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

By Richard Kogan

Overview

The Senate Budget Committee recently approved the Legislative Line Item Veto Act of 2006, a variation of a proposal the Bush Administration submitted earlier this year. The Budget Committee adopted this measure as part of a larger budget-process bill that it passed on June 20.[1]

The Senate is expected to consider the line-item veto measure later this session, most likely as a stand-alone bill rather than as part of broader legislation.[2] The House of Representatives passed its own version of line-item-veto legislation on June 22.

The Senate Budget Committee measure would allow the President to sign appropriations bills, and then to propose — up to one year after signing the bills — to cancel (or "veto") specific provisions in them. The President would be allowed to propose canceling far more than "earmarks." He could, if he chose, leave all earmarks

KEY FINDINGS

- Line-item veto legislation recently approved by the Senate Budget Committee would significantly enhance Presidential power. The President could wait up to a year after enactment of an appropriations bill before proposing to cancel funding in that bill. And while Congress would have to vote on the President's veto proposals within 13 days of his submitting them, he could continue withholding funds for 45 days, even if Congress quickly rejected his veto requests. The President could wait to submit vetoes until summer, causing the funds for some programs to lapse by withholding them through the end of the fiscal year even if Congress rejects the vetoes.
- In addition, the President could package vetoes of egregious pork items that had received damning publicity with vetoes of meritorious programs he opposed on ideological grounds — and force Congress to vote up-or-down on the package as a whole *with no amendments allowed*. This could lead to the cancellation of programs a majority of Congress considers worthwhile.
- 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 favor.
- The bill also would enable the President to veto both increases in entitlement programs and new "targeted tax breaks." But the type of tax breaks that could be vetoed is heavily restricted. The President could veto a change in an entitlement that would aid millions of poor children or elderly people, but most tax breaks would be immune.

[1] The line-item veto proposal is Title I of the larger bill, S 3521. See our summary of S. 3521 at http://www.cbpp.org/6-19-06bud.pdf.

[2] For our analysis of the House-passed proposal (H.R. 4890), see http://www.cbpp.org/6-19-06bud2.pfd. For our analysis of the Administration's line-item veto proposal, see http://www.cbpp.org/3-25-06bud.pdf.

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 45 days. During that time, Congress would be required to vote on whether to pass the package of cancellations exactly as the President had constructed the package, with no amendments permitted. If Congress turned down the President's request to cancel funds for a program, the President could continue to withhold the funds until the 45-day withholding period had expired. Under some circumstances, the funds could lapse and revert to the Treasury *even though Congress had voted to reject the vetoes*. This could occur if the 45-day withholding period was still running when the fiscal year for which the funds were appropriated came to an end.

The President could use the new "line-item veto" procedure not only with regard to appropriations bills, but also to strike provisions of new legislation that would create or increase entitlement benefits or "targeted tax benefits." The President's authority to strike increases in entitlement programs would be unlimited. Entitlement improvements that would benefit millions of low-income children or elderly people, such as provisions to cover more of the uninsured or to increase the Social Security widow's benefit, could be subject to the line-item veto. The President's authority to strike new tax breaks, however, would be far more circumscribed. As explained below, all tax breaks that benefited more than a "limited group" of taxpayers would be exempt.

Likely Effects of the Measure

As explained in the body of this analysis, most non-partisan experts who have examined the line-item-veto have concluded it is likely to do little to improve fiscal discipline or reduce deficits. Its principal effect is likely to be a significant enhancement in the President's leverage in dealing with Congress, and not only in budgetary matters.

The expansion of Presidential authority under the Senate Budget Committee's line-item veto measure raises serious concerns.

- As noted, the measure would give the President up to one year after a bill is enacted to propose the cancellation of items in it. By contrast, the 1996 line-item-veto legislation, which the Supreme Court subsequently struck down for other reasons, gave the President *five days* after a bill's enactment to propose vetoes. The line-item bill that the House recently passed would give the President 45 days to submit vetoes.

  The longer that a President has to submit his vetoes, the greater his ability to threaten to veto various items of importance to particular Members of Congress if they do not vote for proposals the President is pushing on other, unrelated matters (which could be anything from another budgetary matter to a judicial nomination). This lengthy period would increase the prospects that the line-item-veto authority would be used primarily to heighten White House leverage and power rather than to promote fiscal discipline.

- The measure would enable the President to package items from different pieces of legislation — including both appropriations bills and bills dealing with mandatory programs or taxes — into a single veto package, with Congress being required to vote up-or-down on the package as a whole and with no amendments allowed. This would enable the President to take a few egregious pork items (e.g., a new "bridge to nowhere") that had received damning publicity and to package vetoes of those items with vetoes of other, more meritorious items that the President opposed on ideological grounds. Members who voted "no" on the package could risk being attacked for refusing to curb the egregious pork.

