



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
 Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

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Ralph Tarr, Constitutionality of Line-Item Veto Proposal (1985)¹

A line-item veto gives the president the authority to veto specific provisions of a proposed bill, while simultaneously approving the rest of the bill. Many governors have such a power, but the president of the United States has traditionally been understood to be limited to a general veto power, giving him the authority to veto (or approve) bills in their entirety. Many conservatives in the 1980s became enthusiastic about the idea of a line-item veto for the president. This was seen as a potentially effective tool for reducing federal spending since it would give the president the ability to strike out particular line items in appropriations bills that might be favored by individual legislators but not by a majority of Congress. Constitutional amendments were proposed to give the president such a power. The 1984 Republican Party platform included call for a presidential line-item veto to control “wasteful spending.”

*There were also some who argued that Article I of the Constitution had already implicitly given the president a line-item veto power or that Congress could grant the president such a power by statute. The Line-Item Veto Act of 1996 was eventually passed during the Clinton administration, but the statute was struck down in *Clinton v. City of New York* (1998).*

In 1985, Reagan’s Office of Legal Counsel examined a somewhat different statutory proposal for giving the president a line-item veto and concluded that such proposals were unconstitutional and easily circumvented through careful drafting of appropriations bills. Why might Reagan’s Justice Department not embrace a line-item veto? Is Assistant Attorney General Tarr persuasive that the line-item veto would violate the original constitutional design? Is there a way to draft a statute that would avoid these objections?

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 The constitutional issue arises from the traditional construction of the provisions in the Constitution governing the veto power of the President. Article I, section 7, clause 2, states in pertinent part:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become 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 . . .

The veto clause sees to give the President only two options: he may either sign the bill or return it with his objections. Thus, on its face, the language of the Constitution does not seem to permit the President to veto individual parts of a bill.

This conclusion is confirmed by the actual practice of Presidents under the veto clause. No President has ever attempted to exercise an item veto. To the contrary, many Presidents have expressly considered the question and concluded that the President is without item veto power. In 1793, George Washington stated that he had signed many bills with which his judgment was at variance, but felt compelled to do so because “from the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto.” . . . President Grant, while urging the adoption of a constitutional amendment to authorize an item veto, recognized the absence of such a power under the Constitution. . . .

¹ Excerpt taken from “Constitutionality of Line-Item Veto Proposal,” 9 Op. Off. Legal Counsel 28 (1985).



The bill attempts to avoid this constitutional obstacle to the line-item veto by requiring each item of appropriation contained in a single bill passed by both Houses of Congress to be enrolled as a separate bill. The President would then be able to veto any of these individual bills. . . .

Perhaps the best way to characterize this legislation from a constitutional perspective would be to state that Congress would take a single vote on a package of bills constituting the total appropriation. The single vote would then simply be a convenient method for the adoption of multiple bills. . . . We would recommend at the very least that the proposal be amended to embody the concept of a single vote on a series of bills.

Even if the bill is redrafted, however, we believe that there are very persuasive arguments that could be made against the constitutionality of the proposal. To the extent that we have been able to identify any policy underlying the "take-it-or-leave-it" principles of the veto clause, it seems to be that under the system of checks and balances established by the Constitution, the President has the right to approve or reject a piece of legislation, but not to rewrite it or change the bargain struck by Congress in adopting a particular bill. . . . If the President were allowed to veto individual parts of legislation, then the bargain struck by Congress in adopting a bill could be altered. Indeed, the bargain might be altered so significantly that it would not receive the approval of a majority of both Houses. . . .

The proposed bill could be considered to be inconsistent with this constitutional principle because it permits the President to alter the bargain reached by Congress without the necessity for reapproval by both Houses. . . . [T]he only manifestation of agreement expressed by each House would be an agreement with respect to the entire package. If the package is subsequently broken down into separate parts and the President is permitted to eliminate some of those parts from the final law, then the statute will not necessarily reflect the consent of each House of Congress. . . .

It is not a satisfactory answer to this constitutional argument to respond that Congress would have voluntarily imposed this limitation on itself Congress made the same argument in the *Chadha* case (1983) with respect to the President's approval of legislative veto statutes, but the Supreme Court expressly stated that it was not permissible to alter by legislation the veto provisions of the Constitution. . . .

. . . . Given the importance of the line-item veto in the President's program . . . we would urge that strong consideration be given to the issue of whether the benefits of [a line-item veto statute] outweigh the substantial constitutional issues it raises and the uncertainty that would attach to any legislation enacted through the mechanism that it creates. . . . It may also be important to consider whether the President might be faulted for not utilizing effectively the power granted by this statute, when in fact its effectiveness as being undercut by Congress through clever construction of appropriations bills.