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Personal Reflections on the Partial Veto

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PERSONAL REFLECTIONS ON THE PARTIAL VETO

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From my earliest years, I have been fascinated by the theory of politics. Therefore, within a year of beginning my college studies, I decided to make political science my major. As a law student, I volunteered for a number of political campaigns and began to move from the theoretical world to the practical world.

After receiving my law degree, I served as a legal advisor to the Marathon County Board of Supervisors and later was appointed City Attorney for the City of Wausau. My move from the theoretical world to the practical world, however, became complete in 1969 when I was elected to the Wisconsin State Assembly representing the Wausau area.

When I left Wausau to serve in the Assembly, it was my understanding that the governor could propose laws but only the legislature could pass laws. It was also my understanding that governors could veto those laws with which they did not agree and that their veto would stand unless it was overridden by more than two-thirds of the members of each house of the legislature. I had never considered that the partial veto could be used creatively to write laws that had never been considered by the legislature. I was in for a major learning experience.

My first lesson concerned the power of a veto's timing. I learned this lesson when then Governor Warren P. Knowles exercised a number of vetoes after the legislature had adjourned its final floor session in 1970. Although it was very unlikely that any of the Republican Governor's vetoes would have been overridden by the Republican-controlled legislature, there was no opportunity to even consider doing so because of the timing of Knowles' vetoes. The legislature had concluded its business and could not even attempt an override.

After the 1970 elections, the Democrats became the majority party in the Wisconsin Assembly. To remedy their previous inability to challenge

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partial vetoes, the Democrats established a schedule of floor sessions which explicitly included a three-day session at the end of all other sessions. These three-day sessions were reserved for the consideration of partial vetoes. The concern of many legislators at that time (including myself) was the imbalance of power between the governor and the legislature concerning the use of the veto, particularly if the legislature did not have an opportunity to consider overriding those vetoes. By establishing a mandatory veto review session, we believed a proper balance of authority between the executive branch and the legislative branch had been established.

The 1970 elections also resulted in the election of Patrick J. Lucey. Governor Lucey was an activist as governor in every sense of the word. He introduced and successfully pursued ambitious legislative programs affecting the state's taxing structure, the university system, and the method for distributing state revenues to municipal units of government. However, his activism was not limited simply to proposing and advocating. The legislature—and the public at large—soon learned that his activism extended to the use of the partial veto.

As a legislator, I was vaguely aware of the potential aggressive use of the partial veto, but I had not anticipated it being put to practical use. Accordingly, along with virtually all of my colleagues in the legislature, I was caught by surprise by Governor Lucey's audacious use of the partial veto. I was surprised rather than alarmed because I was more interested in the results of the Governor's actions than the process he employed. Because I agreed with the results, I did not object to the process. That view was shared by most members of the legislature, so Governor Lucey's early "creative vetoes" were easily sustained by the legislature. Years later, after Governor Lucey announced that he was resigning his office to become the United States Ambassador to Mexico, the legislature did assert itself on this question and overrode a number of his vetoes.

The politics of the Governor's use of the partial veto aside, legal questions as to his authority were raised. In *State ex rel. Sundby v. Adamany*,[1] the Wisconsin Supreme Court affirmed a governor's broad power to veto parts of appropriation bills and concluded that the partial veto power contained in the Wisconsin Constitution authorized the governor to act in a quasi-legislative fashion in the exercise of his veto powers.

1. 71 Wis. 2d 118, 237 N.W.2d 910 (1976).

Accordingly, by the time Governor Lucey turned the governor's office over to Acting Governor Martin Schreiber, the rules governing the use of the partial veto were clear. The rules were neither based on political philosophy, meaning in accordance with the respective roles of the executive and legislative branches, nor were the rules based on what was legal; the supreme court had made clear that a very ambitious use of the partial veto was legal. Rather the rules were based on politics. If a majority (or, more accurately, one-third of the members plus one in either house of the legislature) favored the result occasioned by the use of the partial veto, the result would stand.

The political application of the partial veto was evidenced early in Acting Governor Schreiber's term when he clearly reversed the intention of the legislature regarding funding the Election Campaign Fund. The legislature had proposed that taxpayers be allowed to add a dollar to their tax liability if they wished to support the Election Campaign Fund. Acting Governor Schreiber, by use of the partial veto, allowed taxpayers to indicate whether a dollar should come from the state general fund to support the Election Campaign Fund.

Once again, because a sufficient number of legislators agreed with Acting Governor Schreiber on this matter, his partial veto was sustained. However, a legal challenge was undertaken. In *State ex rel. Kleczka v. Conta*,[2] the supreme court upheld Acting Governor Schreiber's use of the partial veto. The court held that the governor's partial veto can change legislative intent because the governor's partial veto power is coextensive with the legislature's power to enact laws.

In 1978, Republican Lee Sherman Dreyfus was elected governor. The Democrats remained the majority party in both the senate and the state assembly. Thus, the political balance was considerably changed from the Lucey and Schreiber years. However, that did not dissuade Governor Dreyfus from creatively exercising the partial veto. In the 1979 budget bill, Governor Dreyfus exercised a number of partial vetoes, including at least one digit veto. Although Governor Dreyfus's vetoes were subject to a closer legislative review than those of his predecessors, most of them were sustained. The Governor vetoed thirty bills in their entirety, and those vetoes were sustained in all but five cases. Of his twenty-one partial vetoes, all but three were sustained. Although some Democratic leaders in the legislature took issue with the Governor's use of the partial veto on philosophical grounds, the ultimate test of whether the vetoes were sustained was their political appeal. Among the vetoes

2. 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

that were politically appealing enough to be sustained was the digit veto used by Governor Dreyfus in his first budget bill. This digit veto cut approximately $9,000,000 from the state's school aid appropriation.

