Spring 1988

Item Veto: Shield Against Deficits or Weapon of Presidential Power?

Clavin Bellamy

ITEM VETO: SHIELD AGAINST DEFICITS OR WEAPON OF PRESIDENTIAL POWER?

CALVIN BELLAMY*

The debate over the item veto,[1] like so many other constitutional and political issues, engenders high rhetoric and deep emotion. President Reagan used his 1987 Independence Day address[2] to proclaim an "Economic Bill of Rights" and to argue that he needs tools like the item veto to safeguard America's "essential economic freedoms." He also spoke of the item veto in his 1988 State of the Union address, explaining that he would use this authority to "reach into massive appropriation bills, pare away the waste and enforce budget discipline."[3]

Despite President Reagan's long-time support for the item veto, other public officials doubt its ability to reduce deficits. Instead, they see the item veto as a vehicle for dramatically increasing the President's legislative power and initiative. Republican Senator Mark Hatfield, for example, has described item veto legislation as "constitutional madness and a mindless affront to the concept of separate but equal branches of Government."[4]

This article seeks to avoid strong rhetoric. Instead, the analysis reviews the veto provisions contained in each state constitution and summarizes recent judicial decisions which interpret the item veto. Enlightenment is also sought from relevant proceedings of the Constitutional Convention in 1787. The efficacy of the item veto to control government spending is discussed. Throughout, consideration is given to the impact on the balance of power between the executive and legislative branches. The item veto emerges as a far more complex and confusing procedure than might be supposed initially.

---

* Indiana University (B.A., 1964); University of Michigan (J.D., 1967); President and Chief Executive Officer, Calumet National Bank, Hammond, Indiana.

1. Often also described as the "line item veto." For convenience, "item veto" is used throughout this article except when a quoted passage uses the longer phrase. The terms are interchangeable but "item veto" is more descriptive of the concept as currently applied. The item veto is not limited to a "line" and may include whole paragraphs or sections of a legislative proposal.

2. Chicago Tribune, July 4, 1987, § 1, at 3, col. 1.

3. N.Y. Times, Jan. 26, 1988, at 10, col. 1. Mr. Reagan asked for the item veto in his 1987 State of the Union address, saying then that he wanted to "carve out boondoggles and pork — those items that would never survive on their own." N.Y. Times, Jan. 28, 1987, at 16, col. 1.

4. 131 CONG. REC. S9601 (daily ed. July 17, 1985) (remarks of Senator Hatfield).

In concept, the item veto is deceptively simple. If the President had this authority, he could veto portions of an appropriations bill in addition to his already existing power to veto any legislation in its entirety. The procedure governing the President's action and Congress' response would likely be the same for an item veto as for a general veto. The President would return the vetoed legislation to the house of origin with a message explaining his objections. The veto (whether item or general) would stand unless overridden by a two-thirds vote in both houses of Congress. While the procedure would be similar for both types of vetoes, the impact of a federal item veto on the legislative process could be dramatic, as subsequent sections of this article explain.

I. STATE CONSTITUTIONS

The item veto, drafted by unknown authors, first appeared in 1861 in the constitution adopted by the Confederacy.[5] Though born in rebellion of uncertain parentage, the item veto is today widely accepted by rural and urban states — altogether forty-three states in every part of the country — and has been in operation in most places for many years.[6] Table A summarizes the key provisions of each state's item veto language. The item veto is almost always constitutionally limited to legislation which appropriates money. North Dakota and Wyoming carry the matter one step further by permitting item vetoes of legislation making "appropriation of money or *property*."[7] The State of Washington goes all the way, giving the governor authority to apply the item veto to any type of legislation.[8]

---

5. STAFF OF HOUSE COMM. ON RULES, 99TH CONG., 2D SESS., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION 6-7 (Comm. Print 1986) [hereinafter HOUSE STAFF REPORT].

6. Six states, using the federal model, do not permit their governors to veto items. In those states, the governor's veto must include the entire legislation. Those six states include Indiana, Maine, Nevada, New Hampshire, Rhode Island, and Vermont. A seventh state, North Carolina, denies its governor any type of veto power.

7. N.D. CONST. art. V, § 10; WYO. CONST. art. IV, § 9 (emphasis added).

8. WASH. CONST. art. III, § 12.

9. ALA. CONST. art. V, §§ 125, 126; ALASKA CONST. art. II, §§ 15, 16; ARIZ. CONST. art. V, § 7; ARK. CONST. art. 6, §§ 15, 17; CAL. CONST. art. IV, §§ 10(a), 10(b); COLO. CONST. art. IV, §§ 11, 12; CONN. CONST. art. IV, §§ 15, 16; DEL. CONST. art. III, § 18; FLA. CONST. art. III, §§ 8(a), 8(c); GA. CONST. art. III, § 5, ¶¶ 13(d), 13(e); HAW. CONST. art. III, §§ 16, 17; IDAHO CONST. art. IV, §§ 10, 11; ILL. CONST. art. IV, §§ 9(c), 9(d); IOWA CONST. art. III, § 16; KAN. CONST. art. 2, § 14; KY. CONST. § 88; LA. CONST. art. III, § 18(B); art. IV, § 5(G); MD. CONST. art. II, § 17; MASS. CONST. pt. 2, ch. I, § I, art. II; art. amend. LXIII; MICH. CONST. art. IV, § 33; art. V, § 19; MINN. CONST. art. IV, § 23; MISS. CONST. art. 4, §§ 72, 73; MO. CONST. art. III, § 32; art. IV, § 26; MONT. CONST. art. VI, §§ 10(3), 10(5); NEB. CONST. art. IV, § 15; N.J. CONST. art. V, § I, ¶ 15; N.M. CONST. art. IV, § 22; N.Y. CONST. art. IV, § 7; N.D. CONST. art. V, §§ 9, 10; OHIO CONST. art. II, § 16; OKLA. CONST. art. VI, § 12; ORE. CONST. art. V, §§ 15a, 15b; PA. CONST. art. IV, §§ 15, 16 (as

TABLE A[a]
STATE CONSTITUTION PROVISIONS RELATING TO THE ITEM VETO

State	Item	Reduction	Vote to Override
Alabama	X		majority of membership
Alaska	X	X	3/4 of membership
Arizona	X		2/3 of membership
Arkansas	X		majority of membership
California	X	X	2/3 of membership
Colorado	X		2/3 of membership
Connecticut	X		2/3 of membership
Delaware	X		3/5 of membership
Florida	X		2/3 of those voting
Georgia	X		2/3 of membership
Hawaii	X	X	2/3 of membership
Idaho	X		2/3 of those present
Illinois	X	X	3/5 of membership if vetoed majority of membership if reduced
Indiana	NO		
Iowa	X		2/3 of membership
Kansas	X		2/3 of membership
Kentucky	X		majority of membership
Louisiana	X		2/3 of membership
Maine	NO		
Maryland	X		3/5 of membership
Massachusetts	X	X	2/3 of those present
Michigan	X		2/3 of membership
Minnesota	X		2/3 of membership
Mississippi	X		2/3 of membership
Missouri	X	X	2/3 of membership
Montana	X		2/3 of those present
Nebraska	X	X	3/5 of membership
Nevada	NO		
New Hampshire	NO		
New Jersey	X	X	2/3 of membership
New Mexico	X		2/3 of those present and voting
New York	X		2/3 of membership
North Carolina	NO		
North Dakota	X		2/3 of membership
Ohio	X		3/5 of membership
Oklahoma	X		2/3 of membership
Oregon	X		2/3 of those present
Pennsylvania	X	X	2/3 of membership
Rhode Island	NO		
South Carolina	X		2/3 of membership
South Dakota	X		2/3 of membership
Tennessee	X	X	majority of membership
Texas	X		2/3 of those present
Utah	X		2/3 of membership
Vermont	NO		
Virginia	X		2/3 of those present
Washington	X		2/3 of those present
West Virginia	X	X	2/3 of membership
Wisconsin	X		2/3 of those present
Wyoming	X		2/3 of membership
Model State Constitution	X	X	2/3 of membership

While wording differences exist, several states have similar item veto provisions. For example, the Michigan Constitution, using wording very close to that of twelve other states, provides that: "[t]he governor may disapprove any distinct item or items appropriating moneys in any appropriation bill."[10] Eleven additional states enhance the item veto by authorizing the governor to *reduce* as well as eliminate an appropriations item.[11] With authority to reduce appropriations, the governor's "law making" power is dramatically expanded, as discussion in the next section demonstrates.

Several states have provisions unique to their own circumstances. Hawaii's governor cannot apply his item veto to appropriations for the judicial or legislative branches — an obvious attempt to maintain the balance of power among the three branches.[12] Although Missouri's governor is given the general authority to reduce appropriations, he cannot reduce spending for public education or for the payment of principal and interest on public debt.[13] In Louisiana, the governor "may veto" items of appropriations bills for any reason, but his Constitution also mandates that he "shall veto" sufficient appropriations items (or use other means) to balance the state budget.[14] Washington bars the governor from vetoing less than an entire section of legislation unless that section contains more than one appropriation.[15] In a similar vein, the Florida Constitution restrains the governor's item veto by providing that he cannot veto a qualification or condition

---

interpreted, in part, in Commonwealth *ex rel.* Attorney General v. Barnett, 199 Pa. 161, 48 A. 976 (1901)); S.C. CONST. art. IV, § 21; S.D. CONST. art. IV, § 4; TENN. CONST. art. III, § 18; TEX. CONST. art. IV, § 14; UTAH CONST. art. VII, § 8; VA. CONST. art. V, § 6; WASH. CONST. art. III, § 12; W. VA. CONST. art. VI, § 51D(11); art. VII, §§ 14, 15; WIS. CONST. art. V, § 10; WYO. CONST. art. 4, §§ 8, 9; NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 4.16 (rev. 6th ed. 1968).

10. MICH. CONST. art. V, § 19, the balance of which reads as follows:

> The part or parts approved shall become law, and the item or items disapproved shall be void unless re-passed according to the method prescribed for the passage of other bills over the executive veto.

