Indiana Committee for the Humanities

"TO CONTROL THE ABUSES OF GOVERNMENT"

The Veto and the Separation of Powers

A Guide for Discussion of Proposals To Institute Item and Legislative Veto Powers

THE INDIANA JEFFERSON MEETING
ON THE CONSTITUTION

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"Article—

"The executive powers vested in the President shall include the authority to veto individual items of appropriation within bills submitted by Congress for executive approval."

"Article—

"The legislative powers vested in the Congress shall include the authority of either house to veto rules and regulations issued by the Executive Department pursuant to laws passed by Congress."

Proposals to revise the veto power of the executive and legislative branches challenge one of the most basic doctrines of American government: the separation of powers. The founders built a representative system confident of man's ability to realize self-government. They created a system of institutional checks and balances because they were equally confident of his ability to abuse power. The accumulation of power could mean the end of freedom.

The executive veto is an example of how the founders sought to separate and check power. The Federalist Papers explained it this way:

> *The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive. But upon the supposition that the legislature will not be infallible. That the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself on maturer reflection would condemn. The primary inducement to conferring the power in question upon the executive, is to enable him to defend himself; the secondary one is to increase the chances in favor of the community, against the passing of bad laws, through haste, inadvertance, or design.* (Federalist #72)

Modern attempts to change the veto come in the context of a continuing reappraisal of the complex system of separated powers. Some claim that free government today is more threatened by its own massive inefficiency than by an imbalance of power. The item and the legislative vetoes are two of many proposed reforms which, by conferring new constitutional powers upon the executive and legislative branches, are meant to make the government less cumbersome and more effective.

The proposed item veto would refine the executive veto power by allowing the President to disapprove part of an appropriations bill without having to veto the entire bill. Instead of "all or nothing," the President could strike out specific items he

thought unnecessary while signing the rest of a bill into law. This ability to pick and choose is meant to give the President the opportunity to take the initiative in the budget-cutting process, which critics say the Congress has been unable to do. The item veto would be subject to a congressional override by a two-thirds majority vote. (Sen. Alan Dixon's (D-IL) item veto proposal, currently before Congress, would allow a simple majority vote override.)

The need for a veto power in the legislative branch was not considered at the Constitutional Convention. Since Congress was to initiate all legislative action, it did not make sense to give it the power to nullify what it had already approved. But the legislative process has diverged a good deal from the framers' original vision, and the "legislative veto" is largely a product of that change.

The expanding size and scope of the government has led Congress to lighten its heavy legislative load by delegating some regulatory duties to specialized executive branch agencies. At the same time that it delegated broad powers to the executive branch, Congress found a convenient way of keeping control over the agencies by giving itself the right to review and veto any of their proposed regulations or actions. This is the legislative veto, which enables Congress to reject proposed executive branch actions by disapproving them before they become effective. The use of the legislative veto has risen dramatically during the past decade, signaling Congress' increased reliance on the device as a way to delegate power safely.

The legislative veto was declared unconstitutional by the Supreme Court in *Immigration and Naturalization Service vs. Chadha* in June 1983. The Court ruled that it violated the separation of powers doctrine and the "presentment clause" of the Constitution, which says that final legislative approval lies in the hands of the executive. Critics have brought similar charges against the item veto. They say it would give the President too much direct control over the purse, which is rightfully the domain of the legislature. In effect, either one or both of the Constitutional amendments to change veto powers would shift governmental powers and make them less separated than the founders intended them to be.

THE FORMATIVE DEBATE

"Auxiliary Precautions"

Having only recently won independence from a distant and arbitrary central power, the framers of the Constitution were cautious as they undertook to strengthen the federal government at the Philadelphia Convention. Their caution developed from experience and the examples of history; they were fully aware that giving the people the right to elect their own government was in itself no guarantee against despotism.

> *In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.* (Federalist #51)

The founders looked to the writings of the French philosopher Montesquieu for guidance as they considered what type of "auxiliary precautions" they could incorporate into the new American system. The primary lesson, accepted by the Federalists and their opponents alike was that

> *The accumulation of all powers legislative, executive and judiciary in the same branch, whether of one, a few or many and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny.* (Federalist #51)

The way to control power, therefore, was to divide it.

