had been in place and had saved just 1% per year of total Federal spending, the cumulative savings over a twelve-year period from 1974 through 1985 would reduce the 1985 deficit by $105 billion, over half the deficit now estimated for that year.\(^5\) Over the same period, the same source calculates a reduction in the 1985 deficit of $49 billion, or about 25%, if savings of only 2% of total discretionary spending were achieved.\(^5\)

The Budget Committee of the House of Representatives\(^5\) states that $503 billion of the estimated $928 billion fiscal 1985 budget would be exempt from the line-item veto as follows:

- net interest payments $127 Billion
- Social Security $187 Billion
- Medicare and Medicaid $ 92 Billion
- Other mandatory programs $ 97 Billion

Total amount exempt from item veto: $503 Billion

The Committee further states that the prime areas where the item veto would apply are national defense\(^5\) — $265 billion — and nondefense discretionary spending\(^5\) — about $161 billion. It points out that much spending in fiscal 1985, however, is based on prior year budget authority and therefore is also exempt from an item veto — $90 billion of defense and $78 billion of discretionary — thus leaving only $257 billion subject to the item veto.\(^6\) The Budget Committee goes on to exempt the rest of military spending from the item veto because President Reagan favors increases in that area. This leaves only $83 billion subject to the item veto.\(^6\) It therefore concludes that the item veto could not reduce deficits in the short run because it could not reach the vast majority of federal expenditures.\(^6\)

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51. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
Of course, the item veto has its dramatic effects over time; it is not reasonable to judge a permanent constitutional change on the basis of one year's figures. The item veto represents a long-term not a short-term solution to federal budget problems. While a large part of the budget is uncontrollable if viewed in isolation, a much greater share of the budget is subject to the veto when viewed over a longer time period.\textsuperscript{58}

Further, while entitlements were about 45\% of total fiscal 1984 spending, entitlement programs accounted for less than 25\% of the total deficit that year.\textsuperscript{59} This is because the bulk of entitlements are subject to a type of "balanced budget" requirement. Social Security and Medicare, for example, are supported by dedicated taxes, and do not call on general revenues. To a large extent, however, those parts of the budget subject to the item veto are unsupported by sufficient tax revenue, and therefore contribute more directly to federal deficits.

One important reason for the item veto's success is its effectiveness in reducing the use of legislative tactics that contribute to excessive spending and waste. In a Wall Street Journal article, Henry Hazlitt stated that "Congress has perfected the device of throwing in pork-barrel, log-rolling, and other vote-buying appropriations with those that the President needs to carry on the government. In addition, Congress has perfected the practice of passing its appropriations bills at the very end of a session, so that if the President vetoed a typical omnibus spending bill in order to get rid of an objectionable item, he would be left without any money at all. So far as appropriations bills are concerned, Congress has usurped total power. The presidential veto has been reduced to a nullity."\textsuperscript{60}

Others have made the same point. By trading support for one another's projects and proposals, Congressmen can pass legislation containing excessive and wasteful spending.\textsuperscript{61} Carried to an extreme, pork-barrelling and logrolling can lead to an absurd situation: the more broadly a bill is supported, the more excessive and wasteful it may be.\textsuperscript{62}

\begin{thebibliography}{99}
\bibitem{58} Palfy, \emph{Line-Item Veto: Trimming the Pork}, supra note 46, at 4.
\bibitem{59} \textit{BUDGET 1985}, supra note 1.
\bibitem{60} Hazlitt, \emph{Line-Item Leash on Runaway Spending}, Wall St. J., Sept. 9, 1983, at 32, col. 4, 5.
\bibitem{61} Ross & Schwengel, \textit{supra} note 35, at 75.
\bibitem{62} \textit{Id}.
\end{thebibliography}
Further, the trading is not always related to public works projects, or other brick and mortar legislation. Congress has grown expert at assembling huge omnibus bills. If the President vetoes such bills, vital government programs and activities may come to a halt. For instance, the Wall Street Journal pointed to final Congressional action on a "mind-boggling" $91 billion appropriations bill and commented that "surely, the item veto is a more prudent way to deal with sums of this size."

