

**STATEMENT BY LOUIS FISHER,
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SENATE COMMITTEE ON THE BUDGET,
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“A PRESIDENTIAL ITEM VETO”**

Mr. Chairman, I appreciate the opportunity to testify on legislation to grant the President a line-item veto.

I recognize that supporters of the item veto may regard it as a useful tool for cutting spending, eliminating certain tax provisions, and helping to reduce the level of federal deficits. I think those objectives are unlikely to materialize, for reasons I will give, but more important to me are the values of protecting institutional and constitutional interests. I am concerned that an item veto would damage Congress as an institution and weaken our system of separation of powers and checks and balances. Even if some budgetary savings resulted (minimal at most), the political cost to our system of self-government would be substantial.

Safeguards for Liberty and Freedom

How we structure government has a fundamental impact on individual rights and liberties. To the framers, it was second nature that the protection of individual rights did not start with trust in government or the good intentions of public officials. Protection came from dispersing power and creating a system of effective constraints on governmental abuse. Any weakening of those institutional checks represents a threat to individual liberties. Especially is that so with the spending power. In his concurrence in the item veto case of *Clinton v. City of New York* (1998), Justice Kennedy wrote: “Liberty is always at stake when one or more of the branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. . . . [The framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term . . .” 524 U.S. at 450.

Damaging Congress as an Institution

The item veto does damage to the institutional interests of Congress in several ways. First, it transfers to the President part of the power of the purse that has always been associated with a democratic system of self-government. James Madison explained in Federalist No. 58 that the power of the purse represents the “most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” Members of Congress should think long and hard before transferring any of the spending power to the President.

Second, the mere enactment of an item-veto bill would damage Congress. It sends a message to the public that Congress is irresponsible with its legislative work and has decided to depend on the President to eliminate items that should never have been included in the bills presented to him. Probably even worse, it communicates to lawmakers that they are not up to the task and cannot properly conduct their constitutional duties. The assumption seems to be that the President is the more trusted guardian of the purse and the far better judge of what is in the national interest. I don't know why we should believe that. If we look at the chronic problems of budget deficits over the last two or three decades, what evidence supports the view that the President is more responsible in fiscal affairs?

Third, consider how the item veto process would operate. The President submits to Congress a list of items to be cancelled. In taking that action, the President would automatically receive credit in the public arena for fighting against waste. At the same time, Congress would be rebuked for having enacted the supposedly wasteful items. If Congress were to now disapprove the bill drafted by the Administration to eliminate the items, it would receive a second rebuke. The President could go to the public and admonish Congress for failing to support his effort to delete unwanted and unneeded funds. If Congress has an interest in building support and credibility with the public, this is a procedure to avoid.

Fourth, the President would have a new tool to control lawmakers and lessen their independence. He or his aides could call Members of Congress to alert them that a particular project in their district or state might be on a list of programs scheduled for elimination. During the phone call, the Member would be told that the Administration actually thinks the project is a good one and should be preserved. The Member is assured that the Administration will do everything it can to see that the project is not included on the final list. The Administration could then redirect the conversation to determine whether the Member is willing to support a bill, treaty, or nomination desired by the President. That political leverage diminishes Congress as a coequal branch.

How Much Would Be Saved?

What we know about the item veto indicates that the amount saved would be quite modest and certainly not a remedy for annual deficits in the range of \$300 billion or \$400 billion. The experience with the item veto, both conceptually and in actual practice, suggests that the amounts that might be saved would be relatively small, in the range of perhaps one to two billion a year. Under some circumstances, the availability of an item veto could actually increase spending. The Administration might decide to withhold the use of an item veto for a particular program if Members of Congress agreed to support a spending program initiated by the President.

In January 1992, the General Accounting Office (GAO) released a report that estimated the savings that could be achieved through an item veto. The study assumed that the President would apply the item veto to all the items objected to by the Administration in its Statements of Administration Policy (SAPs). GAO estimated that

the savings over a six-year period, during fiscal years 1984 through 1989, could have been \$70 billion.¹ I was asked to review the GAO study. Looking at the same data, I concluded that the savings over the six-year period would have been not \$70 billion but \$2-3 billion and probably less. I also suggested that instead of reductions the process could lead to increases through executive-legislative quid pro quos.²

Comptroller General Charles A. Bowsher, writing to Senator Robert C. Byrd, later acknowledged that actual savings from an item veto “are likely to have been much less” than the \$70 billion originally projected. Actual savings “could have been substantially less than the maximum and maybe, as you have suggested, close to zero.” Mr. Bowsher also discussed situations “in which the net effect of item veto power would be to increase spending.” Such a result could occur if a President “chose to announce his intent to exercise an item veto against programs or projects favored by individual Senators and Representatives as a means of gaining their support for spending programs which would not otherwise have been enacted by the Congress.”³

Another helpful measure in gauging how much an item veto would reduce federal deficits comes from the Clinton Administration. President Bill Clinton used the authority in the Line Item Veto Act of 1996 to cancel a number of discretionary appropriations, new items of direct spending, and targeted tax benefits. The total savings, over a five-year period, came to less than \$600 million. His cancellations for fiscal year 1998 were about \$355 million out of a total budget of \$1.7 trillion.⁴

The totals would have been somewhat higher had all of his recommendations been accepted by Congress. He canceled 38 projects in the military construction bill, with an estimated savings of \$290 million over a five-year period. At hearings held by the Senate Appropriations Committee, testimony was received from the Air Force, the Navy, and the Army. The military witnesses contradicted claims made by the Administration in justifying the cancellations.⁵ The votes against the cancellations, in a joint resolution of disapproval, were 69 to 30 by the Senate and 352 to 64 by the House. President Clinton vetoed the resolution, but Congress managed override votes of 78 to 20 in the Senate and 347 to 69 in the House.