In the system of separated powers, the executive enforces the laws passed by Congress and protects the people from bad laws and "popular or factious injustice." The executive must also protect itself.

> *... in republican government the legislative authority, necessarily, predominates ... As the weight of the legislative authority requires that it should be thus divided the weakness of the executive may require on the other hand, that it should be fortified.* (Federalist #51).

In considering what kind of check to give the executive, the founders had experience as a guide. Alexander Hamilton suggested an absolute veto along with his proposal to elect the President "during good behavior" but both ideas were rejected as too monarchical. At the other extreme, the New Jersey Plan did not provide for a veto of any kind but kept close to the model of the Articles of Confederation and gave the states a stronger hand in checking the federal legislature. The authors of the Virginia Plan used a device found in state constitutions when they proposed a "Council of Revision," consisting of the President and members of the judiciary, who would have the power to review and revise legislation. The "qualified" executive veto, giving Congress the power to override with a two-thirds majority was a provision in the Massachusetts state constitution. Publius used all these examples to describe the proposed presidential veto and how it would work.

The qualified negative of the President differs widely from the absolute negative of the British sovereign; and tallies exactly with the revisionary authority of the Council of revision of [New York], of which the Governor is a constituent part. In this respect, the power of the President would exceed that of the Governor of New York because the former would possess singly what the latter shares with the Chancellor and Judges: But it would be precisely similar with that of the Governor of Massachusetts, whose constitution, as to this article, seems to have been the original from which the Convention have copied. (Federalist #69)

Like similar provisions in the states, the executive veto had a dual purpose. First, as a negative,

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 approve, 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 which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become law ... (Article 1, Section 7)

and second, as a requirement for approval as contained in the "presentment clause".

Every order, resolution, or vote, to which the concurrence of the Senate and the House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the case of a bill. (Article 1, Section 7).

The presentment clause is the particular article in the Constitution that is challenged by the legislative veto. By enabling Congress to disapprove of actions taken by the executive branch in carrying out legislation, the veto ignores the need for presidential approval and leaves the last word to Congress.

Two Uses of the Separation of Powers Doctrine—1787

The doctrine of separated powers was a universal assumption of all interested in the framing of republican government, whether Federalist or Anti-Federalist. It inspired some of the most memorable prose of the Constitution-making era, including the famed Federalist #51, written by James Madison. Another powerful statement invoked the same principle to oppose the Constitution and specifically the executive veto. Written by an Anti-Federalist who called himself "William Penn", it appeared in the Philadelphia Independent Gazeteer.

MADISON: ... the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government but the greatest of all reflections on human nature?

WILLIAM PENN: ...I believe that it is universally agreed upon in this enlightened country that all power residing originally in the people, and being derived from them, they ought to be governed by themselves only, or by their immediate representatives ...

The next principle, without which it must be clear that no free government can be ever subsist, is the DIVISION OF POWER among those who are charged with the execution of it. It has always been the favorite maxim of princes, to divide the people, in order to govern them. It is now time that the people should avail themselves of the same maxim, and divide powers among their rulers, in order to prevent their abusing it. The application of this great political truth, has long been unknown to the world, and yet it is grounded upon a very plain natural principle. If, says Montesquieu, the same man, or body of men, is possessed both of the legislative and executive power, there is NO LIBERTY, because it may be feared that the same monarch, or the same senate, will enact tyrannical laws, in order to execute them in a tyrannical manner. Nothing can be clearer, and the natural disposition of man to ambition and power makes it probable that such would be the consequence.

The Power of the Purse

The division of the executive, legislative and judicial powers of government was more than a question of checks and balances. It was also a question of defining very carefully which branches were to carry on which functions. Tradition and efficiency placed the power of the sword in the hands of the executive. Caution and experience warned against placing the power of the purse in

the same hand that held the sword. Entrusting the sole right to initiate money bills to the House of Representatives was a precaution, but it was also the result of a British revolutionary tradition which proudly claimed the emerging sovereignty of the people as its own. The power of the purse symbolized that tradition.

> *The House of Representatives can not only refuse, but, they alone can propose the supplies requisite for the support of government. They in a word hold the purse, that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may in fact be regarded as the most compleat and effectual weapon with which any constitution can arm the immediate representatives of the people for obtaining a redress of every grievance and for carrying into effect every just and salutary measure.* (Federalist #58)

The proposed item veto challenges the Houses' power over the purse because it gives the President more direct control over what is and what is not in appropriations bills.