Similar provisions are found in ALA. CONST. art. V, § 126; ARK. CONST. art. 6, § 17; COLO. CONST. art. IV, § 12; CONN. CONST. art. IV, § 16; DEL. CONST. art. III, § 18; IDAHO CONST. art. IV, § 11; KY. CONST. § 88; MD. CONST. art. II, § 17; N.D. CONST. art. V, § 10; OKLA. CONST. art. VI, § 12; PA. CONST. art. IV, § 16; WYO. CONST. art. 4, § 9.

11. The California provision illustrates this form of the item veto:

> The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. The Governor shall append to the bill a statement of the items reduced or eliminated with the reasons for the action. The Governor shall transmit to the house originating the bill a copy of the statement and reasons. Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.

CAL. CONST. art. IV, § 10(b). For other states with "reduction" authority, see Table A.

12. HAW. CONST. art. III, § 16.

13. MO. CONST. art. IV, § 26.

14. LA. CONST. art. IV, § 5(G).

15. WASH. CONST. art. III, § 12.

placed on an appropriation without also vetoing the appropriation to which it relates.[16]

No state grants an absolute item veto. As Table A shows, all forty-three states empower the legislature to override an item veto — most frequently by a vote of two-thirds. Twenty-three states require the two-thirds to be based on the full membership of the legislature — whether or not the members are present or voting.[17] Eight states count only those legislators who are present[18] and two more states look for two-thirds of those actually voting.[19] Other states use different percentages — most often either an absolute majority[20] or three-fifths of the membership.[21] Alaska provides another twist. A two-thirds vote is generally required to overcome a veto, but if the veto relates to taxes or to appropriations bills (including an item of appropriation), then the override vote must be three-fourths of the membership.[22] In West Virginia, a majority of the members is required to override most vetoes, and two-thirds for budget and appropriations bills.[23] The Illinois Constitution contains a further refinement. Regular vetoes and regular item vetoes can be overridden by a three-fifths vote of both houses. However, if the governor uses his item veto authority to reduce (rather than eliminate) an item, the legislature has an easier requirement. A vote by a majority of the membership of each house can override an item reduction.[24]

In most states, the item veto is established by the addition of just a few words to the Constitution, a short paragraph at most. But there is no uniformly applied or adopted master clause, no single formula that can be carried from one state government to the next. The item veto in practice is a

16. FLA. CONST. art. III, § 8(a).

17. ARIZ. CONST. art. V, § 7; CAL. CONST. art. IV, §§ 10(a), 10(b); COLO. CONST. art. IV, §§ 11, 12; CONN. CONST. art. IV, §§ 15, 16; GA. CONST. art. III, § 5, ¶¶ 13(d), 13(e); HAW. CONST. art. III, § 17; IOWA CONST. art. III, § 16; KAN. CONST. art. 2, § 14; LA. CONST. art. III, § 18(B); art. IV, § 5(G)(1); MICH. CONST. art. IV, § 33; art. V, § 19; MINN. CONST. art. IV, § 23; MISS. CONST. art. 4, § 72; MO. CONST. art. III, § 32; art. IV, § 26; N.J. CONST. art. V, § I, ¶ 15; N.Y. CONST. art. IV, § 7; N.D. CONST. art. V, §§ 9, 10; OKLA. CONST. art. VI, § 12; PA. CONST. art. IV, §§ 15, 16; S.C. CONST. art. IV, § 21; S.D. CONST. art. IV, § 4; UTAH CONST. art. VII, § 8; W. VA. CONST. art. VI, § 51D(11); art. VII, § 15; WYO. CONST. art. 4, §§ 8, 9. *See also* NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 4.16 (rev. 6th ed. 1968).

18. IDAHO CONST. art. IV, §§ 10, 11; MASS. CONST. pt. 2, ch. I, § I, art. II; art. amend. LXIII; MONT. CONST. art. VI, §§ 10(3), 10(5); ORE. CONST. art. V, §§ 15a, 15b; TEX. CONST. art. IV, § 14; VA. CONST. art. V, § 6; WASH. CONST. art. III, § 12; WIS. CONST. art. V, § 10.

19. FLA. CONST. art. III, § 8(c); N.M. CONST. art. IV, § 22.

20. ALA. CONST. art. V, §§ 125, 126; ARK. CONST. art. 6, §§ 15, 17; KY. CONST. § 88; TENN. CONST. art. III, § 18.

21. DEL. CONST. art. III, § 18; MD. CONST. art. II, § 17; NEB. CONST. art. IV, § 15; OHIO CONST. art. II, § 16.

22. ALASKA CONST. art. II, § 16.

23. W. VA. CONST. art. VI, § 51D(11); art. VII, §§ 14, 15.

24. ILL. CONST. art. IV, §§ 9(c), 9(d).

concept with many constitutional variations and even more numerous judicially developed interpretations. Before adding the item veto to the federal system, advocates of this change should describe with particularity which version they are advancing and why.

II. State Judicial Decisions

In recent years, state court review of the item veto has increased dramatically. While these cases have become more numerous, they do not always present a clear or consistent picture of the item veto.[25] Most courts, at least in their early review of the item veto, enunciate nearly universally accepted principles about its nature. One of the most often quoted truisms was summarized by the Supreme Court of Idaho:

> The power of partial veto is the power to disapprove. This is a negative power, or a power to delete or destroy a part or item, and is not a positive power, or a power to alter, enlarge, or increase the effect of the remaining parts or items. It is not the power to enact or create new legislation by selective deletions.[26]

As is so often the case, principles are easier to state in the abstract than to apply in a logical and consistent fashion. For example, since the use of the item veto is generally limited to appropriations bills, courts have often had to struggle with the threshold question of what constitutes an appropriation. When they have found the legislation to be an appropriation, consideration turns to other matters such as the definition of "item," "part," or "section." Additional concerns involve whether conditions or provisions can be eliminated, and if so, whether the legislation so severed and reconstructed still represents the intention of the legislature.

The cases have been so numerous that only a sampling of recent decisions is possible in the following paragraphs. The goal of this exercise is to illustrate the wide variety — and often contradictory nature — of judicial interpretations of the item veto. No attempt is made to harmonize these many cases because no single harmony exists. Moreover, as the following paragraphs make clear, the cases are difficult to characterize. The rulings do not fit into neat categories. Put in other words, frequent state judicial review of the item veto has not cleared the water; in many ways, it has become muddier. The cases described below are intended to demonstrate the tangled state of thinking on these issues. Bewilderment may likely be the natural reaction to this expanding body of case law.

---

25. House Staff Report, *supra* note 5, at 37-38, 164.
26. Cenarrusa v. Andrus, 99 Idaho 404, 414, 582 P.2d 1082, 1092 (1978).

A. Definition of Appropriation

In a number of different contexts, courts have been asked to define what constitutes an appropriations bill. In 1983, the New Mexico Supreme Court held that the governor could not apply the item veto to provisions of the Liquor Control Act. This legislation dealt with granting and revoking liquor licenses but "because the Act does not appropriate money," the court held that "the Governor's veto power was invalidly exercised."[27]

Even though legislation contains many nonappropriation items, a court may permit the governor to item veto those parts relating to appropriations. The Florida Supreme Court upheld the governor's item veto of portions of a bill relating to public education. The House of Representatives, through its Speaker, had challenged the governor's item veto arguing that the lengthy and massive piece of legislation was not an appropriations bill since it contained only one section authorizing the expenditure of funds. The court was unconvinced by the Speaker's argument, however, noting that this single appropriations section could not be considered incidental since it contained eighty-six items authorizing the expenditure of hundreds of millions of dollars.[28]

The Wisconsin Supreme Court also had to define "appropriations bill" when it reviewed legislation that enabled Wisconsin taxpayers to voluntarily contribute one dollar to a state-run campaign fund.[29] The contribution was to be designated on the annual state income tax form and the extra dollar added to the tax otherwise due. The governor used his item veto to strike out a few key words in this provision. The bill, as modified by the governor, allowed taxpayers to designate a dollar for the campaign fund without having to pay the dollar themselves. The payment would come instead from the state's general funds. The governor's action was challenged as an improper item veto on the theory that the campaign finance bill as initially enacted by the legislature did not appropriate public funds and, therefore, was not a bill subject to item veto under the Wisconsin Constitution. But the court did not agree, finding that even under the original legislation, public funds were involved since whatever was collected would be deposited first to the state's general funds and only later transferred to the campaign trust fund.[30]

Other courts have viewed more narrowly the question of what constitutes an appropriations bill subject to the governor's item veto. In Massa-

27. Chronis v. State *ex rel.* Rodriguez, 100 N.M. 342, 344, 670 P.2d 953, 955 (1983).

28. Thompson v. Graham, 481 So. 2d 1212 (Fla. 1986).

29. State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

30. In the court's words, "[t]he Governor's veto left the appropriation untouched. Rather, it affected the source from which the appropriated funds were to be derived." *Id.* at 705, 264 N.W.2d at 550.

chusetts, the governor applied his item veto to the annual county bill in order to eliminate three county positions that he felt were unnecessary. The governor cited savings of $120,000 per year as the reason for his item veto. But the court held that the annual county bill was not an appropriations bill and, therefore, not subject to the item veto.[31]

In *Thomas v. Rosen*,[32] the Alaska Supreme Court reviewed the governor's item veto of one part of a bond issue. The effect of the governor's action would have been to reduce expenditures for fire training centers from $7.1 to $4.2 million. In striking down the governor's item veto, the court drew a distinction between the appropriations process and debt financing.[33]

In indicating less concern about governmental expenditures financed by bond issues, the court may have been influenced by the fact that this particular bond issue (like many but not all Alaskan bond issues) was to be submitted to a voter referendum before it was approved. While recognizing that the people may need the governor to protect them from the excesses of the legislature, the court felt that where the people can speak directly (as in a referendum), they do not need the further protection of the governor's item veto.[34]

Taken as a whole, these cases do not offer a precise definition of what an appropriations bill is. Therefore, they provide little guidance in anticipating how other jurisdictions might craft their own definitions. This definitional muddle also makes it difficult to predict the exact impact and scope of the item veto if it were to be introduced at the federal level.