Another proposed cancellation by the Clinton Administration, estimated to save \$854 million over five years in the federal retirement system, was withdrawn after Senator Ted Stevens, chairman of the Appropriations Committee, and Senator Pete Domenici, chairman of the Budget Committee, challenged the legal basis for the

¹ U.S. General Accounting Office. *Line Item Veto: Estimating Potential Savings*, GAO/AFMD-92-7, January 1992.

² My CRS memorandum of March 23, 1992 is reprinted at 138 Cong. Rec. 9981-82 (1992).

³ Letter of July 23, 1992 from Charles A. Bowsher, Comptroller General of the United States, to Senator Robert C. Byrd, chairman, Committee on Appropriations, reprinted at 142 Cong. Rec. 6513 (1996).

⁴ *The Line Item Veto*, hearing before the House Committee on Rules, 105th Cong., 2d Sess. 12 (1998). Testimony by June E. O’Neill, Director of the Congressional Budget Office.

⁵ 143 Cong. Rec. 22133-34 (1997) (statement by Senator Ted Stevens). For the Administration’s justifications, see *Weekly Compilation of Presidential Documents*, vol. 33, pp. 1501-02 (1997) and *Public Papers of the Presidents*, 1997, II, p. 1301.

cancellation. The Administration had proposed the action as a cancellation of discretionary budget authority, but the two Senators determined that the change in federal retirement benefits did not constitute “budget authority.” Administration officials later admitted that President Clinton did not have legal authority to cancel funds in the retirement program.⁶

In his testimony on March 15, 2006 before the House Rules Committee, Acting CBO Director Donald Marron cautioned against expecting much savings from an item veto. The impact of item-veto legislation, he said, may “simply shift spending priorities to those favored by the President” and introduce “subtle, indirect effects” on the legislative process and fiscal policies.⁷ Unless there is a political consensus between the two branches to establish fiscal discipline, “the proposed changes to the rescission process included in H.R. 4890 are unlikely to greatly affect the budget’s bottom line.”⁸

Procedural Changes Alter Political Behavior

It might be argued that the procedures contemplated by S. 2381 would produce some material savings, even if modest. Let us assume that presidential pressure through this procedure will prompt Congress to support his recommendations to reverse some legislative decisions. What would be the final result? Suppose that Congress currently adds 150 items each year that the President objects to. Through the item-veto authority, he recommends that 100 be rescinded. Of that amount, Congress agrees to support the cancellation of 50. The progress appears to be a net reduction from 150 to 100. But it all depends on what Members of Congress do with the availability of an item veto. A new dynamic has been added. Why shouldn’t Members increase the number of congressional add-ons from 150 to 250? The President responds by recommending that 125 be rescinded. Congress supports him on 75. The result: a net reduction from 250 to 175. That isn’t progress. It’s more like a shell game and far removed from the “transparency” used to describe the goals of item-veto legislation. Functioning in this manner, the process reduces congressional responsibility.

The Source of Targeted Tax Benefits

The experience of the Clinton Administration with targeted tax benefits is of interest because it challenges a common assumption that these provisions typically come from lawmakers who seek to assist a favored and powerful constituent. Under the 1996 item veto law, the President was authorized to cancel “any limited tax benefit” — defined to mean any revenue-losing provision that provided a federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries, or any federal tax provision that provided temporary or permanent transitional relief for 10 or fewer beneficiaries.

⁶ Stephen Barr and Joan Biskupic, “Clinton Recants on Item Veto of Pension Switch,” *Washington Post*, Dec. 20, 1997, at A1. See also 62 Fed. Reg. 54338 (1997) for the cancellation proposal.

⁷ CBO Testimony, Statement of Donald B. Marron, Acting Director, “CBO’s Comments on H.R. 4890, the Legislative Line Item Veto Act of 2006,” before the Subcommittee on the Legislative and Budget Process, Committee on Rules, U.S. House of Representatives, March 15, 2006, at 1.

⁸ *Id.* at 6.

Out of 79 opportunities to cancel limited tax benefits, President Clinton canceled only two. Reporters questioned this modest use. One reporter asked him why the statutory authority had not been used more vigorously against a limited tax benefit that “sounds like the very definition of a special interest goodie.” President Clinton responded: “Well, it’s certainly the definition of a special interest group, but not all special interests are always in conflict with the general interest. If that were true, our country would not have survived for over 200 years.”⁹ He also explained that 30 of the items had been recommended by the Treasury Department to fix flaws in current law, and another dozen or more were put in by Congress by agreement with Treasury to fix other procedural problems.¹⁰

Delegating Legislative Authority as Well?

