

Revised April 21, 2006

PROPOSED LINE-ITEM VETO LEGISLATION WOULD INVITE ABUSE BY EXECUTIVE BRANCH

President Could Continue Withholding Funds After Congress Voted to Release Them

By Richard Kogan

The Administration has proposed the Legislative Line Item Veto Act of 2006, which was recently introduced in Congress by Senate Majority Leader Bill Frist (R-Tenn.) as S. 2381 and by Representative Paul Ryan (R-Wis.) as H.R. 4890.¹ Both the House and the Senate are expected to consider the proposal in coming months.

The proposal would allow the President to sign appropriations acts and tax and entitlement legislation, and then strike specific provisions from them. He would be allowed to strike far more than “earmarks.” For example, the President could, if he chose, leave all earmarks in place while eliminating all funding for the 91 programs he proposed to eliminate in his February 2006 budget.

Under the proposal, when the President chose to strike amounts from appropriations acts, he could withhold the funds in question for *180 days*. During that time, Congress would be required to vote on whether to pass legislation eliminating the funding as the

¹ The text of the proposal is available at http://www.whitehouse.gov/omb/pubpress/2006/line_item_veto.pdf.

KEY FINDINGS

- The line-item veto legislation would expand Presidential power to a greater degree than has been understood.
- If the President proposed to cancel funds appropriated for a program, Congress would have to vote on his proposal within 10 days from the bill's introduction in Congress. But even if Congress turned down his request, he could continue withholding the funds until *180 days* had passed.
- If the fiscal year ended before the 180-day period did, the funds could expire. This could enable the President to kill some types of programs even if Congress had rejected his proposals to cancel funding for the programs.
- The Congressional Budget Office, the Congressional Research Service, columnist George Will, and other analysts have concluded the legislation is as likely to *increase* expenditures as to reduce them, because a President could use this new authority to pressure Members of Congress to support some of his spending and tax-cut priorities in return for a promise not to propose canceling appropriation items they favored.
- The legislation supposedly applies to both increases in entitlements and new “targeted tax benefits.” In fact, its application to special-interest tax breaks may be more apparent than real, as Congress would be able to draft new tax breaks in ways that exempted them from the line-item veto procedure.

President had requested, without any amendments being allowed. If Congress turned down the President's request to eliminate the funds the President *could continue to withhold them* for months after Congress had voted to reject his request to eliminate the funding. Some of the funds could expire in the meantime if the 180-day period extended beyond the end of the fiscal year for which the funds had been appropriated.

As acting Congressional Budget Office director Donald Marron explained in recent testimony on the proposal, the withholding of funds “would not end upon the Congress’s rejection of the rescission proposals...,” giving the President the “power to unilaterally defer spending for six months, thereby effectively canceling some budget authority and some programs altogether (for which the funding would lapse at the end of the fiscal year...”²

The President also could use the new “line-item veto” procedure to strike provisions of new entitlement legislation and certain new “targeted tax benefits” contained in recently enacted tax bills. This authority would be far broader with respect to entitlement expansions than with respect to tax cuts. In fact, it appears Congressional tax-writers could draft new tax breaks in a way that made them exempt from the new procedure.

How Would the New Proposal Differ From the President’s Existing Authority to Propose Rescissions?

The new proposal would significantly expand the President’s authority. Currently, the President can request that Congress rescind (or cancel) enacted appropriations, and he can temporarily withhold the money in question while Congress considers the rescission request. The new procedure the Administration is proposing would be *in addition* to these existing procedures. (If the President wished Congress to rescind funding, he would be free to submit his rescission proposals to Congress under either set of procedures.)

The new procedure would differ from the existing rescission procedure in a number of important ways:

- The new procedure would give the President a “fast track” to force an up-or-down congressional vote on his package of terminations in its entirety. The package of cancellations could not be divided into separate parts, amended, or filibustered. The vote would occur within 10 days of the package’s introduction in Congress as a piece of legislation, and within 13 days of the President’s submitting the package. (The package would have to be introduced in Congress within three days after the President submitted it.)
- The President could package his proposed cancellations in any way he wanted. He could split his proposed cancellations of items from a single piece of legislation into a number of packages, sending Congress a separate “package” for each proposed cancellation and compelling Congress to take dozens of individual votes. Or, he could combine cancellations from *different* bills — both appropriations bills and bills affecting mandatory programs — into a single package. Congress would have to cast an up-or-down vote on each package exactly as the

² Statement of Donald B. Marron, Acting Director, Congressional Budget Office, before the Subcommittee on the Legislative and Budget Process, House Rules Committee, March 15, 2006, available at <http://www.cbo.gov/ftpdocs/70xx/doc7079/03-15-LineItemVeto.pdf>.