Anti-Federalist Response

Despite the precautions taken by the framers, Anti-Federalists still objected to the extent of the power given to Congress in the new Constitution. James Monroe, at the Virginia ratifying convention, challenged

> *... The general power given to Congress to make all laws that will enable them to carry them into effect. There are no limits pointed out. They are not restrained or controlled from making any law, however oppressive in its operation, which they may think necessary to carry their powers into effect ... When, then will be the check to prevent encroachments on the right of the people?*

Anti-Federalists shared the Federalist fear of concentrated and unchecked power but found the Federalist remedy inadequate. Separation of powers within the central government was not protection enough. The only check on the legislative branch was in the wrong hands; the power to review and reject proposed congressional legislation belonged not to the executive but to the states.

By giving the executive veto power the framers stopped short of creating totally separate branches of government. They gave the executive a hand in the legislative process as a check on Congress. But some Anti-Federalists saw this check as a further opening for collusion rather than a safeguard against it. The veto

raised the specter of the British monarch; separation had to be more absolute.

> *The first and most natural division of the powers of government are into the legislative and executive branches. These two should never be suffered to have the least share of the other's jurisdiction, or to intermeddle with it in any manner. For whichever of the two divides its power with the other, will certainly be subordinate to it: and if they both have a share of each other's authority, they will be in fact but one body. Their interest as well as their powers will be the same, and they will combine together against the people. It is therefore a political error of the greatest magnitude, to allow the executive power a negative, or in fact any kind of control over the proceedings of the legislature. The people of Great Britain have been so sensible of this truth, that since the days of William III no king of England has dared to exercise the negative over the acts of the two houses of parliament, to which he clearly is entitled by his prerogative.* (Independent Gazeteer January 3, 1788)

The Size of the Republic: Federalism or Despotism?

The framers were working against precedent when they created a limited republic to govern such a large geographical area, and this put an added burden on them to limit the powers of the central government. Many seriously questioned whether the republican form was suited to any but small geographical areas. Geography would be the downfall of this republican experiment, claimed Anti-Federalists like Mr. Dawson of Virginia. James Madison had more confidence in the proposed plan and saw the size and diversity of the country as the key to its success.

> *DAWSON: If we grant to Congress the power of direct taxation; if we yield to them the sword, and if we also invest them with the Judicial authority, two questions, of the utmost importance, immediately present themselves to our inquiries—whether these powers will not be oppressive in their operations, and, aided by other parts of the system, convert the thirteen confederated states into one consolidated government; and whether any country as extensive as North America, and where climates, dispositions, and interests, are so essentially different, can be governed under one consolidated plan, except by the introduction of despotic principles.* (Virginia ratifying debates)
>
> *MADISON: Whilst all authority in (the United States) will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority.*
>
> *... In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place*

on any other principles than those of justice and the general good ... It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lies within a practicable sphere, the more duly capable it will be of self-government. And happily for the republican cause, *the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the* federal principle. (Federalist #51)

Liberty or Efficiency?

The framers had one goal as they met in Philadelphia—to create a government that both worked efficiently and protected the liberty of the people. For the sake of efficiency they were not willing to divide powers as absolutely as some Anti-Federalists would have liked. The framework they created was genuinely a balance between the competing demands of power and freedom.

That balance has been called into question many times over the past two centuries, especially by critics frustrated with the inefficiency caused by separation of powers. The search for efficiency is a major force behind item and legislative veto proposals; supporters claim the item veto would streamline the budget process and the legislative veto would make the practical and time-saving delegation of regulatory duties feasible. The desire to safeguard liberty above all else motivates opponents of the vetoes. Chief Justice Warren E. Burger sums up the opposition argument in his majority opinion in the *Chadha* case, declaring the legislative veto unconstitutional:

> *The choices we discern as having been made in the Constitutional Convention imposed burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of the Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President ... With all the obvious flaws of delay, untidiness and potential for abuse, we have not found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.*