The comments above discourage the expectation of achieving significant savings through an item veto. However, language in S. 2381 appears to offer unusual opportunities for savings in entitlement programs. The 1996 statute authorized the President to cancel “any item of new direct spending,” defined to mean budget authority provided by law (other than an appropriation law), entitlement authority, and the food stamp program. As specified in Section 1021(a), the President was required to “cancel in whole.” There were thus two restrictions: cancellation would be directed toward *new* direct spending, and the cancellation would have to be in whole not in part.

Section 1021 of S. 2381 authorizes the President to propose the rescission of any dollar amount of discretionary budget authority or the rescission, “in whole or in part,” of any item of direct spending. That seems to authorize not merely the cancellation of an entitlement but some alteration of the legislative language adopted by Congress. Later in the bill, on page 13, the terms “rescind” or “rescission” are defined to mean “to modify or repeal a provision of law to prevent (A) budget authority from having legal force or effect; (B) “in the case of entitlement authority, to prevent the specific legal obligation of the United States from having legal force or effect”; and (C) in the case of the food stamp program, to prevent the specific provision of law that provides such benefit from having legal force or effect. What is the meaning here of “modify”? It appears to be something more than repeal. Does it contemplate giving the President authority to rewrite mandatory programs enacted by Congress?

It is true that S. 2381 only authorizes the President to *propose* modifications. His recommendations must be enacted into law by Congress. Still, the President has decisive advantages in changing legislative language. He may pick and choose as he wishes, pursuing whatever modification is in his interest. For its part, Congress must vote his proposals up or down. The fast-track procedure prohibits any amendments by Congress, either in committee or on the floor. The essence of legislative authority is the capacity to shape a product. Under S. 2381 the President can do that. Congress cannot.

⁹ 33 *Weekly Compilation of Presidential Documents* 1209 (1997).

¹⁰ *Id.* at 1226.

Further Analysis of S. 2381

Several features of the Senate bill would shift significant political power to the President. First, the bill places no restrictions on the number of rescission proposals he may submit to Congress. It could be one message per bill or a hundred per bill. Section 1022(a) of the 1996 statute directed the President to transmit a cancellation proposal “[f]or each law.” S. 2381 appears to allow the President to package proposed rescissions from different laws. If Congress decided to withhold approval, nothing in S. 2381 prevents him from submitting it another time. The result is that the President gains substantial control in driving and determining the legislative schedule.

Second, S. 2381 permits the President to defer spending for 180 calendar days while Congress considers his proposal. It is not clear why 180 days are needed. Under the expedited procedures, committees must act within five days and floor action must be completed within the next five days. One chamber could complete the process within two or three weeks. Let us say 20 days. If that chamber decides not to approve the proposal, why shouldn’t the funds be released for obligation? Why continue to block their expenditure for the next 160 days? The bill allows the President to release the funds if he “determines that continuation of the deferral would not further the purposes of this Act.” The branch that decides whether the purposes are furthered is the President, not Congress.

Third, there is no time limit when the President must submit his item-veto proposal to Congress. The 1996 statute required the President to notify Congress of his recommendations to cancel items “within five calendar days (excluding Sundays)” after the enactment of a law containing discretionary budget authority, new direct spending, or limited tax benefits. S. 2381 has no deadline for presidential action. Suppose a bill reaches the President 80 days into a fiscal year. He then takes 120 days to notify Congress of his proposal and proceeds to defer obligation for 180 days. If the funds are one-year money they would lapse. The consequence: a virtual cancellation by the President without any congressional action or support.

The problems identified here could be taken care of by changes to the bill: placing limits on the number of rescission bills the President may present to Congress, prohibiting repetitive requests, reducing the 180 days to something like 45, requiring the President to submit his requests within a specified number of days (such as 10 or 15), and eliminating the authority to “modify” language in mandatory spending bills. Those changes would improve S. 2381 but would not, in my opinion, address the serious institutional damage done to Congress and representative government.

Conclusions

Failure to enact some type of item-veto legislation does not prevent the President from exercising close control over the level of federal spending and the size of the annual

deficit. Through the regular veto power, the President can instruct Congress that unless it removes a number of items in a bill that is in conference, he will exercise his veto. Threats of that nature are regularly employed to control the contents of legislation. The President may announce that if a bill exceeds a certain aggregate amount, he will veto it, again putting pressure on Congress to reshape the bill to the President's satisfaction. At any time the President may submit a rescission bill to Congress under the 1974 Budget Act procedure. Congress is at liberty to ignore his request, but a determined President can apply sufficient pressure and appeals to the public so that legislative inaction comes at a cost. Just as important, the President is the one who submits the plan for a national budget and it is within his power to recommend a budget that balances expenditures and revenues in such a way as to minimize or eliminate budget deficits. Presidential leadership of that form has far greater impact on spending and deficits than item-veto authority.