The effects of Congressional tactics on the President's current veto power may be summarized as follows:

Despite constitutional provisions implying that the President shall be free to give effect to his independent judgment upon the merits of each bill which comes before him for approval, the President, in fact, has little or no choice. Appropriations bills almost invariably are composed of items necessary for public welfare as well as items not necessarily in the national interest. The President may "choose" to accept the bill in its entirety thus approving the undesirable and unnecessary items and the wasteful expenditure of funds, and assenting to any attached legislative "riders" or he may reject the bill in its entirety, thus risking delay if not discontinuance of necessary functions and work on needed projects. When appropriations bills are rushed through Congress in the closing days and perhaps hours of the legislative session, as is often the case, the President has, for all practical purposes, no choice at all. Yet it is under the stress of these conditions that some of the most objectionable features can be and are attached to appropriations bills.

Presidential use of the veto in the post-World War II era seems to support the conclusion that the veto power has been eroded in the budget area. The eight American Presidents since Franklin D. Roosevelt (Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, and Reagan) have vetoed a total of 645 bills. Excluding pocket vetoes, these Presidents vetoed 384 bills. Only 39, or about 1%, were successfully

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63. Id. at 69.
67. Id.
overridden by Congress. If appropriation bills are singled out, however, a much different picture emerges. First, these Presidents vetoed very few appropriations bills. Truman, who vetoed 180 bills, vetoed only one appropriations bill. Reagan has vetoed only three. These figures indicate that either Presidents were satisfied with the spending levels in the bill or that there were factors preventing them from using the veto as extensively in the budget area as they did in other areas.

Second, when these Presidents did veto an appropriations bill, the veto was much more likely to be overridden. While only 1% of all regular vetoes were overridden by the necessary two-thirds vote in both the House of Representatives and the Senate, 35% of the vetoes of appropriations bills were overridden. An appropriations veto was therefore much less likely to be sustained than a regular veto, perhaps further deterring a President from exercising it in the former case.

The item veto, because it forces Congress to consider each project on its own merit, and because it exposes logrolling and pork-barreling to the light of day, will return to the President the veto power he possessed before these legislative tactics became so prevalent. The nature of the federal government has changed; Congress must respond to that change. Given the present scope and nature of the federal government and the ongoing fiscal crisis facing the United States, Congress cannot continue logrolling and pork-barreling.

When the U.S. Constitution was written, the states were the dominant political institutions. The principal federal role, measured by manpower (including defense), was running the nation's mails. Until 1940, federal expenditures were smaller than combined state and local expenditures. By 1983, federal expenditures were almost twice the combined state and local spending. This is more than just a change in numbers. It represents a dramatic shift in the nature and role

68. Id.
69. Id.
70. Presidential Vetoes 1789-1976, supra note 66.
72. Presidential Vetoes, supra note 66.
75. Id.
of the federal government. Individual state spending decisions do not have a significant impact on the overall performance of the U.S. economy. On the other hand, federal budget expenditures frequently influence the economy. The Employment Act of 1946 and the later Humphrey-Hawkins Act provide official recognition of what became apparent during the Roosevelt "New Deal".

As government has grown, Congress has eroded the ability of the President to participate in shaping and controlling that growth. Congress sent as many or more appropriations bills to the President in the 1840's as it sends him now. The Presidential veto has become a blunt weapon, less and less capable of being used to control federal spending. "Congressional practices . . . have tended to negate the system of checks and balances which is a basic principle of our system of government." Congress has eroded Presidential disciplining of spending decisions without implementing any workable substitute. Nonetheless, many members of Congress have strong reservations regarding the item veto. The testimony of Senator Hatfield, Chairman of the Senate Appropriations Committee, at this year's hearing on the item veto, provides an excellent summary of what is probably the principal concern. Senator Hatfield stated that the item veto would "make a substantial shift in the balance of powers between the Executive and Legislative branches of government." He further stated that:

the President can and does effectively use his veto power to enforce his aggregate budgetary plan on Congressional spending bills. The item veto, however, will empower the President to go beyond simple control on overall spending, and allow him to virtually dictate spending priorities over individual programs and activities. With this power the President can frustrate a decision of the Congress on any individual program, be it for political or ideological reasons — or simply because of personal bias.

78. Ross & Schwengel, supra note 35, at 77.
80. Id.
The concern is fundamental. Senator Hatfield and many others in Congress view the item veto as a new grant of power to the President at the expense of Congress. Many in Congress believe the legislative branch has already ceded too much authority over the budget to the executive. If correct, this is a damning indictment of the item veto. Separation of powers and maintenance of a balance of powers is at the heart of the American system of government. Opponents of the item veto are really arguing that the President is intruding into the legislative arena, where he has no right to be. A look at the constitutional history of the President's existing veto power demonstrates that the argument may not be as strong as it first appears.