QUESTIONS TO GUIDE DISCUSSION

- What does separation of powers mean today? Has experience shown it to be a protection of liberty? Does it cause inefficiency? Are liberty and efficiency in government irreconcilable goals?
- Would changes in veto powers violate the doctrine of separation of powers or would they merely add to the "internal controls" and make the system work better?
- Would the item veto give the President more power over the purse? Would the legislative veto give Congress a larger role in the executive function of government? What does this imply about the way the founders delineated the functions of each branch of government?
- Has the power of the purse been an "effectual weapon" against tyranny in the hands of the House of Representatives?
- Should the branches of government be made more accountable to each other or to the people? Are there sufficient mechanisms for a popular "negative" on federal legislation?
- What has changed since 1787 to cause the reexamination of the separation of powers? The nature of legislation, the size of the unelected bureaucracy, the relative power of the executive and legislative branches? Do these changes warrant reform of veto powers or have the changes perhaps been exaggerated?

THE DEBATE CONTINUES

The founders regarded the veto primarily as a "negative," a defensive measure against the potential excesses of the legislative branch. But modern use of the veto reveals that, in practice, this instrument of restraint can be a powerful political lever in periods of conflict between the President and Congress.

Two pieces of legislation from the 1970's illustrate the role the veto can play in the struggle between the branches. The War Powers Resolution of 1973 used the legislative veto to check the President's powers as Commander in Chief of the military. In protest over the conduct of the Vietnam War, it gave Congress the power to pass a concurrent resolution ordering the President to withdraw troops from combat areas during peacetime. In 1974 Congress asserted further control over the "imperial Presidency" by passing the Budget and Impoundment Control Act to stop President Nixon's practice of impounding funds for programs he thought were unnecessary. In effect, Nixon was using his impoundment powers to do what the item veto would do: cut out individual appropriations without vetoing an entire bill. By passing the Act, Congress was reclaiming full jurisdiction over the national purse.

The evolution of the veto has gone hand in hand with the changing role and duties of the government. The power of the purse is vastly different and more complex today, if only because there are many more demands on it. The size and power of the executive branch in the military alone has grown beyond the vision of the founders, to the point where Congress clearly feels the need to assert some control over the traditionally executive functions. Just as the founders hoped, however, the powers originally divided among the branches have been jealously guarded by their owners as usurpation from without threatens.

The Item Veto in Perspective

When President Reagan called for "structural reforms" to help solve the deficit problem in his January, 1984 State of the Union Address, he was proposing a measure supported by almost every President since Grant: the item veto. Formal and informal proposals to enable Presidents to weed out only certain items in a bill have been made since the 1830's, with little success. While Congress still weighs in more heavily against the item veto than for it, the proposal has come a long way since 1842, when President John Tyler's attempt to get item veto power resulted in a House Committee charge of "a defacement of the public records and archives." The history of the item veto proposal reflects Congress' determination to keep full power over the purse.

- The Confederate president, who was limited to a single six-year term, was given a line item veto.

- After the Civil War, several states adopted the line item veto; 43 states give their executives the power today.
- In 1978, President Ulysses S. Grant formally proposed an amendment allowing the President "to approve of so much of any measure passing the two houses of Congress as his judgment may dictate, without approving the whole." The proposal was repeated by President Rutherford B. Hayes in 1879 and Chester A. Arthur in 1882.
- In 1883 and 1884, the item veto amendment gained ground in Congress. It fell just short of the two-thirds majority in the House necessary to approve Constitutional amendments, and the Senate Judiciary Committee approved it. No further action was taken, however.
- FDR submitted a proposal similar to the item veto to Congress in 1938, but the Senate rejected it.
- President Nixon's impoundment of funds for specific items already approved by Congress was halted by the Congressional Budget and Impoundment Act of 1974.
- National opinion polls since 1945 have shown a majority of the general public in favor of the item veto. Support peaked in 1978 with 70% in favor and measured 67% in November, 1983.
- President Reagan proposed the reform in the State of the Union Address on January 23, 1984.

Recent developments have drawn attention to the item veto: support from the balanced budget movement, a number of bills introduced in Congress, and the search for solutions to the growing deficit problem, which has taken top priority on the economic agenda.

In response to those who claim the item veto would enable the President to restore efficiency to the budget process, Senator Mark O. Hatfield (R-OR) raises the question of power.