- In some cases, the measure would enable the President to cancel funding for programs *unilaterally* even when Congress had disapproved his vetoes. Not only would the bill give the President a year after a bill's enactment to submit vetoes, but once the President proposed a veto, he could withhold the funds in question for 45 days regardless of how Congress responded. A White House could use these procedures to request vetoes in July or August and then to withhold appropriated funds through the end of the fiscal year, so that the funds could lapse even if Congress had voted to reject the veto.

The measure also provides for disparate (and inequitable) treatment of entitlement expansions and special-interest tax breaks. Entitlement expansions to aid the poor, the unemployed, or the uninsured could be vetoed. New tax breaks, including special interest tax breaks for well-heeled interests and big campaign contributors, would generally be exempt.

This analysis now proceeds to consider how this line-item-veto authority would differ from the authority the President already has to propose rescissions of appropriated funds. It also examines in greater detail the bill's treatment of special-interest tax breaks. Finally, it examines whether the legislation would be likely to reduce the deficit or to strengthen the legislative process, and how presidents might use the new authority.

How the Measure Compares With the President's Existing Authority to Propose Rescissions

Under current law, the President can request that Congress rescind (or cancel) enacted appropriations. He can temporarily withhold the money in question while Congress considers his rescission request. The new procedure would differ from the current 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 cancellations in its entirety. Not only would filibusters be barred, but no amendments — not even "motions to strike" — would be permitted, and the President's package could not be divided into separate parts. The vote would have to occur within ten days of the package's introduction in Congress, and within 13 days of session of the President's submitting the package. (The package would have to be introduced in Congress within three days of session after the President submitted it.)

- The President could submit his proposed cancellations in no more than four packages over the course of a year, one of which would accompany his annual budget. He could place proposed cancellations from a single piece of legislation into different veto packages. Since Congress generally enacts 11 separate appropriations bills each year, as well as a number of separate entitlement and tax bills, the President would both be permitted and effectively compelled to *combine* cancellations from a number of different bills — including appropriations, entitlement, and tax bills — into mega-cancellation packages. Congress would have to cast an up-or-down vote on each package of cancellations as a whole exactly as the President had constructed it. In contrast, the existing rescission procedure allows Congress to package the President's rescission requests in ways that are most convenient for congressional consideration, to consider amendments to the President's rescission requests, or to decline to vote on them.

- Still another key difference between the new line-item veto procedure and the President's current rescission authority is that the new procedure could be applied not only to appropriations for discretionary programs but also to new entitlement legislation and to a limited category of new tax breaks. At any time before the submission of his next annual budget, the President could propose to cancel any increases in benefits or eligibility contained in a provision of a recently enacted entitlement bill (and a limited category of tax breaks contained in new tax legislation). The President could propose to cancel provisions increasing entitlement benefits even if the legislation containing those provisions *reduced* entitlement costs as a whole.

- Another difference is that under the new procedure, if Congress enacted a package of cancellations the President had submitted, the Budget Committee chairs would be required to 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 approach of dedicating all cancellations to deficit reduction also applies to entitlement and tax cancellations.) This inflexible approach might prove self-defeating in some cases. A legitimate purpose of eliminating certain unworthy projects may be to direct scarce funds to higher priority programs or to urgent needs that have suddenly and unexpectedly arisen. That would not be permitted under the new procedure and represents another departure from how the current rescission procedures work. Without the opportunity to redirect at least a portion of

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, however, 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 the Budget Committee proposal gives the President up to a year.

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 only four packages of cancellations per year, practically insuring that the President will *combine* vetoes from the 11 separate appropriations bills, and from entitlement bills, into mega-veto packages that cannot be amended and that must be accepted or rejected as a whole.

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 appropriations veto by defeating the President's proposal to cancel the funds, the President can continue to withhold the funds for up to 45 days — long enough, in some cases, to effectively cancel the funds.

the savings to better uses, Congress may be less willing to approve the President's cancellation packages in the first place.

- A final difference between the new procedure and the President's existing 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 he wished to propose a reduction in funding, he could continue to use the current procedure, which would remain in effect alongside the new procedure.

The new procedure also retains a troubling feature of the President's existing rescission authority. It would allow the President to withhold discretionary appropriations for up to 45 days after he proposed a package of cancellations, even if Congress quickly voted to reject the cancellations. If the President submitted a package of cancellations in July or August of a year (he could submit cancellations of appropriated items any time up to a year after an appropriations bill had been enacted), he might be able to kill various items simply by withholding their funding until the end of the fiscal year on September 30, even if Congress voted down his proposed cancellations.[3]

This problem could have been lessened to some degree if the President was required to submit his proposed cancellations shortly after an appropriations bill was enacted (as the House version of the bill requires). The problem also could have been mitigated if the line-item veto measure had been crafted to require release of the withheld funds once 15 or 20 days of Congressional session had passed from the point that the President submitted his veto requests. Since Congress would have to vote on the President's veto package within 13 days of session of his submitting it, a 15-or 20-day withholding period would be more than sufficient to ensure that a vote occurred before the funds had to be released. (If Congress voted in favor of the vetoes, the funds would promptly be cancelled.) Such an approach was known to the Budget Committee but was rejected.