Considering America's history, it is remarkable that the Constitutional Convention of 1787 included any kind of veto power for the President. Before the American Revolution, legislative acts of the colonies or states-to-be were subject to two vetoes. Both the Governor of the colony and the King of England could veto bills, and both vetoes were absolute—not subject to an override by the legislature. The colonies naturally resented and opposed this type of veto. In fact, the first two grievances set forth in the Declaration of Independence stated that "He [George III] has refused his assent to laws . . . . He has forbidden his Governors to pass laws . . . ."

During and immediately after the American Revolution, therefore, there was a strong disposition against any veto power for governors or any national executive. During this time period, no state except Massachusetts gave its governor any kind of veto. Some states dispensed with governors altogether, using a commission instead. At the national level, under the Articles of Confederation there was not even an executive commission, except the "Committee of States" which managed governmental activities when Congress was not in session. "[I]n fact, the Articles went to the other extreme and granted to five states, and in some cases to a single state, the authority that was so feared in the executive: for the assent of nine of the thirteen states was required to all important acts, and unanimous assent was required to amend-

83. The Declaration of Independence para. 3 (U.S. 1776).
85. E. Mason, The Veto Power (1890).
86. The Articles of Confederation art. IX (U.S. 1777).
ments to the articles." By 1787, however, the Framers of the U.S. Constitution recognized the inadequacies of the Articles of Confederation. They decided that a national executive was needed.

The scope of the presidential veto power which the Constitution provided has been a matter of some dispute. There is general agreement that the veto can be used to protect the executive branch from legislative encroachment, and that the President can veto bills he believes are unconstitutional. On the other hand, vetoes for policy purposes — bills vetoed because the President thinks they are unwise — have generated periodic objections from members of Congress and scholars. One commentator called the current broad use of the veto power an illustration of "the power of text over expectation," indicating his belief that the Framers did not intend the veto power to be used for policy purposes.

Today, however, Presidents use the veto to disapprove bills because they are unwise, too costly, low-priority, or for numerous other policy reasons. There is nothing in the text of the Constitution to prevent such a use of the veto power. In fact, there is evidence that some of the most prominent framers of the Constitution anticipated and approved of such a use. For example, Alexander Hamilton wrote that the veto power:

not only serves as a shield to the executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body."

Likewise, during the Constitutional Convention, James

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87. E. Mason, The Veto Power (1890).
91. Id.
92. Black, Some Thoughts on the Veto, supra note 89.
Madison stated that the veto is available "to restrain the Legislature from encroaching ... on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form."95

Woodrow Wilson also recognized the importance of the legislative role of the President. Before he became President, he wrote: "For in the exercise of his power of veto, which is of course, beyond all comparison, his most formidable prerogative, the President acts not as the executive but as a third branch of the legislature!" And again: "The President is no greater than his prerogative of the veto makes him; he is, in other words, powerful as a branch of the legislature rather than as the titular head of the Executive."96

The text of the Constitution provides a further indication that the President was intended to play a legislative role: the veto power is contained in Article I, the legislative article, rather than in article II, the executive article.97 The Constitution gives the President additional powers of a legislative character. It allows the President to order Congress to convene.98 It also requires the President to "give the Congress information on the state of the union, and recommend for their consideration such measures as he shall judge necessary and expedient."99

Even if the Constitution envisions a strong role for the President in the legislative process, the balance of power questions remains unanswered. Whether the item veto changes the balance of power in favor of the President depends on whether the item veto expands his veto power.

As discussed earlier, some commentators argue that the item-veto is a restoration of rather than an increase in the veto power the Constitution intended the President to have.100 The legislative tactics that have eroded the President's veto power were uncommon when the Constitution was written. These tactics did not become prevalent until about the time of the Civil War,101 and their increased usage during that period is what caused the Confederacy to include an item veto in its constitution.102 The item veto is thus a

95. Fisher, supra note 90, at .
96. Black, Some Thoughts on the Veto, supra note 92, at 88.
98. U.S. Const. art. II, § 3.
101. Id. at 2.
102. Id.
reaction to legislative tactics that have tended to undermine the President's veto; it therefore restores the status quo.