> *If the President is granted the power to veto in part or whole individual appropriation accounts, he would be able to virtually dictate to Congress what could be provided for each program and activity of the government. This is not merely a concern over money, but rather over the issue of whether Congress should have a separate and equal voice in making those decisions as to how federal resources are allocated.*

Yet others regard the veto more in its original light: as a "negative" and not a dictatorial power.

> *The usual argument against the line-item veto—that it would unfairly expand the President's power—is clearly fatuous. Congress in 1974 arrogated to itself responsibility for spending; it has clearly failed. Politics in America most effectively performs its proper role—arbitrating among the competing interests of a huge population of free and informed people—when power is real but rarely used. It's most likely*

that once a President held the power to veto individual spending items, Congress would sort our for itself what is justifiable spending and what isn't, just as it did before the "budget control act." And if, as now, Congress declined to exercise prudence in managing the people's tax payments, that national constituency that elects a President would surely expect him to use the item veto to restore prudence, regardless of the highly publicised screams of Congress's main constituencies.

That is how the balance of power was intended to work ... (Wall Street Journal, editorial, September 14, 1983)

Similarly, supporters see the item veto as a common sense measure.

...We ought to run the government in a sensible way, so that when the President gets a 1,000 page appropriations bill, or something of that sort, he can turn to page 316, line 14, and take out $11,633,412.16 for the Senate from some place who ought not to have it in the first instance except he made a deal ...

These budgets are full of that kind of stuff. Let me tell you something. The Senator from Illinois puts them in, too, and the Senator from Illinois is going to keep on putting them in—I want to put everybody on notice—because I want to stay in this place just like the rest of you.

But we ought to have somebody with an eraser on a pencil downtown that takes it out once in a while. (Senator Alan J. Dixon (D-IL), Senate floor debate, October 29, 1983)

But to opponents it is a dangerous way to tamper with the power of the purse and leaves no protection for the rights of the people.

...who would give instructions on a line item veto? Some budget analyst in OMB, that's who. Do you even know his name? Do you ever get a chance to vote for him? None of those things. It is a person with an eyeshade and an eraser who would decide whether to cut aid to dependent children by a certain amount of money.

Where does the public get a chance to be heard?

...They came up through the appropriation process and Congress listened. They had a chance to elect the person that makes up the budget... But to what positive end if it all goes down the drain because of a line item veto triggered in the far-away corners of OMB?

I think that it is the kind of thing that would take away our responsibility and muffle the public voice. (Senator Lawton Chiles (D-FL), Senate floor debate, October 29, 1983)

The Legislative Veto in Action

The legislative veto grew from cooperative legislative/executive branch attempts to devise a way of getting around some of the limitations imposed by the Constitution. Since it originally

appeared in 1932, the legislative veto has been used to grant the executive branch broad rule-making powers as well as to assert Congressional authority over executive branch agencies. It is a measure of convenience that recognizes the fact that the legislative process can be too cumbersome to pass regulations on the technical specialities covered by the agencies.

Today more than 200 laws contain legislative veto provisions, more than half of which have been passed since 1970, and all of which are called into question by the recent Supreme Court decision.

- The legislative veto was first used in 1932, when President Hoover worked out a deal with Congress. In return for the broad power to reorganize the federal government, he agreed that Congress could overrule his proposed reorganization plans by passing a one-House veto.
- The mechanism initiated by the Hoover administration did not become controversial until the 1970's, when Congress began to employ it to assert more control over the President, such as in the War Powers Resolution of 1973. Presidents have generally opposed the measure since then.
- In foreign affairs and national security areas, the veto was frequently used during the 1970's to increase Congressional control over administration policies. In addition to the War Powers Resolution, bills authorizing Congress to block defense contracts, terminate a presidentially-declared national emergency and disapprove international agreements concerning nuclear technology were passed between 1974–1978.
- While handing the responsibility for national energy policy to the executive branch, Congress has required that actions involving export policy, price controls, storage and developing energy alternatives all be subject to congressional approval or disapproval before implemented.
- Similarly, Congress has mandated agency rule-making powers while keeping the power to reject those rules in the case of the Education Department, the Federal Election Commission, the Department of Health and Human Services (Social Security), the Federal Trade Commission, the Environmental Protection Agency and others. For instance, the Federal Election Campaign Act amendments of 1979 said that FEC rules and regulations could be disapproved by a one-House Resolution. The Act creating the Department of Education retained congressional power to disapprove the Department's rules and in 1980 the Congress asserted control over Environmental Protection Agency rules governing hazardous substances by use of the legislative veto.
- On June 23, 1983, the Supreme Court declared the legislative veto provision in *Immigration and Naturalization Service v. Chadha* unconstitutional. That provision was passed in 1952 in response to the many private immigration bills introduced in

