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HOUSE "LINE-ITEM VETO" PROPOSAL INVITES ABUSE BY EXECUTIVE BRANCH

By Richard Kogan

The House Budget Committee has approved the Legislative Line Item Veto Act of 2006, a variation of a proposal that the Bush Administration submitted earlier this year.[1] The House floor is expected to consider this legislation during the week of June 18, while the Senate Budget Committee is scheduled to consider a different version of the proposal (along with other changes to the budget process) starting June 20.

KEY FINDINGS

- **The line-item veto legislation would expand Presidential power to a greater degree than has been commonly understood.**
- **If the President proposed to cancel funds appropriated for a program, Congress would have to vote on his proposal within 14 legislative days of the President's submission. But the President could continue withholding the funds until *90 days* had passed, even if Congress had turned down his request.**
- **The Congressional Budget Office, the Congressional Research Service, columnist George Will, and other analysts have concluded that line-item veto 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 also applies to increases in mandatory programs (i.e., entitlements) and, in theory, to new "targeted tax benefits." In fact, its application to new, special-interest tax breaks is largely non-existent, because "targeted tax benefits" are defined in the legislation as tax breaks that benefit only a *single* person or entity. Thus, the President could cancel a change in a mandatory program serving millions of needy children or elderly people, but special-interest tax breaks benefiting as few as two large corporations or two wealthy investors would be exempt.**

The House proposal would allow the President to sign appropriations acts and tax and entitlement legislation, and then propose canceling (or "vetoing") specific provisions of those measures. He would be allowed to propose canceling far more than "earmarks." For example, the President could, if he chose, leave all earmarks in place while canceling all funding for the 91 programs he proposed to eliminate in his February 2006 budget.

When the President chose to strike amounts from appropriations acts, he could withhold the funds in question for up to 90 days. During that time, Congress would be required to vote on whether to pass legislation canceling the funding as the President had requested, and amendments to the legislation would be barred. If Congress turned down the President's

[1] The reported bill is H.R. 4890, and Rep. Paul Ryan is the chief sponsor. For our analysis of the Administration's proposal, see http://www.cbpp.org/3-23-06bud.pdf.

request to cancel the funds, *the President could continue to withhold them* for several months after Congress had voted to reject his request to eliminate the funding. Under certain circumstances, some of the funds could expire — even though Congress had rejected the vetoes — if the 90-day withholding period extended beyond the end of the fiscal year for which the funds had been appropriated.

The President also could use the new "line-item veto" procedure to strike provisions of new entitlement legislation and, in theory, certain new "targeted tax benefits" contained in recently enacted tax bills. In fact, this authority would apply in any meaningful way only to entitlement expansions. Any tax cut or tax break benefiting *as few as two individuals or entities* (such as two large corporations) would be entirely exempt; the President would be prohibited from proposing to cancel it. Thus, entitlement improvements benefiting millions of low-income children or elderly people could be vetoed, while new tax loopholes benefiting as few as two wealthy investors or large corporations would be immune.

Moreover, under the legislation, even special-interest tax breaks benefiting a *single* individual or corporation could be shielded from the line-item veto authority by the chairmen of the House Ways and Means and Senate Finance Committees. The legislation gives them the authority to exempt even tax breaks affecting only a single taxpayer or firm.

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

On balance, 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 would differ from the rescission procedure currently in law 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 cancellations in its entirety. The package of cancellations could not be divided into separate parts, amended, or filibustered. The vote would occur within nine days of the package's introduction in Congress as a piece of legislation, and within 14 legislative days of the President's submitting the package. (The package would have to be introduced in Congress within five days after the President submitted it.)

- The President could package his proposed cancellations in a number of ways. He could split his proposed cancellations of items from a single piece of legislation into as many as five different veto packages — and as many as ten different packages in the case of an omnibus reconciliation bill or an appropriations bill that contains items from at least two subcommittees — thereby compelling Congress to take dozens of individual votes. Congress would have to cast an up-or-down vote on each package of cancellations exactly as the 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.[2]

- The new procedures would allow the President to withhold funding for up to 90 days after he proposed a package of cancellations, *even if Congress voted quickly to reject the terminations.* Existing rescission procedures, in contrast, allow a withholding period of 45 days of "continuous session." Even with Congressional recesses, the existing withholding period under the current procedures is generally well short of 90 days.

  If the President submitted a package of cancellations in July of a year (e.g., with respect to a supplemental appropriations bill enacted in May or June[3]), he might be able to kill various items simply by withholding funding until the end of the fiscal year on September 30, even if Congress acted swiftly to reject his proposed cancellations.[4]

  This lengthy period of withholding clearly is not necessary, since the fast-track mechanism in the bill would require a vote in Congress within *14 legislative days* of Congress' receiving the President's package of proposed cancellations. The American Law Division of the Congressional Research Service believes it would be constitutional for the proposal to have required that funds be released upon Congress's completion of its fast-track consideration.[5]

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[2] The new proposal appears to require that each package of cancellations pertain to budget items that were provided in a single piece of legislation. The President could not combine cancellations from two or more measures into a single package for an up-or-down vote. In other words, he could not combine some cancellations from the Labor-HHS appropriations bill with ones from the Transportation-Treasury-HUD appropriations bill. However, the text of the House Budget Committee proposal is not entirely clear in this respect.

[3] After budget legislation is enacted, the President would have 45 days to decide whether to submit a package of cancellations to Congress. After he submitted the package of proposed cancellations, he would have two additional 45 day periods — which is why we say "up to 90 days" — during which he could continue to withhold the amounts in question.

[4] 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. Congress frequently permits funds provided in supplemental appropriations bills to continue to be available beyond September 30, in which case they would not lapse even if withheld for 90 days. But unless Congress provides a longer "term of availability" in this way, a 90-day withholding period could lead to the expiration of funds, even if Congress had voted to disapprove the President's proposed cancellations.