President had constructed it. In sharp contrast, the existing rescission procedure allows Congress to package the President's rescission requests in ways that are most convenient for congressional consideration, amend the President's rescission requests, or decline to vote on them.

- The new procedures would allow the President to withhold funding for 180 days after he proposed a package of terminations, *even if Congress voted quickly to reject the terminations*. If the President submitted a package of cancellations in the spring of a year, he could effectively kill various items simply by withholding funding until the end of the fiscal year on September 30, even if Congress had acted swiftly to reject his proposed cancellations.³

This lengthy period of withholding obviously is not necessary, since the fast-track mechanism in the proposal would require a vote in Congress within *13 days* of Congress' receiving the President's package of proposed cancellations. The existing rescission procedure allows the President to withhold funds requested for rescission for 45 days, not 180 days. (In recent Congressional testimony, Rep. Paul Ryan stated that the bill's 180-day withholding provision "is required to make sure that Congress has the opportunity to act if the President's rescission proposal is made directly before an extended recess."⁴ This argument does not withstand scrutiny. The bill could have followed the current rescission procedures, under which the clock on the withholding period *does not run* during Congressional recesses of more than three days. The Administration evidently made a decision not to follow that approach and instead to allow the President to continue withholding funds regardless of Congressional action.)

- Exacerbating this problem, it appears that if the President proposed the rescission of funds under either the existing rescission procedure or the new procedure and Congress did not accede to his request, the President could then *re-propose* the *same* rescissions under the other procedure, withholding the funds for an additional period of time and thereby increasing the chances that the funding would effectively be cancelled despite congressional opposition to the cancellation. (The funding would effectively be cancelled if the fiscal year ended before the withholding period did.)
- Another difference between the proposed procedure and the President's current rescission authority is that under the new procedure, the President could propose the *elimination* of appropriations for discretionary programs but not a *reduction* in funding for such programs. If the President wanted to reduce but not eliminate a program or line item, however, he could continue to use the existing rescission procedures.
- Another significant point is that under the new procedure, if Congress enacted a package of cancellations that the President had submitted, the Budget Committee Chairmen would reduce accordingly the amount allocated to the Appropriations Committees for the fiscal year in question. The effect would be to dedicate all savings from the cancellations to deficit reduction.

³ The appropriations provided for most programs expire at the end of the fiscal year in question. In such cases, any funds that have not been obligated by September 30 revert to the Treasury. (If the line-item veto legislation were enacted, it is possible that Congress would respond by lengthening the period of time for which appropriations for various programs would remain available, but it is unclear whether Congress would do so.)

⁴ Statement of Rep. Paul Ryan before the Subcommittee on the Legislative and Budget Process, House Rules Committee, March 15, 2006.

This rigid approach is problematic, however, and could well prove self-defeating. A legitimate purpose of eliminating certain unworthy projects may be to direct scarce funds to higher priority programs, but that would not be permitted under the new procedure. And without the opportunity to redirect at least some of the savings to better uses, Congress is likely to be less willing to approve the President's package of cancellations in the first place.

- The new procedure could be applied not only to appropriations for discretionary programs but also to new entitlement legislation and to new "targeted tax benefits" contained in recently enacted tax bills. The President could propose to cancel *or scale back* an increase in benefits or eligibility in a provision of an entitlement bill if he submitted his request after enactment of the bill but before his next annual budget was issued.

Since many entitlement increases work by making additional categories of people eligible for benefits or increasing benefits by changing the formulas for calculating them, the authority to scale back a new entitlement increase appears to give the President the authority to change entitlement laws in unexpected ways. For instance, if Congress created a Medicare "buy in" option for uninsured people between the ages of 62 and 65, the President might be able to use the new procedure to scale back this entitlement increase by raising the buy-in age to 63 for some types of people and to 64 for others, even if Congress had not created any such distinction between eligible individuals.

- The story is quite different with regard to "targeted tax benefits," which the President could propose to cancel but not to scale back. Of particular note, under the Administration's proposal, the term "targeted tax benefit" would be defined so narrowly that it appears *Congress could design special-interest tax breaks so they would be exempt from any possible presidential rescission.*

Targeted tax benefits would be defined as measures that provide a tax break to 100 or fewer beneficiaries. The definition of targeted tax break used in the proposal is identical to the definition used in the Line Item Veto Act of 1996. At the time the earlier legislation was enacted, the Joint Committee on Taxation indicated that tax benefits generally could be drafted in ways that would make them exempt from this presidential authority, even if they were targeted to 100 or fewer people.