Congress to allow certain individuals to remain in the United States. Members were allegedly receiving payments for introducing the private bills. Under that law, Congress gave the Attorney General the power to allow immigrants to remain, keeping the right to veto the decision by House or Senate action. The Supreme Court ruled that the veto provision violated the "presentment clause" (Article 1, Section 7) of the Constitution and the doctrine of separation of powers.

The Legislative Veto Reconsidered

The *Chada* decision has excited fresh discussion of the principles behind the separation of powers. Supporters of the Supreme Court decision herald it as a welcome incentive to return the two branches to the paths intended for them by the founders.

> *True the legislative veto was a convenient way for Congress to give authority and retain it at the same time, but it is not indispensable to the effective operation of government.*
>
> *In the future, legislators will have to be more careful about what functions they delegate: compromises and boundaries will have to be clearly understood before bills are sent to the White House; and special interest groups, which have fought the executive branch with this device, will have to develop new tactics. The lines separating the powers of the three branches of government have been clearly reaffirmed by this decision. That is far more important than the fact that the work of one branch, the legislative, will be more difficult —even more risky—after today.* (Washington Post, editorial, June 24, 1983)

Proponents of the legislative veto argue that it has evolved as a necessary measure to cope with the demand on today's government and that the Supreme Court decision reflects an unrealistic, unyielding attachment to the founding doctrines.

> *The fundamental problem in trying to make the government of the United States work effectively is not to preserve the separation of powers but to overcome it ... The legislative veto is a device that has served that purpose. Insofar as this device of accomodation is now rendered unavailable, the two branches are condemned that much more often to the confrontation, stalemate and deadlock that so frequently leave the government of the United States impotent to cope with complex problems.* (James Sundquist, Brookings Institution)

> *Without the legislative veto, Congress is faced with Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless specific circumstances across the entire policy landscape, or in the alternative, to abdicate its lawmaking function to the executive branch and independent agencies ...* (Justice Byron R. White, dissent in *Chadha*)

Despite the *Chada* decision and its sweeping implications, several laws with legislative veto provisions have passed the Congress since June 1983.

Implications of Reform

Interpretation of the actual effects of the item and legislative vetoes varies widely. Would the item veto be a way to lead the country out of the deficit or merely a political tool in the hands of a power-grasping executive? Who will be more restricted by the Supreme Court rejection of the legislative veto? Some claim the executive branch is the loser: Congress will be more reluctant to grant broad powers without the assurance that it can have a check on them. Others think that loss of the legislative veto will put the onus on Congress to do its job rather than delegating regulatory authority.

Debate over these immediate concerns raises more fundamental questions: Is adherence to the founding principles more important than enabling government to function? Which alternative, if either, is more true to the spirit of the Constitution? Do they have to be mutually exclusive criteria? For the time being, in any case, the Supreme Court has had the last word.

> *The fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.* (Chief Justice Warren E. Burger, Majority Opinion, *Chadha*)

ARGUMENTS FOR THE ITEM VETO

- An item veto would reduce the number of unnecessary, unrelated provisions which members of Congress tack onto important budget bills. Even though they may not be in the best interests of the country, the President now must accept them or reject the entire bill

- The item veto would strengthen the ability of the President to eliminate the deficit because it would give him more control over the budget process.

- The item veto has proven effective in the 43 states whose governors are authorized to exercise it.

- Sixty-seven percent of the general public favors the item veto according to the latest Gallup Poll.

- The founders did not discuss the item veto because appropriations were simple and direct and a yes or no response easily sufficed. Today's omnibus bills are so complex that the President needs to be able to decide on the national priorities from among many competing interests.

ARGUMENTS AGAINST THE ITEM VETO

- The item veto tilts the balance of power to the President. By threatening to veto certain items, the President can coerce Congress into capitulating on other issues.