S.J. Res. 26 does not fully depend on this argument, however, because it permits an item veto to be overridden by a majority of Congress. It requires a President to choose: either veto an entire bill, forcing Congress to attempt to override by a two-thirds vote, or use the item veto, recognizing that it would be easier for Congress to override. S.J. Res. 26 allows the President to put the Congress on record to see whether there is in fact majority support for certain individual items of spending in an omnibus bill.

The 97th Congress approved 473 public laws. An additional 215 public laws were approved in 1983. Even the relatively few appropriation bills within that total entail hundreds of pages. No single Congressman or Senator reads every line of every bill. Instead, Congress relies on the judgments of a few of its members on any given issue, and, like the President, on the judgment of its staff.

Senator Lawton Chiles of Florida, arguing against the item veto, stated that:

the President doesn't sit down and read this budget line-by-line . . . . It's not even the Director of OMB, Mr. Stockman. It is some guy with a little green shade that sits in the bowels of OMB, who's never liked a project, who's always been against it, and he says here's my chance, he puts it on the list for the line-item veto . . . .

Now that little fellow that sits in OMB, no one elects him, no one can write a letter to him, he doesn't change whether the Republicans are in office or the Democrats are in office, he listens to no hearings. Now the Congress sets up and holds all of the hearings on the budget. We are the ones that the people think are responsible because the Constitution says we tax and spend the money. . . . (but) that little fellow down in the bowels of OMB is making that decision . . . .

Senator Chiles may be eloquent but not completely accurate, for with majority override, the item veto would require Congress to demonstrate that there is in fact the majority support

for an item that legislative theory says exists. It would require Congress to go on record in situations where Congressional staff and experts are not able to reach agreement with Presidential staff and experts.

After all, the fact that a bill passes Congress is supposed to mean that there is majority support for that bill, including every item in it. If an item were not supported by a majority, there are numerous opportunities to offer an amendment to remove such an item. S.J. Res. 26 would reveal the numerous pork-barreling and logrolling deals. If Senators and Representatives cannot afford to go on record on those deals, then perhaps they should not have been made in the first place.

Majority override would prevent a President from overturning strong Congressional support for a single item through use of the item veto and the support of "one-third plus one" in either the House or the Senate. An item veto would be sustained only if the President could command majority support in at least one House; it would be overturned if Congress could demonstrate majority support.

An item veto with majority override thus works to ensure that the balance of powers is not upset. It would make the President's veto power more effective by exposing logrolling, pork-barreling and other legislative tactics that contribute to excessive spending and waste. The item veto does not require a two-thirds vote to be effective. By requiring Congress to vote on individual items the item veto will decrease the likelihood that the presence of inappropriate items will endanger items for which there is actually majority support.

Of course, a constitutional amendment providing an item veto is not the only way to bring additional discipline to the budgetmaking process. Some suggest that use of the impoundment power would be an adequate remedy. However, unrestricted Presidential impoundments undermines the legislative process and the rule of law. Unrestricted impoundment authority would permit a President to sign an appropriations bill, but then not spend the money it contained. Even a two-thirds majority in Congress would be left with no way to overturn that Presidential decision short of passing another law.

It does not make Constitutional sense, however, to force Congress to pass a second law in order to say in effect that "we really mean it; spend the funds." Enactment of the first law must result in release of the money as called for in the statute if the lawmaking function is to have any meaning at
all. President Nixon discovered that fact when he attempted to make overly broad use of impoundment authority. The result was enactment of the Congressional Budget and Impoundment Control Act.\textsuperscript{105}

Whether the Budget Act restricted Presidential impoundment authority is open to debate. What is clear, however, is that the Act resulted in an explicit outline of the range of authority available to the President. To oversimplify, Congress stated that a President could use two mechanisms, recissions and deferrals, to impound funds appropriated by law and it placed strong controls over each. A President was never permitted to rescind funds unilaterally. He could propose a rescission, but unless Congress enacted legislation rescinding that appropriation within 45 days, the funds had to be released. A President could defer spending temporarily, unless either the House or the Senate passed a resolution not subject to presidential veto directing that the money be spent.\textsuperscript{106}