Note that the proposal would establish unequal treatment of entitlement increases and tax breaks. The President could use the proposed fast-track procedure to force a vote on the cancellation of an entitlement improvement that would benefit millions of people, but he would *not* be able to force a vote on a tax break if it benefited as few as 101 people. This is despite the finding by Congress's Joint Committee on Taxation, the Government Accountability Office, and former Federal Reserve Chairman Alan Greenspan that many tax breaks are analogous to entitlement programs and are properly thought of as "tax expenditures" or "tax entitlements."⁵

⁵ According to the Joint Committee on Taxation, "special income tax provisions are referred to as tax expenditures because they may be considered analogous to direct outlay programs, and the two can be considered as alternative means of accomplishing similar budget policies. Tax expenditures are similar to those direct spending programs that are available as entitlements to those who meet the statutory criteria established for the programs." See Joint Committee on Taxation, "Estimates of Federal Tax Expenditures for Fiscal Years 2005-2009," January 12, 2005, p. 2. This equivalence is why former Federal Reserve Chairman Alan Greenspan has referred to these tax breaks as "tax entitlements."

In addition, the President could modify and rewrite entitlement improvements and create new entitlement categories and program distinctions that Congress never intended, but he could make *no* such modifications even in targeted tax cuts affecting fewer than 100 tax payers; he could only accept these targeted tax breaks or propose to cancel them.

Finally, the new procedure would place the savings achieved by vetoing an entitlement increase into a “lockbox,” as with vetoed items from appropriations bills. But the savings from vetoing a targeted tax benefit would appear *not* to be placed in a lockbox and thus would remain available for another tax cut (although the drafting of the bill is murky on this point).

Would The Proposal Reduce The Deficit?

The Congressional Budget Office has suggested that the consequences of this proposal might be to *increase* total spending rather than reduce it, because “Congress might accommodate some of the President’s priorities in exchange for a pledge not to propose rescission of certain provisions, thereby increasing total spending.” CBO says that studies of states with line-item vetoes have “documented similar devices employed by state legislatures.”⁶

The columnist George Will makes the same point:⁷

How Does This Proposal Differ From the Line Item Veto Act of 1996?

Unlike H.R. 4890, the Line Item Veto Act of 1996 granted the President the unilateral authority to cancel enacted appropriations. The Supreme Court ruled in 1998 that such authority was unconstitutional, since it allowed the President to change a law by himself, thus violating the constitutional rules for creating or amending laws. The new proposal is presumed to be constitutional because it does not grant the President the authority to change an appropriations act unilaterally; rather, he would request that Congress enact a change in the appropriations law.

There are three ways in which the new proposal could grant the President *more* power than under the 1996 act. First, that act gave the President five days from the enactment of appropriations, entitlement, or tax legislation to decide whether to cancel some of its provisions, while H.R. 4890 gives the President up to a year. In addition, under the 1996 act, if Congress overturned a presidential rescission by statute, the withheld funds would have to be released; under H.R. 4890, if Congress overturns a presidential veto by defeating the President’s proposal to cancel the funds, the President can continue to withhold the funds for the 180-day period — long enough, in some cases, to effectively cancel them.

Second, the 1996 act allowed the President to cancel entitlement increases but not to scale them back. As noted in this analysis, the authority to scale back entitlement increases may permit the President to rewrite entitlement benefits in unexpected ways. (The drafting of the new proposal also suggests that the President could propose to cancel or modify provisions of new legislation that would *reduce* entitlement benefits. In short, it appears that he could veto or modify both entitlement increases and entitlement decreases.)

Finally, the 1996 act included a sunset provision; the act would expire after eight years if not reauthorized. This provision apparently was included due to the uncertainty about the effects that the line-item veto legislation would have. The new proposal, by contrast, has no expiration date. It would become permanent law.

⁶ Testimony of Donald B. Marron, *op.cit.*

⁷ George Will, “The Vexing Qualities of a Veto,” in the *Washington Post*, March 16, 2006, page A23.

Arming presidents with a line-item veto might *increase* federal spending, for two reasons. First, Josh Bolten, director of the Office of Management and Budget, may be exactly wrong when he says the veto would be a “deterrent” because legislators would be reluctant to sponsor spending that was then singled out for a veto. It is at least as likely that, knowing the president can veto line items, legislators might feel even freer to pack them into legislation, thereby earning constituents’ gratitude for at least trying to deliver. Second, presidents would buy legislators’ support on other large matters in exchange for not vetoing the legislators’ favorite small items.