B. *Definition of Item*

Determining whether the legislation is an appropriations bill is only the

---

31. Opinion of the Justices, 349 Mass. 804, 808, 212 N.E.2d 562, 567 (1965), in which the court stated:

> The annual county bill in substance and effect does not authorize any payment of state funds from the State treasury. It is more in the nature of an authorization of the raising of money by the counties and of the expenditure of money so raised, and of other funds, by the several counties for specified objects.

32. 569 P.2d 793 (Alaska 1977).

33. The Alaska court explained its position as follows:

> Thus, any time the legislature allocates monies from the general fund or special funds, the governor's line item veto would be appropriate. However, the sale of general obligation bonds is the commitment of the state to a debtor relationship with those who purchase the bonds, and is therefore distinguishable from such allocations.

Id. at 796.

34. *Id.* at 796, where the court wrote: "In the case at bar, if the governor's veto of bond authorizations were to prevail, it would in effect allow the executive to interpose its judgment between the legislature and the electorate. Such an expansion of the item veto power is unwarranted . . . ."

initial hurdle. The court must also address whether the vetoed portion is a separate item or section which can be severed from the balance of the act. In *Brault v. Holleman*,[35] the Virginia Supreme Court upheld the governor's item veto of a portion of the mass transit appropriations bill. The vetoed part would have appropriated funds to build the mass transit system. At the same time, the governor let stand another paragraph of the bill appropriating funds to construct parking lots to serve the same mass transit network. Petitioners argued that the entire mass transit provision was a single item of appropriation which could not be separated by the governor's item veto. While conceding that the two appropriations were closely related to each other, the court found the vetoed provision to be a separate, self-contained appropriation, dedicated to a stated purpose.

Many courts take the position that an item can be less than a whole paragraph and possibly less than a complete sentence. In these states, phrases and even words can be made subject to the item veto. In Ohio, for example, the governor was permitted to remove a short clause from the annual health care appropriation that would have guaranteed nursing homes certain fixed payments in caring for state supported patients. The court recognized that the governor's action changed the reimbursement method from a flat payment system to a system based on substantiated costs. Nevertheless, the court felt the fixed payment provision was separate and distinct from other parts of the act.[36]

In Colorado, on the other hand, the governor was unsuccessful in his attempt to item veto a provision that established specific revenue sources to fund specific expenditure. The court concluded that:

> [T]he source of funding is as much a part of an item of appropriation as the amount of money appropriated and the purpose to which it is to be devoted. It cannot be removed from the bill without affecting the legislature's intendment in enacting the measure.[37]

In Iowa, the legislature added a provision in five separate appropriations bills that prohibited the transfer of appropriated funds from one state department to another. The governor used his item veto to remove this clause from each bill. In striking down the governor's action, the court held that his "veto distorted the obvious legislative intent that the funds only be spent for the appropriated purposes."[38] But in another Iowa case, the court sided with the governor when he vetoed part of an appropriations bill that

35. 217 Va. 441, 230 S.E.2d 238 (1976).

36. Elmhurst Convalescent Center, Inc. v. Bates, 46 Ohio App. 2d 206, 348 N.E.2d 151 (1975).

37. Colorado Gen. Assembly v. Lamm, 704 P.2d 1371, 1389 (Colo. 1985).

38. Rush v. Ray, 362 N.W.2d 479, 483 (Iowa 1985).

would have required the State Department of Health to transfer its federal grant for family planning services to another agency. The court upheld the item veto even though the vetoed subsection was not an appropriation. The language constituted a rider — an unrelated piece of substantive legislation grafted onto an appropriations bill — and, therefore, was in the class of legislation that could be item vetoed.[39]

Courts in several other states have also addressed the rider issue. Some have rejected the governor's attempt to apply the item veto to riders.[40] On the other hand, the Massachusetts court has held that even subsequently enacted riders may be subject to the item veto to prevent "evasion of the item veto by a two-step process."[41]

A recent California case[42] involving welfare reform presented a similar issue. The controversy began when the legislature appropriated $1.5 billion to fund California's Aid to Families with Dependent Children (AFDC) program. Then in a separately enacted "implementation bill," the legislature authorized AFDC payments to begin as early as the date the family applied for aid rather than on the date the application was approved, as had been the rule. The governor used his item veto to first reduce the general appropriations bill by the estimated cost of the new rule. He then issued a second item veto to strike the new starting date from the implementation bill.

The court recognized that the implementation bill was not an appropriation and, therefore, not subject to an item veto. If the court had stopped there, this decision might have narrowed the impact of the California item veto. But the court was not finished. It went on to hold that the implementation bill, which was nearly as broad as the budget itself, violated the single subject rule and could not be used as a legislative technique in the future. As a result, legislative attempts to add substantive restrictions to the budget would have to be contained in separately enacted single subject legislation to which the governor could apply his regular veto whenever he wished. While this decision gives a conservative interpretation to the item

39. Colton v. Branstad, 372 N.W.2d 184 (Iowa 1985).

40. *E.g.*, Jessen Assocs., Inc. v. Bullock, 531 S.W.2d 593, 599-600 (Tex. 1975). The legislature enacted a bill requiring Coordinating Board approval of new school construction projects unless the construction was specifically authorized by the legislature. A few days later the legislature approved the annual General Appropriations Act with a rider empowering the University of Texas to spend bond proceeds and other available funds for construction projects at the law school. In rejecting the governor's attempted veto of the law school project, the court ruled that the rider was not an item of appropriation because the language "only referred to funds which have otherwise been made available." *Id.*

41. Opinion of the Justices, 373 Mass. 911, 914, 370 N.E.2d 1350, 1352 (1977). In this case, the legislature amended the general appropriations bill in several respects, including one item that barred the use of public funds to pay for abortions. The court upheld the governor's item veto of the abortion ban even though it did not involve a direct appropriation of funds.

42. Harbor v. Deukmejian, 43 Cal. 3d 1078, 742 P.2d 1290, 240 Cal. Rptr. 569 (1987).

veto, it does so in the context of increasing the legislative prowess of the California governor.

In a variety of different settings, the courts have attempted to address what constitutes an item of appropriation. These many decisions, coming from different courts or even the same courts at different times, produce various and not always consistent results. Even with this diversity, however, contemporary case law shows the tremendous impact that the item veto has had on the legislative process and on public policy, especially when the judiciary gives the governor's power a liberal interpretation. In considering the item veto at the federal level, thorough consideration should be given to its ability to enhance presidential power and leverage in the lawmaking process. Recent cases provide a reminder that more than control of spending is in question. The real issue is the direction of public policy and the process that is used to determine that policy.

C. Provisions and Conditions

Governors frequently attempt to apply the item veto to conditions designed by the legislature to limit or control the expenditure of appropriated funds. Some courts permit such vetoes to stand. Other courts do not. These cases are often similar to those described in the preceding section, and like those cases, reinforce the conclusion that courts, even when interpreting similar constitutional provisions, do not reach consistent conclusions.

In 1981, the Massachusetts Supreme Court reviewed the governor's attempt to veto part of an appropriations bill relating to care for children and battered women.[43] In striking down this item veto, the court held the conditions imposed on these programs by the legislature were inseparable from the actual appropriations made for them, concluding, "[d]eletion of the provisions directly affects the legislative purpose to provide a certain level of funding for these programs."[44]

Other courts have also limited the governor's power to item veto provisions or conditions. New Mexico's governor wished to remove some conditions regulating expenditures by the State Planning Office. In striking down the governor's veto, the court held, "[t]he effect of this attempted veto was to affirmatively appropriate $150,000 without conditions and without regard to the limitation on the amount thereof which could be disbursed."[45] This same court also objected to an item veto that struck out portions of a complete and readily understandable sentence. The court held that the gover-

43. Opinion of the Justices, 384 Mass. 828, 428 N.E.2d 117 (1981).
44. *Id.* at 837, 428 N.E.2d at 123.
45. State *ex rel.* Sego v. Kirkpatrick, 86 N.M. 359, 366, 524 P.2d 975, 982 (1984).

nor's veto was an attempt "to appropriate funds for an uncertain purpose by grammatically incorrect language."[46]

But in the 1984 case of *Karcher v. Kean*,[47] the New Jersey Supreme Court took a more expansive view of the governor's power in upholding several item vetoes. One part of the appropriations bill under review provided funds to construct a new state prison. In appropriating these funds, the legislature added a proviso which prohibited the new prison from being located in a certain county. The court permitted the governor to remove this proviso and noted that "the selective veto power may be exercised with respect to any subject matter that is included in the appropriations act and is broadly related to the State's fiscal affairs as reflected in the act."[48] The court also upheld several item vetoes relating to highway appropriations. These vetoes eliminated specific projects but left aggregate spending at the same levels as passed by the legislature. In effect, the governor's item vetoes freed the funds from the purposes chosen by the legislature and instead made them subject to priorities set by the governor.[49] The New Jersey decision and other similar liberal interpretations[50] of the item veto are interesting because of the wide latitude given the governor to modify legislative intent. These cases demonstrate that the item veto can be and often is much more than a tool of fiscal restraint. None of these vetoes reduced total expenditures. They merely enabled the governor — for good or for ill — to replace the legislature's priorities with his own.

Surprising results may occur even when the court sets out to deny the governor authority to delete substantive sections or conditions. The Oklahoma Supreme Court's decision in *State ex rel. Wiseman v. Oklahoma Board of Corrections*[51] provides a classic example of the twisted logic that

---

46. *Id.* at 367, 524 P.2d at 983. *See also* Cenarrusa v. Andrus, 99 Idaho 404, 582 P.2d 1082 (1978).

47. 97 N.J. 483, 479 A.2d 403 (1984).

48. *Id.* at 508, 479 A.2d at 416.

49. *Id.* at 489-497, 479 A.2d at 411-13.

50. *See, e.g.*, Attorney General v. Administrative Justice, 384 Mass. 511, 427 N.E.2d 735 (1981), where the court upheld the governor's item veto of a provision making the administrative judge of the Boston Municipal Court also the administrative overseer of the Housing Court, and State *ex rel.* Kleczka v. Conta, 82 Wis. 2d 679, 707, 264 N.W.2d 539, 551 (1978), where the court upheld the governor's item veto of a portion of Wisconsin's campaign finance law, using a test of severability that simply required "that what remains be a complete and workable law. The power of the Governor to disassemble the law is coextensive with the power of the Legislature to assemble its provisions initially."

