

**STATEMENT BY LOUIS FISHER,  
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BEFORE THE COMMITTEE ON THE BUDGET,  
U.S. HOUSE OF REPRESENTATIVES,  
“LINE-ITEM VETO — CONSTITUTIONAL ISSUES”  
JUNE 8, 2006**

Mr. Chairman, thank you for inviting me to testify on legislation that would give the President authority to exercise a type of item veto. The apparent goal is to reduce federal spending, earmarks, and the budget deficit. For reasons given in my statement, I think spending, earmarks, and deficits would not be materially changed by this procedure and might even grow worse. That is counterintuitive, perhaps, but I will explain why.

Whatever the fiscal results of this legislation, a more profound issue is the effect the bill would have on congressional prerogatives, checks and balances, and the system of separation of powers. Individual rights and liberties are protected in large part by the way we structure government. How should Members of Congress decide the constitutional issues implicit in this legislation? Look to court decisions for ultimate guidance or make independent judgments about how best to protect congressional interests?

### **Making Constitutional Judgments**

In House and Senate hearings held earlier this year, considerable attention was paid to whether this legislation would meet the standards set forth in the item veto case of *Clinton v. City of New York* (1998). Although it is useful to examine judicial precedents, each Member of Congress has an obligation to support and defend the Constitution and needs to exercise independent judgment in fulfilling that task. The branch responsible for protecting the rights, duties, and prestige of Congress is not the judiciary. It is Congress. The framers expected each branch to defend itself.

Earlier hearings offered testimony that the item veto bill — drafted by the Administration — might not satisfy the conditions set forth in *Clinton*. Especially was that so with the President’s authority to defer spending for 180 calendar days while Congress considered his proposal to terminate spending. Depending on the time of the year when the President submitted his request, one-year money might lapse, resulting in a virtual cancellation by the President without any congressional action or support.

Of course Congress can amend the Administration bill to avoid this problem, but Congress needs to do more than merely adjust legislative language to satisfy Supreme Court decisions. Even if this bill were significantly modified to eliminate any problems under *Clinton*, a Member of Congress has a separate and unique duty. The fundamental test: Does this legislation protect the prerogatives, powers, and reputation of Congress as a coequal branch? The answer does not lie in case law. It lies in the willingness of each Member to determine what Congress must do to preserve its place in a

system of coordinate branches. The true expert here is the lawmaker, not the judge. No one outside the legislative branch has the requisite understanding of congressional needs or can be entrusted to safeguard legislative interests.

A lawmaker need not be an attorney to decide such questions. A non-attorney is just as able and experienced in judging what Congress must do to protect representative democracy and the rights of citizens and constituents. Congress should not consciously pass an unconstitutional bill. Similarly, lawmakers should not pass legislation that damages their institution simply because they predict the bill will not be overturned in the courts.

### **Protecting the Reputation and Credibility of Congress**

This item veto bill does damage to the institutional interests of Congress in several ways. First, it sends a clear message to the public that Congress has been irresponsible with its legislative work, both in the level of spending and the particular provisions it places in bills. To remedy those supposed defects, Congress will establish a fast-track procedure to enable the President to eliminate items that should never have been included in the bill. This process signals that Members are not up to the task and cannot properly conduct their constitutional duties. That is Damage No. 1.

I don't know on what grounds it can be said that the President is the more trusted guardian of the purse and the far better judge of what is in the national interest, including earmarks. Why is the President, with the assistance of aides, more qualified to decide how federal funds are to be allocated to particular districts and states? Granted, he has the general veto power and can, by threatening its use, force Congress to strip from bills certain features and provisions. But lawmakers know district and state needs better than agency employees and have the legitimacy that comes from being an elected official.

As for the level of aggregate spending and the size of the federal deficit, what evidence supports the view that the President is more responsible in fiscal affairs? Congress initiates various spending programs, of course, but the big-ticket items seem to come generally from the President: the national highway system, the space program, supercolliders, the Supersonic Transport, military commitments, entitlement programs, etc.

### **Other Likely Damages**

I have questioned the premise behind the bill. Now I look at the way it would operate. Under the fast-track procedure, the President would submit to Congress a list of items to be cancelled. In so doing he would automatically receive credit in the public arena for fighting against waste. The public is unlikely to be able to differentiate between "justified" and "unjustified" programs. The President would win on image alone, not substance or analysis. At the same time, Congress would receive a public rebuke for having enacted the supposedly wasteful items. That is Damage No. 2. If Congress were to disapprove the bill drafted by the Administration to eliminate the items, it would be further criticized. The President could go to the public and claim that Congress, having

established the fast-track procedure to correct for its deficiencies, refuses to delete unwanted and unneeded funds. Damage No. 3. If Congress has an interest in building support and credibility with the public, this is a procedure to avoid.

Moreover, the President would have a new tool to coerce lawmakers and limit their independence. He or his aides could call Members to alert them that a particular project in their district or state might be on a list of programs scheduled for elimination. During the phone call, the Member would be told that the Administration actually thinks the project is a good one and should be preserved. The Member is assured that the Administration will do everything in its power to see that the project is not placed on the final list. At that point the conversation shifts course to inquire whether the lawmaker is willing to support a bill, treaty, or nomination desired by the President. That political leverage diminishes the constitutional independence of Congress. Damage No. 4.