Congressional Research Service senior specialist Louis Fisher also came to the conclusion that presidents would more likely use line-item veto authority to pressure lawmakers to support White House spending policies by threatening to cut Members’ pet projects, than to reduce total spending or the deficit. In a 2005 report, Fisher warned that “experience with the item veto, both conceptually and in actual practice, suggests that the amounts that might be saved by a presidential item veto could be relatively small, in the range of perhaps one to two billion dollars a year. Under some circumstances, the availability of an item veto could increase spending. The Administration might agree to withhold the use of an item veto for a particular program if Members of Congress agreed to support a spending program initiated by the President. Aside from modest savings, the impact of an item veto may well be felt in preferring the President's spending priorities over those enacted by Congress.”⁸

Finally, Douglas Holtz-Eakin, director of the Congressional Budget Office from February 2003 to December 2005 and now a fellow at the Council on Foreign Relations, recently observed that, “I don’t think there’s any evidence that this, in itself, is a powerful enough weapon to alter the path of spending.” Holtz-Eakin noted that in studying the effect of line-item vetoes at the state level, he found they produced mixed results. He found no major differences in spending between states where governors had this power and states where they did not.⁹ Similarly, in his recent testimony on this proposal, the current acting CBO director noted that in the absence of a political consensus to establish fiscal discipline, “the proposed changes to the rescission process included in H.R. 4890 are unlikely to greatly affect the budget’s bottom line.”¹⁰

Would the Proposal Improve the Quality of Legislation and the Political Process?

Mr. Will’s second point, cited above, is not just about the size of the federal budget but also about the political power of the President. The current division of powers gives the President the power to veto legislation, but balances this presidential power by giving Congress the power to package legislation. The new proposal would further weaken Congress in relation to the President by enabling the President to propose cancellations that could divide the congressional coalition that had negotiated the legislation in the first place. Mr. Will concludes that “The line-item veto's primary effect might be political, and inimical to a core conservative value. It would aggravate an imbalance in our constitutional system that has been growing for seven decades: the expansion of executive power at the expense of the legislature.”

⁸ Louis Fisher, “Item Veto: Budgetary Savings,” Congressional Research Service, May 26, 2005,

⁹ Jonathan Nicholson, “Precursor to Line-Item ‘Veto’ Failed to Restrain Prior Spending, GAO Says,” Bureau of National Affairs, *Daily Tax Report*, March 13, 2006, p. G-6.

¹⁰ Testimony of Donald B. Marron, *op.cit.*

As Will makes clear, the proposal would enhance the President’s ability to engage in political “horse-trading” with members of Congress. The President also would gain enhanced ability to engage in political horse-trading with outside groups. Whether dealing with legislators or outside groups, the President could threaten to propose the cancellation of their favored items — or pledge *not* to cancel their favored items — in return for their support on other, unrelated matters. The President’s threat to cancel, or promise not to cancel, items of importance to legislators or to outside groups could be used to increase his leverage to advance policies unrelated to the budget, such as support for his nominees, for regulatory legislation, or even for foreign treaties.

These effects were recently discussed by a former staff director of the House Appropriations Committee, who testified —

There is no question that a nexus has developed between campaign fund-raising and the community that advocates on behalf of earmarks. The more earmarks a Senator or Congressman is able to win for a local university, hospital, city government or art museum, the more lobbyists he may expect to find in attendance at his fund-raisers. ... Earmarks are increasingly used to persuade members to support legislation that they might otherwise oppose or oppose legislation that they might support. In the House this practice is now being extended to the granting of earmarks in one piece of legislation in return for a member’s vote on unrelated legislation. Chairman Thomas joked openly about the delay in consideration of the highway bill last summer so that the leadership could gain more support for the Central America Free Trade Agreement.¹¹

Some would maintain that H.R. 4890 is intended to be a partial cure for these diseases. But it could just as easily aggravate the diseases by giving the President an easier and more direct way to play the game. The premise of the proposal seems to be that the President will be *less* political, *less* interested in rounding up votes for policy issues, nomination, and other proposals, and *less* interested than Members of Congress in securing the financial and political support of outside groups for such purposes. Would that really be the case? Norman Ornstein, of the American Enterprise Institute, thinks not.

[T]he Republicans have rejected the one device that has been proved in the past to bring fiscal discipline, the pay-as-you-go provisions that governed fiscal policy through the golden years in the 1990s. Instead, they are pushing a sham version of the line-item veto, basically just a sharply enhanced rescission authority for the president. Congress would pass its spending bills, the president would pluck out items he did not like and send them back to Congress to vote on them again.

Leave aside the simple abdication of responsibility by Congress here — the refusal to set up a provision to have separate votes on earmarks or related items before any bill gets to the president, and the basic message of “stop us before we spend again.” The

¹¹ The highway bill was a cornucopia of earmarked projects. The testimony was by Scott Lilly before the Subcommittee on Federal Financial Management, Government Information, and International Security, Committee on Homeland Security and Governmental Affairs, United States Senate, March 16, 2006.

larger reality is that this gives the president a great additional mischief-making capability, to pluck out items to punish lawmakers he doesn't like, or to threaten individual lawmakers to get votes on other things, without having any noticeable impact on budget growth or restraint.¹²

¹² Norm Ornstein, *Three Embarrassments in an All-Around Shameful Congress*, American Enterprise Institute, April 5, 2006, at http://www.aei.org/publications/filter.social.pubID.24163/pub_detail.asp.