Others have suggested that it would be much simpler and quicker to pass a statute than to amend the Constitution, which requires approval by both Houses of Congress and ratification of of three-fourths of the states. Because of its dissatisfaction with its ability to deal with the deficit problem, last year the Senate came close to greatly expanding the President’s rescission authority by giving him a type of statutory item veto. The amendment, sponsored by Senators Armstrong and Long, established quarterly targets for growth in the ceiling on the amount of outstanding federal debt.\textsuperscript{107} If targets would otherwise be exceeded, the President could then reduce spending for already appropriated items by up to 20%.\textsuperscript{108} This provision made it a somewhat limited statutory item veto, or, more accurately, a form of reduction veto. It would have permitted a President to reduce individual items of spending.\textsuperscript{109} The amendment had strong support in the


\textsuperscript{108} \textit{Id}.

\textsuperscript{109} \textit{Id}.
Senate, but was defeated by a vote of 49 to 46.\textsuperscript{110}

An even more far-reaching amendment\textsuperscript{111} was proposed by Senator Mattingly of Georgia. It would have directed the Secretary of the Senate or the Clerk of the House to split appropriations bills into parts and to send each part to the President as if it were an individual bill subject to veto.\textsuperscript{112} Because there have been no court decisions related to either of these two amendments or with respect to any other statutory item veto proposal, conclusions as to their constitutionality are tentative.

The Congressional Research Service has suggested two reasons why a statutory item veto may not be constitutional. First, the Constitution sets out a very detailed description of the legislative process and provides a limited legislative role for the President, a role that cannot be enlarged without violating the Constitution. Second, to "so enlarge the legislative role of the President in the process of enacting legislation is to create a 'potential for disruption' of the legislative process."\textsuperscript{113}

Regardless of its constitutionality, a statutory item veto would also be poor policy because it would give the President, in effect, two bites at the same apple and therefore would upset the balance of powers. A President now has the constitutional right to either veto a bill or sign it.\textsuperscript{114} If he signs it the spending becomes law. If the President could also unilaterally rescind or otherwise negate that spending, he would essentially have the right to make law on his own. Additionally, if the President were permitted to rescind even if a bill was passed over his veto, the balance of powers would be further disrupted.

A constitutional amendment authorizing an item veto, on the other hand, builds on the role already assigned the President under the Constitution. It gives the President the right to assent or veto items of spending before they become law. It does not give the President two shots at the same target. Instead, it puts him in the position he would be in if an

\begin{itemize}
\item \textsuperscript{110} 129 Cong. Rec. S16334 (Daily ed. Nov. 16, 1983) (vote on Sen. Armstrong's proposed amendment). \textit{see supra} note 110 and accompanying text).
\item \textsuperscript{111} Proposed amendment no. 7056 to S.2565, 98th Cong., 1st Sess., 130 Cong. Rec. S.13435 (1984).
\item \textsuperscript{113} \textit{Id}.
\item \textsuperscript{114} U.S. Const. art. I, § 7.
\end{itemize}
item came before him as an individual measure, rather than as part of an omnibus bill.

The line-item veto is a proven and effective mechanism for providing needed fiscal discipline in the budget area. Forty-three of the fifty states have item veto provisions in their constitutions. The states gave their governors this authority because it was needed, because it works, and because it strengthens their budget processes.

The United States should take advantage of this wealth of experience at the state level and act to make the item veto part of the Constitution. If the item veto was in place and could be used as effectively as it was in Illinois last year, the current federal deficit could be reduced by $27 billion this year alone.

The item veto builds on the President's current veto power. It will make his legislative role more effective, and help eliminate the use of legislative tactics that contribute to excessive spending and waste. With majority override, the item veto ensures that fiscal discipline is not achieved by radically upsetting the balance of powers which lies at the heart of the American system of government.

While the item veto can be an effective means to help reduce federal deficits, it is no panacea. The item veto alone will not eliminate federal deficits that exceeded $175 billion in fiscal 1984. Further, it is only a tool. As a tool, its effectiveness depends on the effectiveness of the President using it. It will not make a weak President strong, but it will help a strong President check federal spending. Because it is proposed as an amendment to the Constitution, it must be viewed in an institutional context. The item veto should not be supported or opposed because of the manner in which a particular President would use it. Rather, debate should focus on the long-term impact on the relationship between the President and Congress. Viewed in this light, an item veto with majority override is a positive, useful, and important addition to the Constitution.

116. Assuming that federal spending would be reduced by the same proportion that spending was reduced in Illinois.