- The veto would take attention away from the deficit, which is the real problem and needs to be addressed more directly.

- The item veto will not help balance the budget because the "add-ons" it seeks to eliminate are an insignificant portion of national expenditures. The "entitlement" programs which would be immune from the item veto are the ones that have been blamed for the deficit increase.

- The item veto puts the power of the purse in the wrong hands: decisions on specific appropriations will be in the hands of anonymous and unelected bureaucrats in the executive branch who are not in touch with the people and do not understand their needs.

- The line item veto reflects the assumption that the Congress cannot regulate itself. If Congress agreed to it, members would in effect be abdicating their fiscal responsibility to the President.

ARGUMENTS FOR THE LEGISLATIVE VETO

- The legislative veto is a way to make sure that elected officials have an effective voice in important policy decisions which otherwise would be made by appointed executive branch officials who are not accountable to the people.

- The legislative veto enables Congress to be flexible when passing legislation involving technical issues or regulatory functions that it cannot anticipate.

- Without the legislative veto, congressional committees will become even more bogged down in the details of technical legislation.

- The veto is the most effective check on presidential war powers.

ARGUMENTS AGAINST THE LEGISLATIVE VETO

- Congress has used the legislative veto to avoid important oversight functions. If Congress is doing its job, the legislative veto is unnecessary.

- The Supreme Court challenge will force Congress to be more specific and take a direct role in matters such as agency regulations, foreign affairs and military appropriations.

- The legislative veto has been used by Congress to satisfy special interest groups seeking a softening of particular agency regulations.

- The veto usurps the President's executing role in the legislative process, violates the separation of powers doctrine and ignores the presentment clause in the Constitution.

THE SEPARATION OF POWERS AND GOVERNMENT REFORM

The item and legislative vetoes are attempts to make government work efficiently while preserving the basic separation and balance of powers. One current proposal combines the vetoes in a single Consitiutional amendment, in the hopes of gaining efficiency while maintaining an even balance.

Other government reform proposals are direct attempts to overcome the separation of powers. Some would bring our system closer to the parliamentary model, others are simply concerned with encouraging cooperation between the branches. Among the reforms discussed during the recent congressional hearings on the "Political Economy and the Constitution," were measures:

- Enabling members of Congress to serve in the President's Cabinet by altering the "incompatibility clause" (Article I, Section 6) of the Constitution and perhaps even requiring a joint Executive-Legislative cabinet.

- Promoting party government and inter-branch cooperation by linking presidential and congressional candidates on a single ballot in federal elections.

- Giving executive branch officials limited powers in Congress to enable them to introduce legislation, manage floor debate or otherwise represent administration policy in the legislative branch.

Non-Constitutional reforms to address the problem raised by the veto proposals would:

- Reform the budget process by making it a two-year cycle and otherwise making it more efficient.

- Make use of checks already built into the Constitution and statutary alternatives to the legislative veto such as Congressional investigations, passing legislation and confirmation hearings.

- Establish an informal Executive-Legislative branch council to facilitate cooperation between the branches.

SUGGESTED READINGS

Edward S. Corwin, *The President: Office and Powers*. New York University Press, 1957.

Lloyd N. Cutler, "To Form a Goverment," *Foreign Affairs*, Fall 1980.

Douglas B. Habig, "The Constitutionality of the Legislative Veto," *William and Mary Law Review*, Vol. 23, Fall 1982.

Alexander Hamilton, John Jay and James Madison, *The Federalist Papers*, ed. with introduction by Garry Wills, Bantam Books, 1982. Especially numbers 47-51.

Opinion of the Supreme Court, *Immigration and Naturalization Service v. Chadha*, June 23, 1983.

Kevin Phillips, "An American Parliament," *Harper's*, November 1980.

Nelson W. Polsby, *Congress and the Presidency*, 3rd edition, Prentice-Hall, 1976.

Senate Debate, item veto proposal, October 29, 1983, *Congressional Record* S14934-949.

James L. Sundquist, *The Decline and Resurgence of Congress*, The Brookings Institution, 1981.

US Congress, Senate, Committee on the Judiciary, "Legislative Veto Proposals," Hearing, 97th Congress, 1st session on S.890 and S.684, April 23, 1981, US Government Printing Office, 1981.

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