### **What Are the Potential Dollar Savings?**

What we know about the item veto indicates that the amount saved would be quite modest, if any, and certainly would not be a remedy for annual deficits in the range of \$300 billion or \$400 billion. Both conceptually and in actual practice, the experience with the item veto suggests that the amounts that might be saved would be relatively small, in the range of perhaps one to two billion a year. Under some circumstances, an item veto could increase spending, as with the Quid Pro Quo described above. The Administration withholds cancelling a Member's program with the understanding that the Member will support a spending program favored by the President.

In January 1992, the General Accounting Office released a report that estimated the savings that could be achieved through an item veto. The study assumed that the President would apply the item veto to all the items objected to by the Administration in its Statements of Administration Policy (SAPs). GAO estimated that the savings over a six-year period, during fiscal years 1984 through 1989, could have been \$70 billion.<sup>1</sup> I was asked to review the GAO study. Looking at the same data, I concluded that the savings over the six-year period would have been not \$70 billion but \$2-3 billion and probably less. I also suggested that instead of reductions the process could lead to increases through executive-legislative accommodations.<sup>2</sup>

Comptroller General Charles A. Bowsher, writing to Senator Robert C. Byrd, later acknowledged that actual savings from an item veto "are likely to have been much less" than the \$70 billion originally projected. Actual savings "could have been substantially less than the maximum and maybe, as you have suggested, close to zero." Mr. Bowsher also discussed situations "in which the net effect of item veto power would be to increase spending." Such a result could occur if a President "chose to announce his intent to exercise an item veto against programs or projects favored

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

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

by individual Senators and Representatives as a mean of gaining their support for spending programs which would not otherwise have been enacted by the Congress.”<sup>3</sup>

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

### **A Way to Eliminate Earmarks?**

It might be argued that the procedures outlined in the bill would allow the President to single out for cancellation unjustified earmarks added by Members. I suggest that it will be very difficult to measure what happens because the fast-track procedure is likely to change legislative behavior. Suppose, for the sake of argument, that Congress currently adds 150 earmarks that the President finds objectionable. Through item-veto authority, he recommends that 50 be eliminated. Congress agrees to support the cancellation of half that amount. Thus the total declines from 150 to 125, a significant reduction. But how would Members behave with the availability of an item-veto procedure? Perhaps the number of “objectionable” earmarks will grow from 150 to 250, allowing Members to take credit for initiatives taken on behalf of constituents and place the blame on unelected bureaucrats who offer objections. The President responds with a list of 100 earmarks to be eliminated. Congress supports him on half. The result: earmarks decline from 250 to 200. That isn’t progress. It’s more like a shell game and far removed from the “transparency” used to describe the benefits of item-veto legislation. Functioning in that manner, the process reduces rather than enhances congressional responsibility.

### **Other Disputed Provisions**

House and Senate hearings on the item-veto bill have spotlighted other controversial provisions. The bill placed no restrictions on the number of rescission proposals the President may submit to Congress. It could be one message per bill or a hundred per bill, and the same rescissions could be sent up a second or third time. As a result, the President gains substantial control in driving and

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

<sup>4</sup> *The Line Item Veto*, hearing before the House Committee on Rules, 105th Cong., 2d Sess. 12 (1998). The totals would have been somewhat higher had all of President Clinton’s recommendations been accepted by Congress. He canceled 38 projects in the military construction bill, with an estimated savings of \$290 million over a five-year period. At congressional hearings, witnesses from the military services contradicted claims made by the Administration in justifying the cancellations. President Clinton vetoed the resolution of disapproval but both Houses easily overrode the veto (votes of 78 to 20 in the Senate and 347 to 69 in the House).

determining the legislative schedule. I have already mentioned the 180 calendar day time for deferring the spending of funds. Third, there is no time limit when the President must submit his item-veto proposal to Congress. The problems identified here, and there are others, could be taken care of by changes to the bill: placing limits on the number of rescission bills the President may present to Congress, prohibiting repetitive requests, reducing the 180 days to something like 45, requiring the President to submit his requests within a specified number of days (such as 10 or 15), and eliminating the authority to “modify” language in mandatory spending bills. Those changes would improve the bill but they would not address the serious institutional damage that would be done to Congress, representative government, and constitutional checks.

### **Remedies Are Available**

There are more effective ways of dealing with federal spending, earmarks, and budget deficits. Through the regular veto power, the President can tell Congress that unless it strips a number of identified items from a bill that is in conference, he will exercise his veto. Threats of that nature are regularly employed to shape the contents of legislation. The President may announce that if a bill exceeds a certain aggregate amount, he will veto it, again putting pressure on Congress to modify the bill to the President’s satisfaction. At any time the President may submit a rescission bill to Congress under the 1974 Budget Act procedure. True, Congress can ignore his request, but through this procedure the President can publicly declare his opposition to excessive spending and put pressure on Congress to comply. A determined and skillful President can assure that legislative inaction comes at a cost.

More important than those tools, however, is the budget that the President submits. It is within the President’s power to recommend a budget that balances expenditures and revenues in such a way as to minimize or eliminate budget deficits. It is quite true that the President’s budget is merely a proposal and that Congress can change it as it likes. But the historical record suggests that the aggregate numbers submitted by Presidents (total spending, deficit or surplus, etc.) are generally followed by Congress, and that legislative changes have to do with priorities, not totals. Presidential leadership in the form of submitting a responsible budget has far greater impact on spending and deficits than the availability of item-veto authority.