51. 614 P.2d 551 (Okla. 1980). The legislation under review related to the state prisons. The bill contained several items of appropriation to support the system and several additional sections of general legislation (nonappropriations) defining the duties and responsibilities of prison officials. One nonappropriation provision was section 17, which mandated a census of the prison population and established criteria for granting paroles. When the bill was presented to the governor at the end of the legislative session, he signed it noting his approval

so often attends item veto cases. The governor was presented with a bill that contained both appropriations and nonappropriations provisions. He wished to apply his item veto to one of the nonappropriations sections. In evaluating the governor's action, the court divided the bill into two parts and treated those parts — the appropriations sections and the general legislation sections — as if they were independent legislation.[52]

Since the governor did not object to any of the appropriations provisions, the court held that they all became law. But the status of the general provisions was not so simple or straightforward. After first holding that the governor could not item veto a condition of general legislation, the court proceeded to strike down every single general legislative provision contained in the bill. The court reasoned that by disapproving just one section, the governor had failed to give unconditional approval to the general legislative provisions. The absence of unqualified approval constituted a pocket veto because the bill was presented to the governor at the end of a legislative session. Therefore, all of the nonappropriations sections failed.[53]

The impact of this decision is ironic indeed: while holding that the governor could not use the item veto to eliminate legislatively designed conditions, the court nevertheless empowered the governor to run the prison system without any of those conditions. In effect, this opinion "treats as two bills that which was born as one," a manipulation of legislative intent and action that a dissenting justice thought was not "proper or wise."[54] Yet such is the anomalous result of the item veto, at least in Oklahoma.

Whenever the governor has the authority to remove legislative conditions governing the expenditure of public funds, he becomes the ultimate determiner of how the funds are spent. His ability to design and implement public policy is greatly increased and the role of the legislature is simultaneously diminished. If the item veto is to be introduced at the federal level, the impact on the delicate balance between the Chief Executive and Congress must be carefully assessed.

D. Power to Reduce Appropriations

As Table A shows,[55] several state constitutions authorize the governor to reduce as well as veto items of appropriation. With the power to *reduce* an appropriation, the governor has three formal levels on which he can impact legislation. He has the traditional power (like the President) to veto

---

of the entire bill except section 17.

52. *Id.* at 556-57.

53. *Id.* at 556.

54. *Id.* at 557 (Doolin, J., dissenting).

55. *See supra* text accompanying note 9.

the entire legislation. If he feels this action is too severe, he may use the item veto to "carve" out and eliminate a portion of the legislation. But if he does not want to go even that far, he can leave the structure created by the legislature undisturbed and merely reduce the funds allocated for that purpose.[56] The ability to reduce items of appropriation clearly maximizes the governor's influence and power in the legislative process. He has more options and more opportunities to influence and shape the outcome. Perhaps fear of this great magnification of the governor's law-making power is the reason only eleven states permit item reduction.

Authority giving the governor the power to reduce appropriations is generally found in a specific constitutional provision. But in one state, the authority was created by judicial interpretation. In a very old case,[57] the Pennsylvania Supreme Court held that the state's constitutional item veto provision included the power to reduce as well as eliminate appropriations, finding that an appropriations bill

> though it be for a single purpose, necessarily presents two considerations almost equally material, namely, the subject and the amount. The subject may be approved on its merits, and yet the amount disapproved, as out of proportion to the requirements of the case, or as beyond the prudent use of the state's income. The legislature had full control of the appropriation in both its aspects and the plain intent of this section was to give the governor the same control.[58]

Whatever the force of this argument, no other recent cases could be found where courts were willing to imply an authority to reduce where not specifically provided in the state constitution.[59]

E. Conclusion

Courts often approach the item veto from a similar philosophical basis: that the item veto is merely a negative power which cannot be used to nul-

---

56. The additional leverage given the governors of these states is demonstrated by an Illinois case concerning the annual funding of three teacher pension plans. Without disturbing the basic structure of the retirement plans, the governor was able to use his item veto to reduce the annual appropriation by $186 million, more than half the amount approved by the legislature. People *ex rel.* Illinois Fed'n of Teachers v. Lindberg, 60 Ill. 2d 266, 326 N.E.2d 749 (1975).

57. Commonwealth *ex rel.* Attorney General v. Barnett, 199 Pa. 161, 48 A. 976 (1901).

58. *Id.* at 173-74, 48 A. at 976.

59. Before its new constitution authorized item reduction, the Illinois Supreme Court refused to permit the governor this additional authority, finding that the power to reduce appropriations is power to "perform a function which belongs exclusively to the legislative branch — that of using the discretion necessary to determine the amount which should be appropriated for any particular object." Fergus v. Russel, 270 Ill. 304, 349, 110 N.E. 130, 147 (1915).

lify legislative intent. In the words of the Florida Supreme Court: "The governor may not reassign vetoed moneys to other uses; he can neither create projects nor require the legislature to do so. The funds vetoed in this appropriation remain unexpended rather than being used for a different purpose."[60] But in reviewing recent state cases described above, the statement by the Washington Supreme Court may be more to the point when the courts leave philosophical speculation and approach the reality of the situation before them: "[W]e find the [affirmative-negative] test to be unworkable and subjective; it is a conclusion, not a test. There are no standards to predict whether a veto will be perceived by the court as affirmative or negative."[61]

Because the courts have been contradictory in their interpretations, there is little predictability from state to state. In this confused and mixed setting, state cases provide limited guidance on how item veto langauge would be read in specific factual situations if applied to the federal level. However, these cases illuminate one point that may be of value in the current debate. In a multitude of different circumstances, the courts have provided a framework that generally works to increase the chief executive's power — power that can be used not simply to reduce spending but which can also be exercised to determine or redirect public policy.[62] It is this aspect of the item veto which deserves more forthright discussion at the federal level. Fiscal restraint is not the real issue. The question that needs answering is this: Is it wise to introduce at the national level a tool like the item veto that defies clear definition and has the potential for changing the balance of power between the President and Congress?

III. Federal Constitutional History

The President's power to veto legislation passed by Congress is set forth in Article I, Section 7 of the Constitution.[63] One of the longer provi-

60. Thompson v. Graham, 481 So. 2d 1212, 1215 (Fla. 1986). *See also* Rush v. Ray, 362 N.W.2d 479 (Iowa 1985).

61. Washington Fed'n of State Employees v. State, 101 Wash. 2d 536, 546, 682 P.2d 869, 874 (1984). *See also* State *ex rel.* Sundby v. Adamany, 71 Wis. 2d 118, 237 N.W.2d 910 (1976) (upholding the governor's item veto that had the effect of making local referenda on tax levies mandatory instead of optional as provided in the bill passed by the legislature).

62. *See* Brown v. Firestone, 382 So. 2d 654 (Fla. 1980) (considered six attempted item vetoes, some of which were upheld and others which were not).

63. U.S. Const. art. I, § 7. The relevant parts of Article I, § 7 read as follows:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent together with the Objections, to the other House, by

sions of the Constitution, Section 7 makes clear that the President may exercise his veto only over a bill as a whole. The federal Constitution, unlike so many state constitutions, provides no authority to veto parts — or items —of legislation. The federal Constitution takes an "all or nothing" approach to executive vetoes.

The introduction of any veto authority into the Constitution may at first seem curious and surprising, considering the American colonists' belief that the royal veto had been so often misused. In fact, the King's refusal to "Assent to Laws, the most wholesome and necessary for the public good" was listed in the Declaration of Independence as one of the justifications for the American Revolution. By the time of the Constitutional Convention in 1787, many Americans still remembered the excessive and arbitrary use of the royal veto. Benjamin Franklin, frequently and in graphic terms, recounted for his fellow delegates the misuse of the veto by the colonial Governor of Pennsylvania:

> The negative of the Governor was constantly made use of to extort money. No good law whatever could be passed without a private bargain with him. An increase of his salary, or some donation, was always made a condition; till at last it became the regular practice, to have orders in his favor on the Treasury, presented along with the bills to be signed, so that he might actually receive the former before he should sign the latter. When the Indians were scalping the western people, and notice of it arrived, the concurrence of the Governor in the means of self-defense could not be got, till it was agreed that his Estate should be exempted from taxation. . . .[64]

Roger Sherman also spoke against "enabling any one man to stop the will of the whole."[65] This theme was repeated by the opponents of the Constitution during the state ratification debate. Luther Martin exclaimed, for example, "[t]hat the President was not likely to have more wisdom or integrity" than Congress, nor "to better know or consult the interests of the states."[66]

Despite these strong arguments, the Convention (and ultimately the nation) recognized the value of an executive veto, perhaps convinced by Madison's argument that a greater threat to republican principles can be expected from the "powerful tendency in the Legislature to absorb all

---

which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law.

64. 1 W. BENTON, 1787: DRAFTING THE U.S. CONSTITUTION 794 (1986). *See also id.* at 798-99 and 801-02.

65. *Id.* at 794.

66. 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 54 (1981).

power into its vortex."[67] Without some sort of veto authority, Gouverneur Morris feared that the Executive's powers would be "so inconsiderable and so transitory" and "so feeble" as to make it unlikely that he could resist "Legislative usurpations" and "incroachments."[68]

After deciding that the veto was desirable, Convention delegates next debated who should have this important power. Edmund Randolph initially proposed that this responsibility be given to a "Council of revision" consisting of the President and "a convenient number of the National Judiciary."[69] Much debate occurred on this proposal.[70] Charles Pinckney thought that the "heads of the principal departments" would make more appropriate members of the council of revision.[71] In the end, both of these suggestions were rejected and the power was vested in the President alone.

The other major veto debate concerned whether the President's veto should be absolute or subject to a legislative override. James Wilson argued for the "absolute negative" without which he felt the "Legislature can at any moment sink [the Presidency] into nonexistence."[72] But the Convention decided that the President's veto should be subject to override by a supermajority of two-thirds of each house of Congress.