I was elected governor in November of 1982 and assumed office in January of 1983. At the time, there were comfortable Democratic majorities in both houses of the legislature. Because both the executive and legislative branches were controlled by Democrats and because of a generally good working relationship between these branches, I did not exercise my veto power often. My partial veto power was seldom exercised because the Democratic leadership and I were able to agree in advance that certain proposed legislation should not become law and that the easiest way to obtain that result was to ensure that the legislation did not reach my desk.

On the other hand, because of the comfortable Democratic majorities in both houses, I was tempted to expand upon the use of the creative partial veto exercised by my immediate predecessors. I felt my friends in the legislature would surely sustain me in those efforts. I was in for a surprise.

In the 1983-85 budget bill, I vetoed letters and digits to reduce a paragraph of five sentences into a one-sentence paragraph of twenty-two words. This time, the legislature was not interested in the political result; it looked only at the philosophical question of the balance of power between the legislative and executive branches. It determined decisively that as a representative of the executive branch, I had gone too far. The veto was overridden unanimously by the state assembly and with only one dissenting vote in the senate. I had learned my lesson and did not attempt similar creative vetoes during the balance of my tenure. Beyond that general concern, it seemed to me that the legislature had drawn a line on the use of the partial veto and that the striking of letters and digits to form new words or new amounts would not be acceptable in the future. It seemed as though a balance had been struck between the legislative branch and the executive branch on the use of the partial veto.

It did not take long to realize that this was not the case. Republican Governor Tommy Thompson took office in January of 1987 faced with two houses controlled by Democrats. In dealing with the budget bill put together by those Democratic majorities, Governor Thompson exercised the partial veto on 290 items using digit vetoes, letter vetoes, and selective editing. Governor Thompson's actions were unprecedented, both in the number of times the partial veto was exercised and in terms of "creativity." A hue and cry arose from Democrats in both houses of the legislature, but every partial veto was sustained. The vetoes were sustained

because the Republicans had more than one-third of the members in each house and committed themselves on political grounds to sustain the Governor's vetoes. The philosophical arguments of the Democratic leadership fell on deaf Republican ears. Many of those same Republican legislators had been precluded from effective participation in the budget-making process, and they were pleased with the political results of the Governor's vetoes. A legal challenge to Governor Thompson's use of the partial veto was taken to the supreme court but was rejected in *State ex rel. Wisconsin Senate v. Thompson*.[3] The court's majority upheld the use of the partial veto to eliminate individual words, letters, and digits so long as there remains after the veto "a complete, entire, and workable law."[4]

Since that time, the use of the partial veto has been both expanded and contracted. It was contracted when the voters ratified an amendment to the Wisconsin Constitution in April 1990 that eliminated the use of the partial veto in striking individual letters (the "Vanna White" Amendment). It has been expanded by Governor Thompson's practice of striking appropriations and substituting his own figures in their place.

With the supreme court's recent rulings on the use of the partial veto and the substantial number of Republicans in the legislature, Governor Thompson is "in the driver's seat" when it comes to the use of the partial veto. Consequently, Democrats in the legislature have attempted to craft "veto-proof" language in appropriation bills and even considered separating appropriations language from the policy surrounding those appropriations by putting them in completely different bills. From my perspective, these exercises are not particularly fruitful.

Now that I am out of public life, my interest in these matters has returned from the practical to the theoretical. It seems to me that there must be a better way to establish an appropriate balance between the executive and legislative branches regarding the use of the partial veto, at both the federal level and here in Wisconsin.

At the federal level, with no partial veto authority by the President, there is an imbalance that places too much authority in the hands of the Legislature. Congress can and regularly does add to budget bills extraneous items that the President has no ability to delete unless he vetoes the entire measure. Wisconsin is on the other end of the spectrum where the governor, through the use of the partial veto, can actually create laws

3. 144 Wis. 2d 429, 424 N.W.2d 385 (1988).

4. *Id.* at 437, 424 N.W.2d at 389.

that were never even considered by the legislature. Neither of these extremes makes for good public policy.

As I reflect upon my experience as a legislator, a cabinet secretary, and governor, I am completely convinced of the efficacy of the partial veto. That veto should be limited, however, to entire items within an appropriation bill, and vetoes should be applicable only to portions of such bills that are "grammatically and structurally distinct." This standard, enunciated by Justice Connor T. Hansen in his dissent in *State ex rel. Kleczka v. Conta*,[5] seems to be the appropriate middle ground.

As I have indicated in the course of this essay, political considerations (as opposed to philosophical concerns about the appropriate balance between the executive and legislative branches) have largely determined how far a governor can reach in the use of the partial veto. The political environment is constantly changing, however, as I can personally testify, and what may be good for the Republicans today may be bad for them and good for the Democrats tomorrow. There are occasions when partisan politics should be put aside in the interest of the public good. I believe that this is one of those occasions and that Democrats and Republicans in both the executive and the legislative branches ought to cooperate in drafting appropriate language to amend the Wisconsin Constitution to limit the use of the partial veto to those portions of appropriation bills that are grammatically and structurally distinct.

As one who has seen the error of his previous ways, I wholeheartedly support such an amendment to the state constitution. Indeed, I would be surprised if most of my predecessors (and fellow governors) would not join me in this matter.

5. 82 Wis. 2d at 716-27, 264 N.W.2d 555-61 (Hansen, J., dissenting in part and concurring in part).