Acting Congressional Budget Office director Donald Marron commented on this aspect of the proposal in recent testimony on the Administration's line-item veto proposal, which allowed a 180-day withholding period. Marron noted that 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…" The risk that Marron cited would be reduced by the requirement in the Budget Committee legislation that the President propose his vetoes within 45 days of the enactment of budget legislation and with a 90-day rather than a 180-day withholding period, but the risk would not entirely be eliminated. Statement of Donald B. Marron 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.

[5] Morton Rosenberg, Specialist in American Public Law at the Congressional Research Service, letter to Senator John Kerry, April 26, 2006.

- 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. Perhaps because the new procedure contemplates the cancellation of entire items, programs, budget accounts, or provisions, the new proposal requires the President to submit his cancellation packages within 45 days of enactment of budget legislation. There is no time limit under the existing procedures. But the existing procedures were designed to accommodate cases in which funds provided at the start of a fiscal year proved to be more than needed much later in the year, as projects were being completed; there are some occasions in which projects come in under budget or circumstances change part-way through the year, allowing an appropriation to be reduced. The new proposal is not designed to deal with the belated discovery of cost reductions, but rather with up-front presidential determinations that entire programs or projects are undesirable.[6]

- Another significant point is that under the new procedure, if Congress enacted a package of cancellations 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. This inflexible approach could prove self-defeating. A legitimate purpose of eliminating certain unworthy projects may be to direct scarce funds to higher priority programs or urgent needs that have suddenly arisen; that would not be permitted under the new procedure. Without the opportunity to redirect at least a portion 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 contained in recently enacted bills. Within 45 days of its enactment, the President could propose to cancel any increase in benefits or eligibility in a provision of an entitlement bill.

- The story is very different with regard to "targeted tax benefits," which the President could likewise propose to cancel, but only on an extremely limited basis. Targeted tax benefits would be defined as being limited to those measures that provide a tax break to *a single beneficiary*. (The Administration's line-item veto bill and the 1996 Line-Item Veto law each set the threshold at 100 beneficiaries, rather than one beneficiary.) A beneficiary could be a business, a partnership, a trust, a non-profit group, or a single taxpayer. Thus, a tax break that applies only to people with income of more than, say, $900 million per year would *not* be considered a targeted tax benefit, because there likely would be more than one individual who makes more than that. Similarly, a special-interest provision designed to provide a tax loophole that would benefit only Exxon-Mobil and Amoco would not be considered a "targeted tax benefit," because two different oil companies would benefit.

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[6] The Budget Committee proposal repeals the existing rescission process and substitutes the new one. It is reasonable to suppose that the President and Congress do not really need the existing process when a project comes in under budget; the President can always propose the reduction of an existing appropriation and Congress does not need a special procedure to deal with these circumstances; it is usually happy to transfer funds that have proved not to be needed to higher-priority projects.

Moreover, the bill would allow the Chairmen of the House Ways and Means Committee and the Senate Finance Committee to list, for each tax bill, which provisions — if any — should be considered a targeted tax benefit. They could, without challenge, take an even more restrictive view than the extraordinarily narrow definition already contained in the proposal.

The proposal would thus establish sharply 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 *not* be able to force a vote on a special-interest tax break if it benefited as few as two 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 hundreds of billions of dollars a year of tax breaks contained in the tax code are analogous to entitlement programs and are properly thought of as "tax expenditures" or "tax entitlements."[7]

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

Unlike the Budget Committee's proposal, 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. 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 the Budget Committee proposal gives the President 45 days (and longer if Congress has adjourned *sine die*).

In addition, the 1996 act effectively limited the President to one package of vetoes per appropriations bill, entitlement bill, or tax bill. This limit was a natural consequence of having only five days to decide which provisions to veto. The Budget Committee proposal, in contrast, explicitly allows five (or in some cases 10) different packages of cancellations for each piece of budgetary legislation.

Finally, under the 1996 act, if Congress overturned a presidential rescission by statute, the withheld funds would have to be released; under the Budget Committee proposal, 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 up to 90 days — long enough, in some cases, to effectively cancel the funds.

Would The Proposal Reduce The Deficit?

The Congressional Budget Office has suggested that the consequences of line-item veto proposals such as this one might be to *increase* total spending rather than reduce it, because

[7] 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."

"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."[8]

The columnist George Will makes the same point:[9]

> 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."[10]

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.[11] 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 [the Administration's version of this proposal] are unlikely to greatly affect the budget's bottom line."[12]

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[8] Testimony of Donald B. Marron, *op.cit.*

[9] George Will, "The Vexing Qualities of a Veto," in the *Washington Post*, March 16, 2006, page A23.

[10] Louis Fisher, "Item Veto: Budgetary Savings," Congressional Research Service, May 26, 2005,

[11] 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.

[12] Testimony of Donald B. Marron, *op.cit.*

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."

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.[13]

Some would maintain that the Budget Committee's proposal 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, nominations, and other proposals, and *less* interested than Members of Congress in securing the financial and political

[13] The highway bill was a cornucopia of earmarked projects. The testimony cited here was presented 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.

support of outside groups for such purposes.[14] 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.
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> 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 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.[15]

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[14] During Budget Committee markup of the proposal, an amendment was offered by Rep. Neal (D-Mass) and modified by Rep. McCotter (R-Mich) expressing the "sense of Congress" that the President should not use the powers granted by the proposal to engage in horse-trading, at least with respect to legislation other than the budgetary measure in question. The amendment was accepted. But it has little meaning. It cannot be enforced and is little more than a pious wish.

[15] Norman 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.