The philosophy behind giving the President alone the veto power and at the same time enabling Congress to override any particular veto was perhaps best expressed by Alexander Hamilton during the ratification debate in New York:

> The primary inducement to conferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to encrease [sic] the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those misteps [sic] which proceed from the contagion of some common passion or interest.[73]

In establishing the executive veto, the twin goals of the Framers were accomplished. The existence of the veto increased the power of what the

67. W. BENTON, *supra* note 64, at 811.
68. *Id.* at 812.
69. *Id.* at 792.
70. *Id.* at 792, 804-14.
71. *Id.* at 805.
72. *Id.* at 793.
73. THE FEDERALIST No. 73, at 495 (J. Cooke ed. 1961) (A. Hamilton).

Framers thought would be a weak chief executive. The possibility of reconsideration and the protection against the passions of the moment were accommodated in two ways: by giving the President power to veto and by giving Congress, by a two-thirds majority, authority to reconsider and override that veto.

Modern advocates on both sides of the item veto debate can find supportive general statements uttered by Convention delegates.[74] Both sides have strong reasons to do so since connecting any cause with the intentions of the Framers is "the hallmark of political respectability in this country."[75] Those fearing increased Presidential power that they believe comes with the item veto will recall Franklin's warning, "The Executive will be always increasing here, as elsewhere, till it ends in Monarchy."[76] But supporters of the item veto may cite George Mason's belief that the real danger is from the frequent passage of "unjust and pernicious laws," which make the restraining power of an effective veto "essentially necessary."[77] However strong the desire to claim support by one or more of the Founding Fathers, these arguments provide virtually no help in settling the current debate over the item veto.

Having addressed whether to establish a veto and in whom it would be vested and whether to make this power limited or absolute, the Convention left the subject. No recorded debate hints at authorizing the President to veto less than all of a bill. Sherman at one point argued that the veto power was only needed "as to votes taking money out of the Treasury"[78] but even here he probably was thinking of an appropriations bill in its totality. In any case, the argument was not developed further. The birth of the item veto concept would have to wait for another time — more than seven decades in the future.[79]

IV. Presidential Veto Power in Practice

From Washington's presidency through 1984, Presidents have exercised their veto power 2430 times. Washington vetoed only two bills. Seven

74. *See* Best, *The Item Veto: Would the Founders Approve?*, 14 PRES. STUD. Q. 183 (1984) (arguing that the Framers would favor the item veto because it enhances "opportunity to reconsider"); Spitzer, *The Item Veto Reconsidered*, 15 PRES. STUD. Q. 611 (1985) (arguing that the Framers would have opposed the item veto because of the power of today's "imperial president").

75. Best, *supra* note 74, at 183.

76. W. BENTON, *supra* note 64, at 797.

77. *Id.* at 814.

78. *Id.* at 824. Gouverneur Morris also thought a restraint was needed on the legislature when it considers "[e]missions of paper money, largesses to the people — a remission of debts and similar measures." *Id.* at 812.

79. *See* HOUSE STAFF REPORT, *supra* note 5, at 6-7.

Presidents never used the veto power.[80] Two Presidents vetoed legislation with exceptional frequency: Cleveland in two terms exercised the veto 584 times, while Franklin Roosevelt vetoed 635 bills, with all but one of those vetoes occurring in his first three terms.[81]

While the Framers generally intended for the President to have a "qualified" or "limited" negative over legislation, one type of veto (now commonly referred to as a pocket veto) is absolute. If Congress adjourns within ten days of presenting a bill to the President, his refusal to sign constitutes an absolute veto which cannot be overridden because, in the words of the Constitution, "Congress by their Adjournment prevent its Return."[82] Presidents have exercised the pocket veto 1032 times.

The remaining 1398 Presidential negatives occurred early enough during the Congressional session so that the President was obligated to "return" the vetoed bill for possible override by two-thirds vote in both houses. Only ninety-eight of these vetoes have been actually overridden — about seven percent of all regular vetoes.[83] Three presidents — Andrew Johnson, Harry Truman, and Gerald Ford — account for the greatest number of overrides, thirty-nine among them or about forty percent of the total.[84] Not surprisingly, these Presidents had hostile Congresses. Johnson, a Democrat elected as Vice President with Republican Abraham Lincoln, was impeached and nearly removed from office by the Republican-dominated Congress. Republican Ford always had a Democratic Congress and Truman governed with opposing Republicans in control of Congress two of his seven years and with many Southern Democrats regularly voting against his policies.[85]

The Framers may have thought they were creating a "qualified" negative in giving the Congress the ability to override a regular presidential veto, but few vetoes are actually overridden. This has generally been the case even where Congress is hostile to the President. Truman and Ford, while experiencing a relatively high number of overrides, were successful in having the vast majority of their vetoes sustained.[86] Only the hapless Andrew Johnson fared badly with fifteen of his twenty-one vetoes being over-

---

80. John Adams, Thomas Jefferson, John Quincy Adams, William Henry Harrison, Zachary Taylor, Millard Fillmore, and James Garfield. *See* PRESIDENTIAL VETOES, 1977-1984, ix (U.S. Government 1985).

81. *Id.*

82. U.S. CONST. art. I, § 7. *See also* Bellamy, *The Growing Potential of the Pocket Veto: Another Area of Increasing Presidential Power*, 61 ILL. BAR J. 85 (1972).

83. PRESIDENTIAL VETOES, 1977-1984, *supra* note 80, at ix.

84. *Id.*

85. MEMBERS OF CONGRESS SINCE 1789 (Cong. Q., 3d ed. 1985).

86. Truman suffered 12 overrides out of 180 vetoes and Ford 12 overrides out of 48 regular vetoes. PRESIDENTIAL VETOES, 1977-1984, *supra* note 80, at ix.

ridden.[87] Thus, the President has a very powerful — nearly absolute — weapon in his ability to veto legislation.

Another way to demonstrate the potency of the veto is to compare the two categories of legislation that have been passed over the President's veto: (1) broad, wide-ranging legislation relating to general policy; and (2) legislation that is focused on a narrow issue — relief for a single individual (an immigration or pension matter, for example) or a single project (post office building in a certain community or a particular bridge). Table B makes this comparison. While the presidents from Franklin Roosevelt through the first term of Reagan had their vetoes overridden forty-six times, only twice was the override vote successful for a narrow focus bill. The other forty-four successful overrides were of broad legislation. This result is not surprising since legislation relating to general policy might be expected to have more support in the country as a whole than a special pension for the widow of a single forgotten veteran.

TABLE B[88]

VETO OVERRIDES BY TYPE OF LEGISLATION

	Total Regular Vetoes	Total Vetoes Overridden	Override of General Legislation	Override of Narrow Focus Legislation
Roosevelt	372	9	9	0
Truman	180	12	11	1
Eisenhower	73	2	2	0
Kennedy	12	0	0	0
Johnson	16	0	0	0
Nixon	26	5	5	0
Ford	48	12	12	0
Carter	13	2	2	0
Reagan (1st term)	18	4	3	1
	758	46	44	2

Table B suggests the potential impact of an item veto, were the President to be granted that authority. Narrow focus legislation would seem analogous to the riders or items that make up more comprehensive legislation. If this analogy is accurate, an item veto would rarely be overridden, giving the President almost absolute power to cancel pieces and parts of

87. *Id.*

88. PRESIDENTIAL VETOES, 1789-1976 (U.S. Government 1978); *id.* at 238-94 (Roosevelt and Truman); *id.* at 395-426 (Eisenhower); *id.* at 427-36 (Kennedy and Johnson); *id.* at 437-48 (Nixon and Ford); PRESIDENTIAL VETOES, 1977-1984, *supra* note 80; *id.* at 1-8 (Carter); *id.* at 9-18 (first term of Reagan).

legislation that he did not like. Thus, as a practical matter, incorporating the item veto into the federal system would not give Congress the ability "for reconsideration and reassessment, for the second-thought and the afterthought" that some advocates of item veto cite as its chief justification.[89] Instead, the President would simply gather to himself the nearly absolute right to say no.

Moreover, the President's power to influence and control the legislative process is not confined to the legislation he actually vetoes. The Framers and every incumbent in that high office have recognized that the veto also has a "silent operation" — by encouraging Congress to "refrain from such laws" as the President would likely veto.[90] Item veto advocates may argue that the ability to forestall "bad legislation" is precisely the reason the President needs expanded veto power — to prevent the enactment in the first place of wasteful and costly riders.

But the impact can be much broader. An activist President may not be satisfied with merely blocking a free spending Congress. The President may — and generally does — have his own agenda. Sometimes his aspirations involve domestic programs; other times he may assign priority to defense and foreign affairs. Whatever he may wish to achieve, his chances of success are enhanced by the item veto. It gives him another bargaining chip. Thus, the item veto may or may not produce more thoughtful and less extravagant legislation. But as experience in the forty-three item veto states demonstrates,[91] the sure result is legislation more shaped to the executive's priorities and less to those of the legislative branch.

V. Federal and State Appropriation Processes Compared

The United States Constitution directs that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[92] The precise form of appropriations bills and the procedures that govern their enactment are not specified anywhere in the Constitution. Presumably, the Framers intended Congress to set its own rules for these matters, and Congress has done so in various ways over the two hundred year history of the Constitution.[93]

By contrast, state constitutions generally bind their legislatures with very detailed rules, procedures, and prohibitions. California, for example, requires appropriations bills to follow the organization of the governor's

89. Best, *supra* note 74, at 184.

90. W. Benton, *supra* note 64, at 795 (Delegate Wilson).

91. *See supra* notes 25-62 and accompanying text.

92. U.S. Const. art. I, § 9.

93. *See* Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U.L. Rev. 51 (1979).

budget.[94] Moreover, until the budget is enacted the legislature is barred from acting on other appropriations except emergency appropriations recommended by the governor.[95] Michigan's Constitution also contains this latter restriction.[96] In New York, the legislature cannot change the budget as submitted by the governor "except to strike out or reduce items therein." If the legislature wishes to add new items of appropriation it can only do so "provided that such additions are stated separately and distinctly from the original items."[97] In Maryland, the governor's power is even greater since the legislature is only able to reduce but not increase the governor's budget for executive departments, which represents the bulk of the total budget.[98] In nearly all states, the legislature is required to limit each bill to a single subject or to describe in the title what its specific purposes are.[99]

A. Lump Sum Appropriations

State appropriations bills, reflecting the detailed constitutional and legislative framework that governs their creation, are generally either divided into individual pieces of legislation or are arranged in separately itemized provisions.[100] This arrangement is consistent with and a necessary prerequisite to the governor's item veto power. Federal appropriations tend not to be so precise or detailed. In fact, Congress generally appropriates lump sum amounts without specific legislative reference to individual projects or programs. These lump sum appropriations often provide for the expenditure of millions, or even billions of dollars. Congress chooses to give most of its instructions outside the confines of appropriations bills in the form of committee reports and the joint explanatory statements that accompany the reports of conference committees.[101]

---

94. CAL. GOV'T CODE § 13338 (West 1980) (amended 1981).

95. CAL. CONST. art. IV, § 12(c).

96. MICH. CONST. art. IV, § 31.

97. N.Y. CONST. art. VII, § 4.

98. MD. CONST. art. III, § 52, ¶ 6. This provision gives the legislature authority to increase as well as reduce appropriations only for the legislative and judicial branches, but these expenditures would obviously represent only a small fraction of the state's expenditures.

99. *See, e.g.*, CAL. CONST. art. IV, § 12(d); ILL. CONST. art. IV, § 8; MD. CONST. art. III, § 29; MICH. CONST. art. IV, § 24; N.Y. CONST. art. III, § 15.

100. For an example of one state's appropriations process and the governor's response to it, see Henry v. Edwards, 346 So. 2d 153 (La. 1977).

101. One small example of the lump sum appropriation technique is provided by the United States Supreme Court's decision in TVA v. Hill, 437 U.S. 153 (1978), sometimes referred to as the "snail darter" case since the controversy concerned the habitat of this tiny and prehistoric fish. At issue was the construction of the Telleco Dam and Reservoir along the Little Tennessee River. The TVA appropriation nowhere mentioned this dam or the amount of money to be spent on it. Detailed instructions for the project along with numerous other projects and activities were contained in House and Senate committee proceedings, which the Court relied on in part to reconcile this appropriation and the Endangered Species Act of

This informal — almost casual — way of appropriating vast sums of money has been practiced off and on from the earliest days of the Republic and is the general method used currently.[102] Scholars cite several advantages of lump sum appropriations.[103] Executive agencies and program managers have more flexibility, more opportunity to apply expert judgment and take initiatives to meet changing circumstances if Congress grants lump sum appropriations. Crises can better be resolved when appropriations are general.[104] While apparently conceding the value of the added flexibility, Congress attempts to direct and guide executive action with the lengthy sets of instructions it provides in nonstatutory places (i.e., committee reports), and it expects the President and his executive officers to carry out those instructions. These outside instructions do not have the force of law, but are generally respected.[105]

However convenient and flexible this system may be, it is not well suited to the application of the item veto. In fact, applying an *item* veto to a *lump sum* appropriation seems to be a contradiction in terms and cannot be documented in state experience where appropriations are always arranged in item form. Moreover, since instructions in committee reports "cannot be equated with statutes enacted by Congress,"[106] they probably cannot be made subject to the item veto. In short, implementing the item veto at the federal level would take more than a simple Constitutional amendment granting this power to the President. The entire appropriations process would also have to be changed. Congress would have to forego lump sum appropriations and instead build its appropriations bills item by item with all the specific projects listed in the actual legislation. Unless Congress is willing (or can be compelled) to legislate in this manner, a federal item veto would have little impact.

B. Entitlement Programs and Debt Service

Another practical impediment to the use of the item veto at the federal level arises from the semipermanent nature of a large portion of federal spending. Some of the federal government's greatest expenditures — e.g., Social Security, Medicare, Medicaid, retirement and disability payments for veterans and civil service and railway retirees — are legally mandated by permanent law which establishes on a continuing basis eligibility standards and benefit levels. These mandated programs legally obligate the federal government to make the required expenditures regardless of the annual

---

1973. *Id.* at 192-93.

102. Fisher, *supra* note 93, at 59-74.

103. *See generally* HOUSE STAFF REPORT, *supra* note 5, at 62-118.

104. Fisher, *supra* note 93, at 66-67.

105. *Id.* at 87-88.

106. TVA v. Hill, 437 U.S. 153, 191 (1978).

budget process. For these expenditures, there would be no annual opportunity to apply the item veto. Even where entitlement programs are nominally subject to annual appropriations, a reduction in payments or a narrowing of the class of beneficiaries could not be accomplished without a change in the underlying law, which may not have been enacted in the same year and, therefore, could not be made subject to item veto long after enactment.[107]

Interest due on the national debt presents a similar issue. This obligation, which has become one of the single largest items of domestic spending is governed by a permanent, open-ended appropriation that authorizes the expenditure of whatever is necessary.[108] Thus, it too would be immune to an item veto.

C. *Other Federal Expenditures*

The remainder of the federal budget consists of appropriations for national defense and domestic discretionary programs which depend on annual appropriations. Even here, however, there would be some limitation on the use of the item veto since large parts of current spending for both domestic and defense purposes are based on commitments made in prior years.[109] President Reagan has further narrowed the potential operation of the item veto by his frequently stated intention to maintain defense spending close to present levels.[110] If Mr. Reagan is not likely to use the item veto on defense spending, discretionary domestic spending would be the only remaining category subject to full application of the item veto. But domestic programs, consisting of only ten to fifteen percent of the budget,[111] are among the few spending categories to have actually declined in recent years.[112] Whether domestic spending can withstand further substantial reductions is open to speculation. But whatever the answer to that question it is clear that the item veto, because of its limited applicability, would not be a particularly effective weapon in reducing overall federal expenditures.[113]

---

107. *See* HOUSE STAFF REPORT, *supra* note 5, at 56-61; AMERICAN ENTER. INST. FOR PUB. POLICY RESEARCH, PROPOSALS FOR LINE-ITEM VETO AUTHORITY 5-7 (1984) [hereinafter AEI STUDY].

108. 31 U.S.C. §§ 1305(2), 3123 (1982). For an account of the impact of interest on the national debt, see Mossberg, *Cost of Paying the Foreign Piper*, Wall St. J., Jan. 18, 1988, at 1, col. 5.

109. AEI STUDY, *supra* note 107, at 16.

110. *See* reports of Mr. Reagan's 1987 and 1988 State of the Union addresses, N.Y. Times, *supra* note 3.

111. 131 CONG. REC. S9602 (daily ed. July 17, 1985) (remarks by Senator Hatfield); Fisher & Devins, *How Successfully can the States' Item Veto be Transferred to the President?*, 75 GEO. L.J. 159, 189 (1986); Tate, *Reagan's Deficit — Cutting Bid may Spotlight Line-Item Veto*, 42 CONG. Q. 114, 115 (1984).

112. AEI STUDY, *supra* note 107, at 16-18.

113. Senator Hatfield has estimated that the 100% elimination of all non-defense domes-

VI. IMPACT ON BALANCE OF POWER

The debate over the item veto usually arises in the context of controlling government spending. Cast in this light, the item veto is seem as a defensive weapon able to limit extravagant or unwise spending. Viewed more broadly, the item veto has the potential to significantly alter the dynamics of the American political process. All Presidents — conservative and liberal —have their "own spending impulses."[114] Liberals like Franklin Roosevelt and Lyndon Johnson had massive domestic programs. Moderate Dwight Eisenhower launched the multibillion dollar interstate highway system and conservative Ronald Reagan presided over the greatest peacetime build-up of the armed forces. The tendency of all recent Presidents to develop elaborate spending habits has led to the assertion that the item veto debate is not really about spending. Rather, the debate is over whose agenda — the President's or Congress' — is to prevail.[115]

As with so many other political debates, there is no sure or scientific method to test this thesis. Since the power has never existed at the federal level, there is not even episodic evidence on its impact. State example and analogy, while imperfect,[116] provide the only source of information about the operational impact of the item veto. One study has explored the impact on balance of power by polling participants in the state budgetary process in forty-five states. This study found that "Partisanship and the use of the item veto are intricately related."[117] While partisan in impact, the item veto is also "bipartisan" in application — "neither a Republican nor Democratic instrument, it is used by both."[118] Concluding with the observation that "[i]t is easier to portray the item veto as an instrument of the executive increasing his or her legislative powers rather than as an instrument for [fiscal] efficiency," the study recognized that "the item veto probably has had minimal effect on making legislatures or state government fiscally more

---

tic discretionary appropriation items would have left a federal deficit of over $100 million for Fiscal 1986. *Line Item Veto: Hearings on S. 43 Before the Senate Comm. on Rules and Admin.*, 99th Cong., 1st Sess. 47 (1985) [hereinafter SENATE HEARINGS]. Studies at the state level also indicate little fiscal impact from the presence of the item veto. *See, e.g.* Cronin & Weill, *An Item Veto for the President*, 12 CONG. & PRESIDENCY 127, 145-46 (1985) (indicating per capita spending may be higher in item veto states than in non-item veto states); Gosling, *Wisconsin Item-Veto Lessons*, 46 PUB. ADMIN. REV. 285, 298 (1986) (where in a twelve-year period, the most impact the governor's item veto had on any one budget was 2.5% of revenue). *See also* Abney & Lauth, *The Line-Item Veto in the States: An Investment for Fiscal Restraint or an Investment for Partisanship*, 45 PUB. ADMIN. REV. 372, 374 (1985).

114. Cronin & Weill, *supra* note 113, at 131.

115. *Id. See also* Fisher & Devins, *supra* note 111, at 164-65, 191-93.

116. *See supra* notes 25-62 and accompanying text.

117. Abney & Lauth, *supra* note 113, at 376.

118. *Id.*

restrained."[119]

Another study examined the impact of the item veto in Wisconsin during the twelve-year period beginning in 1975.[120] This study also found that the item veto had modest impact in reducing state spending. The greatest impact was in fiscal period 1981-1983 when the governor's item veto was credited with reducing state spending by a modest 2.5 percent. In the balance of the twelve-year test period, the effect was much smaller.[121] The governor was three times more likely to cite policy disagreement than cost in justifying his item veto of a measure.[122] Nearly three quarters of all item vetoes "had no fiscal effect at all."[123] In short, "item veto has been used in Wisconsin more as a tool of policy than as one of fiscal restraint."[124]

The 1983-84 budget debate in Pennsylvania provides a startling example of how the item veto affects balance of power.[125] The legislature initially enacted a budget that differed significantly from that proposed by the governor. Among the differences was the legislature's failure to enact certain tax increases recommended by the governor. Expressing his displeasure with what the legislature had done, the governor used his item veto to substantially reduce grants for public education. In addition, he reduced the budget for the state senate by sixty-two percent (including senators' salaries and expenses) and completely eliminated salary and mileage expenses for members of the House of Representatives. Not surprisingly, the legislature promptly accepted the governor's invitation to renew negotiations to develop a mutually acceptable budget bill.

Even in Pennsylvania, the governor could not use this heavy-handed approach very often since the legislature, in most instances, would have the opportunity to override his veto by a supermajority. In addition, constitutional barriers could easily be erected to prevent the item veto from being used to attack another branch of government. Perhaps this danger was anticipated by the drafters of Hawaii's Constitution when they denied the governor power to item veto appropriations relating to the legislature or the judiciary.[126]

Even so, an inventive executive can find many other ways to use the item veto to encourage legislative compliance with his point of view. Senator Charles Mathias (R-Md.) provides one such example:

---

119. *Id.* at 377.
120. Gosling, *supra* note 113, at 292.
121. *Id.* at 297.
122. *Id.* at 296.
123. *Id.* at 295.
124. *Id.* at 296.
125. For a more complete summary of this episode, see HOUSE STAFF REPORT, *supra* note 5, at 83-86.
126. *See* HAW. CONST. art. III, § 16.

> [I]f President Reagan does not like my position on the issue of school prayer, and if he acquires the power to kill funds for the program that I have long supported to save Chesapeake Bay . . . then the president . . . has a hostage.
>
> He can hold the Chesapeake for ransom of my support . . . for the state-sponsored prayer in my school or any other subject that he might want my support on. . . . In my opinion it would destroy the balance that exists between . . . the executive and legislative branches.[127]

Enhancing the President's influence in the appropriations process does not automatically decrease "logrolling." In fact, it may make the President one of the biggest logrollers of all. Instead of school prayer mentioned by Senator Mathias, the President may want billions for a new missile defense program or a six hundred ship navy. The Senator will have his millions for Chesapeake Bay, for example, if he helps the President win billions for the Strategic Defense Initiative ("Star Wars"). With the item veto, the President has a uniquely powerful weapon with which to influence individual members of Congress. However well intentioned the proponents of the item veto may be, the preceding paragraphs are a reminder of the political dangers associated with increasing Presidential power. Rather than granting the President a new fiscal tool, a safer course would be to enjoin on the President the obligation of using more often and more effectively the power he already has.

A. Annual Budget Proposal

First among the President's fiscal tools is his ability to submit an annual budget to Congress. The President's annual budget message can set the stage and frame the debate about national priorities.

The President has less control than most governors over the ultimate shape of the budget.[128] Congress can ignore or remake the President's budget and has done so in recent years.[129] But whatever its imperfections, the President's budget is the statutorily established method for stating the President's plan to raise revenues and spend federal funds.[130] Despite all the

---

127. Broder, *Where Reagan is no Conservative*, The Washington Post, July 24, 1985, at A19.

128. *See supra* notes 92-99 and accompanying text.

129. Heineman, *Politicians Blow Hot Air at the Budget Deficit*, Am. Banker, Nov. 16, 1987, at 4.

130. 31 U.S.C. § 1105 (1982 & Supp. III 1983). *See also* Cronin & Weill, *supra* note 113, at 141-42; Fisher & Devins, *supra* note 111, at 162-65, 192-93. The evolution of presidential budgeting is described in L. FISHER, PRESIDENTIAL SPENDING POWER 9-55 (1975).

blame passing between the President and Congress (and there is probably ample for both), the fact remains that President Reagan has never proposed a balanced budget or even one approaching balance.[131] Before venturing out on the murky waters of the item veto, is it unreasonable to ask the President to at least develop a budget plan to implement needed reductions?

B. General Veto Authority

President Reagan has used his present veto authority only sparingly.[132] Some scholars argue that Congress' habit of using lump sum appropriations and omnibus legislation makes it difficult for the President to effectively exercise the veto power.[133] Their argument is based on a sense of proportion: that the President will be reluctant to shut down a large part of the government in order to kill a relatively small program that he believes is wasteful or wrong. But that argument can also work in reverse. A determined President, willing to put up with the momentary inconvenience that his general veto would cause, could present Congress with a difficult challenge. Faced with general governmental disruption, would not Congress feel the pressure to sacrifice its pet project or at least enter further negotiations with the President? In answering this question in the affirmative, one scholar expressed the dilemma facing Congress in these words:

> When brinksmanship is played in that fashion, the President is much stronger. If a President really wanted to use the authority, he could wait until a continuing resolution came up right at the time of the holidays when everybody wants to go home and nobody wants to see the Government come to a halt, and have a bill of particulars and say I veto this continuing resolution and until you eliminate these items, I will bring the Government to a halt and I will take it out to the public and we will see who the public is going to blame for having this chaos.[134]

Perhaps the President would not win every such confrontation. But if he is not willing at least to attempt a more vigorous use of his existing veto power, doubt is cast on his need for additional veto authority.

---

131. Cronin & Weill, *supra* note 113, at 142.

132. *See* Table B, *supra*, at text accompanying note 88. During Mr. Reagan's first four years, he used the veto about as often as President Carter and only 60% as often as President Ford. This trend has continued into his second term. In the first session of the 100th Congress (1987), President Reagan exercised the veto only three times, one of the lowest one-year figures in the twentieth century. Yang, *Reagan, Despite Rhetoric, Has Vetoed Fewer Bills than Ford or Eisenhower*, Wall St. J., Dec. 23, 1987, at 40, col. 2.

133. Best, *supra* note 74, at 187.

134. SENATE HEARINGS, *supra* note 113, at 201 (testimony of Dr. Norman Ornstein of the American Enterprise Institute).

C. *Deferral and Rescission*

The Impoundment Control Act of 1974[135] opened additional opportunities to the President. That Act created two procedures for the President's use when faced with programs he judges too expensive or unwise. Under the deferral procedure the President can delay spending for the balance of the fiscal year. This power of delay is effective unless disapproved by one house of Congress. The other mechanism — known as rescission — permits the President to identify appropriations with which he disagrees. These programs are permanently cancelled only if both houses of Congress agree within forty-five days.

"Deferral" is automatic unless one house objects by majority vote. This procedure, also known as the one house or legislative veto, was an increasingly popular legislative tool until *INS v. Chadha*.[136] In that case, the Supreme Court held that the provision of the Immigration and Nationality Act permitting one house review of executive branch regulations was an unconstitutional assault on the doctrine of separation of powers.

Chadha has cast doubt on the continuing viability of the deferral technique. After *Chadha*, it is clear that legislative vetoes can no longer be used to limit presidential deferrals, but *Chadha* by itself does not directly forbid deferrals. If deferral authority continues to exist after *Chadha*, the President would have an absolute ability to defer expenditures without any check by Congress. On the other hand, the legislative veto and the right of deferral may be so tightly bound together that the destruction of one eliminates the other. Severability is the real issue: would Congress have given the President the power to defer without the check of a legislative veto?

In the recent case *City of New Haven v. United States*,[137] the Circuit Court for the District of Columbia held that presidential deferral authority and the legislative veto were inseparable and, thus, the destruction of the legislative veto also destroyed the deferral authority:

> Congress would not have enacted section 1013 had it known that the legislative veto provision was unconstitutional. Indeed, to the extent that section 1013 is "operable" absent the legislative veto provision, it operates in a manner wholly inconsistent with the intent of Congress in enacting deferral legislation. . . . [T]he unconstitutional legislative veto provision in section 1013 is inseverable from that portion of the statute conferring deferral authority on the President.[138]

---

135. 2 U.S.C. §§ 681-88 (1982).
136. 462 U.S. 919 (1983).
137. 809 F.2d 900 (D.C. Cir. 1987), *aff'g in part*, 634 F. Supp. 1449 (D.D.C. 1986).
138. *New Haven*, 809 F.2d at 905-06.

Unless the Supreme Court reverses this decision, the President can no longer use deferral authority. If, however, the Supreme Court overturns *New Haven*, the President would have a powerful weapon to control spending in the short term.

Whatever the future of the deferral power, the President still has "rescission" authority. No constitutional challenge is expected because the President's authority to rescind operates in a more traditional manner. He proposes a rescission in the form of a special message to Congress detailing the amount involved, the reasons supporting the rescission and the likely impact. Congress has forty-five days to accept the rescission. Unless both houses of Congress accept the President's recommendation, the rescission fails and the President must proceed with implementing the appropriation.[139]

Thus, the President's ability to effect a rescission is totally dependent on positive action by Congress. While this may seem to be a weapon of limited value, both Presidents Carter and Reagan have used it successfully. In Carter's four years, Congress accepted rescission of nearly two-thirds of the dollar amount the President recommended.[140] Reagan's record is more uneven. Reagan's 208 rescissions in 1981 set a record for the dollar amount of rescissions, and his success rate of 90% was also a record. In 1982, Congress agreed with 63% of the dollar amount of his rescission. In 1983 and 1984, Reagan rarely used rescission and when he did, his success rate was poor. After reelection, he resumed using rescission and in 1985, nearly 40% of his 244 rescissions were approved at least in part. However, the dollar amounts involved in 1985 were modest.[141]

The political difficulties in using rescission when the President and Congress are of different political parties are obvious. Even so, the ten-year history of rescission indicates that it can be used successfully at times. An aggressive President might find additional advantages in the rescission tool. Frequent use of rescission — whether successful or not — would permit the President to present clear-cut alternatives to the American people. He would be able to articulate in a concrete way how spending could be cut and what the impact would be.

If the item veto discussion is really about excessive federal spending, is it not reasonable to ask the President to actively use the tools he already has before giving him additional ones? Proposal of a budget that was close to being in balance, combined with energetic use of the present veto power and rescission authority could go a long way toward promoting fiscal responsibility. And if these techniques prove to be inadequate after vigorous

139. HOUSE STAFF REPORT, *supra* note 5, at 134-40.
140. *Id.*
141. *Id.*

exercise, they may point the way to what should be done next. At least, the issues would be more clearly presented to the American people. Until that time, however, changes in our political system which have the potential of profoundly affecting the balance of power should be avoided.

VII. CONSTITUTIONAL AMENDMENT AND STATUTORY ENACTMENT

All states that permit the item veto do so by means of a specific provision in their constitution. In no state has the power been implied from the general veto authority nor has any state legislature attempted to create the item veto by statute.[142]

Constitutional amendment is the most obvious way to introduce the item veto to the federal level, but amending the United States Constitution is a complicated process that has produced only twenty-six amendments in 200 years. The requirement of a two-thirds vote in each house of Congress and ratification by three-fourths of the states[143] is at best a lengthy procedure and a poor way to respond to any situation perceived to require immediate attention. In hopes of avoiding the uncertainties and delays associated with amending the Constitution, some item veto supporters have proposed legislation that they feel will accomplish the same purpose.

The main challenge to creating an effective item veto by statute is the unbundling of lump sum appropriations. The Constitution requires an all or nothing approach to Presidential vetoes.[144] Thus, some method must be found to break down a comprehensive bill into separate parts. There is also a practical need to unbundle. Without separate items there is nothing against which an item veto can be applied. The most serious effort to overcome these constitutional and practical problems, S. 43, was proposed in 1985 by former Senator Mattingly and others.[145] This legislation would have empowered the enrolling clerk of the originating house of Congress to divide up into separate items or bills any omnibus appropriation passed by Congress. Bills approved as a unified whole would then be taken apart by the clerk who would fashion each individual provision into a separate piece of legislation.

Congress, if so inclined, could accomplish this same result even without enacting legislation like S. 43. The Constitution gives Congress broad powers to determine the rules under which it operates.[146] Pursuant to this authority, the House and Senate could simply establish rules empowering the

142. *See* Table A, *supra*, at text accompanying note 9.
143. U.S. CONST. art. V.
144. U.S. CONST. art. I, § 7.
145. S. 43, 99th Cong., 1st Sess. (1985).
146. U.S. CONST. art. I, § 5, cl. 2.

enrolling clerk to separate omnibus appropriations into separate bills before their presentation to the President.

Since S. 43 was offered as a "practical" alternative to amending the Constitution, it is appropriate to note that what Congress creates by statute or by internal rule-making can be terminated by the same means. Thus, the President's ability to apply the item veto would be under the control of the very body he is attempting to discipline. A device of such slender proportions would seem to be of limited value to the President, certainly little better than his already existing power of rescission.

The present appropriations process gives rise to other practical impediments. As discussed earlier,[147] most appropriations bills do not contain specific appropriations for individual projects. These projects are instead described in committee reports, which would not be subject to any type of item veto. Thus, while an omnibus appropriations bill could be broken down into separate bills, these separate bills would still cover broad general spending categories. They would include not simply the project the President objected to but many others that he might support. His new power to veto broad sub-categories, such as "Military Construction, Army" or "National parks, acquisitions,"[148] would not in fact enhance his ability to carve out and disapprove one specific project.

If some method could be found to overcome all of these objections, which plague the item veto whether fathered by constitutional amendment or statutory enactment, there would still be another difficulty. S. 43's mandate that the enrolling clerk divide appropriations into separate bills grants vast powers to a non-elected, little known individual. This anonymous individual would be the sole determiner of what might be susceptible to presidential veto and what might not be. In testimony before Congress, one scholar has remarked that such authority "would make the enrolling clerk the most powerful individual at least at this end of Pennsylvania Avenue."[149]

Considerable judgment would be required of the enrolling clerk as he made his determination on what were the essential building blocks of an appropriations bill. A dedicated enrolling clerk might create literally hundreds of individual bills from one piece of legislation passed by Congress. These hundreds of bills would have to be presented to the President for his separate action — either to sign or to veto. The vastly increased paperwork has the potential of overwhelming both Congress and the President. The opportunities for mistakes, oversights, and confusion would undoubtedly

147. *See supra* notes 100-06 and accompanying text.
148. SENATE HEARINGS, *supra* note 113, at 48 (testimony of Senator Mark Hatfield).
149. *Id.* at 106 (testimony of Dr. Norman J. Ornstein).

multiply in a corresponding manner.[150]

Other objections to the creation of the item veto by statute concern the doctrine of separation of powers. Even if it wished to do so, Congress may not be able to delegate a greater role in the legislative process to the chief executive.[151] But whether expressed in constitutional terms or based on practical considerations, the operation of an item veto at the federal level is a problem-plagued idea.

VIII. CONCLUSION

Frustration over long-standing, increasingly worrisome federal budget deficits has led to much national discussion on what to do about the problem. Human nature yearns for simple and painless solutions. Many see the item veto as the ideal answer. After all, it is widely accepted at the state level, where forty-three states have adopted some form of the item veto. It has been tested for more than a century and interpreted often by a variety of courts. Rarely can political scientists and politicians find an idea with such an elaborate and well-documented history.

Yet, for all its seeming simplicity and its long history, the item veto is attended by mystery and uncertainty. With no single formula generally agreed upon, many different versions exist at the state level. Court interpretations, growing more frequent in recent years, have clouded understanding rather than clarified it. Simply to express support of the item veto leaves unanswered a host of questions: Should the item veto include the authority to reduce as well as eliminate specific appropriations? Is it wise to give the chief executive authority to veto legislative conditions and at the same time leave untouched the amount appropriated? Can the executive use the item veto to strike out phrases or parts of provisions notwithstanding the impact his action might have on the structure and nature of the legislation? State courts have not reached consistent results when faced with these difficult issues. In the absence of common agreement on these matters, the proponents of a federal item veto need to define precisely what they are proposing.

Neither side of the debate can authoritatively lay claim to knowing the intention of the Framers of our Constitution. In those distant and now quiet times, the item veto did not exist and was not even hinted at during the Constitutional Convention or in the ratification debates that followed.

The item veto does not translate easily from state government to the

150. *Id.* at 41 (statement by Comm. Chair Senator Charles Mathias); *id.* at 48-49 (testimony of Senator Mark Hatfield).

151. McGowan, *The President's Veto Power: An Important Instrument of Conflict in our Constitutional System*, 23 SAN DIEGO L. REV. 791, 809-17 (1986).

national level. The manner in which Congress appropriates funds is very different in style and format from the practice in state legislatures. Congress relies on vast lump sum appropriations, with specific projects nowhere delineated in the legislation, but rather set out in committee reports. This informal procedure, which has been followed throughout American history, does not lend itself to the item veto. Here again, the proponents of the item veto need to explain how the Congressional appropriations process could be changed to rationalize itself to an instrument like the item veto.

Item veto supporters advocate an imprecisely defined tool that seems poorly suited to the federal appropriations process. But these limitations may not be the most important reason to oppose a federal item veto. The central and most critical question is the impact of the item veto on the balance of power between the legislative and executive branches of government. The maddening inefficiencies of the current budget process may cry out for change, but adopting the item veto as the instrument of that change has the important side effect of increasing the already extensive powers of the "imperial President."[152] The real impact of the item veto — enhancing presidential power — is perhaps demonstrated by the philosophical divergence of those who support it. Item veto is not an issue that divides along traditional liberal and conservative lines. While conservative Ronald Reagan is today's chief spokesman, such well-known liberals as Franklin D. Roosevelt[153] and Senator Edward M. Kennedy[154] also have been item veto advocates.

What is it about the item veto that draws together these men of diverse philosophies? The central thread is presidential power. The item veto would change the balance — dramatically increasing the President's influence and control over the agenda of government and at the same time proportionally weakening Congress' ability to influence spending. Those who blame Congress for fiscal irresponsibility may applaud this prospect. But viewing the issue more broadly, the item veto may be seen as a mechanism for increasing presidential power at a time when the presidency is already the focal point of highly concentrated power. The item veto's ability to enhance executive authority was demonstrated in its most dramatic form during Pennsylvania's 1983-1984 budget debate. The governor's use of the item veto to eliminate or drastically reduce legislative salaries and expense allowances was clearly understood by the legislature which promptly renewed negotiations with the governor to reach a compromise acceptable to him.

---

152. Broder, *supra* note 127.

153. F.D. ROOSEVELT, *The Annual Budget Message, January 3, 1938*, in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 22-23 (1941).

154. 131 CONG. REC. S9919 (daily ed. July 24, 1985) (Kennedy, *Line Item Veto: Out of the Shambles*, L.A. Times, July 23, 1985).

Faced with the potential for dramatic change in the balance of power, prudence would suggest avoidance of structural tinkering. The President already has a wide array of impressive powers, and he should be called on to use them before he is given additional authority. The President can frame national debate by the budget he proposes. He can use his general veto power aggressively, even to the point of bringing the government to a temporary halt. His incomplete, but at times effective, power of rescission enables him to highlight his spending priorities. Congress, with its immense authority to appropriate, must also rise to the occasion, taking responsibility for its actions and being less responsive to "special interests."

State experience indicates that the item veto is most often used as a weapon to enforce the governor's political priorities and has not been particularly effective in reducing state spending. At the federal level, the vast majority of spending is not dependent on annual appropriations and, therefore, would not be subject to the item veto. In other words, the item veto — whether created by constitutional amendment or some sort of legislation — cannot be viewed as a magic wand capable of making the deficit disappear. The old fashioned medicine of political leadership remains the only viable cure. The challenge to both Congress and the President arises from a truism about our form of government: While democracy need not always be efficient, it is supposed to work. Massive deficits indicate a breakdown. Repair of some type is needed. But "mechanical contrivance" and "structural panaceas"[155] will not do it. There is no escape from the need for political leadership.

155. Cronin & Weill, *supra* note 113, at 136.