Favored Treatment for Tax Breaks

In theory, the new procedure would apply to "targeted tax benefits" as well as entitlement expansions. But there are two important ways in which the proposal treats new tax breaks differently from new entitlement increases. First, only some — and perhaps very few — tax breaks

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[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. Unless Congress provides a longer "term of availability," a 45-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 would allow 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 provision in the Senate legislation that allows funds to be withheld for 45 days rather than 180, but the risk surely would not be eliminated. (The House version reduces the risk to a greater degree; although it allows the President to withhold funds for up to 90 days, it requires that proposed cancellations be submitted reasonably shortly after an appropriations bill is enacted. As noted, the Senate version allows the President to wait for up to a year after enactment of a bill before submitting his cancellations of items in that bill.) 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.

would be eligible for cancellation under the bill. Second, while the President would be free to determine what constitutes an entitlement increase (and therefore could be subject to cancellation), Congress — rather than the President — would determine what constitutes a "targeted tax benefit" (and therefore could be proposed for cancellation if a President wished to eliminate it). All new tax breaks *not* specifically identified by Congress as "targeted tax benefits" would be exempt.

The Senate Budget Committee bill defines "targeted tax benefits" quite vaguely as provisions in recently enacted tax measures that have "the practical effect of providing more favorable tax treatment to a particular taxpayer or limited group of taxpayers when compared with other similarly situated taxpayers." The Committee's report on the proposal does nothing to clarify this vague definition. This unclear wording could be interpreted in a way that circumscribes very narrowly the tax breaks that could be considered for a veto. The Administration's version of the Line-Item Veto legislation would define the term "targeted tax benefits" more explicitly — as tax breaks that benefit 100 or fewer persons or entities — while the House version of the line-item veto legislation defines a "targeted tax benefit" as being limited to a tax provision that benefits a *single* person or firm. While the Senate's version is broader than the House version, it could be interpreted either more broadly or more narrowly than the Administration's version, and the Congressional Research Service has concluded that the Senate definition is indeed narrower than the Administration's version.[4]

Under the Senate Budget Committee measure, the Joint Committee on Taxation — which functions as the technical tax policy staff for the Senate Finance Committee and the House Ways and Means Committee, and whose director serves at the pleasure of the chairmen of those Committees — would be assigned the task of determining which provisions of a tax bill constituted "targeted tax benefits." The Joint Tax Committee would produce a list of any "targeted tax benefit" in a bill, and the list would be included in the text of the tax bill itself. The President would apparently be precluded from proposing a veto of any tax breaks that did not appear on this list.[5]

Given the vague definition of "targeted tax benefit," the role of the Joint Tax Committee in interpreting that phrase becomes paramount. The possibility that such decisions would be politically motivated was essentially acknowledged by the bill's author, Senate Budget Committee chairman Judd Gregg, when he unveiled the legislation in mid-June. In response to a reporter's question, Gregg said that in deciding whether to classify a new tax break as a "targeted tax benefit," the Joint Tax Committee staff "would be responsible to those people who appoint them."[6] The people who appoint them, of course, are the chairs of the very tax-writing committees that would have crafted and approved the tax breaks in the first place. The committee chairs would have a direct stake in ensuring that the tax breaks they had written could not be vetoed.

The Senate Budget Committee's line-item veto measure thus would provide for notably disparate treatment of entitlement increases and new tax breaks. The President could use the line-item procedure to force a vote on the cancellation of an entitlement improvement that would benefit millions of people, but the President would be very constrained in being able to propose the

[4] Virginia A. McMurtry, "Legislative Line Item Veto Act of 2006: Background and Comparison of Versions, Congressional Research Service," July 5, 2006.

[5] The Senate version is not entirely clear about the role that the Joint Tax determinations are supposed to play, but it appears these determinations are supposed to be binding on the President.

[6] Emily Dagostino, "House, Senate Treat Tax Benefits Differently in Line-Item Veto Bills," *Tax Notes*, June 15, 2006.

cancellation of new tax breaks, both because only tax-cut items of a "limited" scope could be considered for cancellation and because the President would have to rely on a congressional determination of what items fell within that limited scope.

In short, the Senate approach would restrict the President's ability to propose the cancellation of new tax breaks to those tax breaks that apply narrowly to a limited number of beneficiaries, while placing no similar restriction on the President's ability to propose cancellations of appropriations or increases in mandatory programs. The President's line-item veto authority with respect to spending items would *not* be limited to special interest earmarks in appropriations bills; the President could propose the cancellation of entire programs and broad program provisions that would benefit millions of Americans and did not single out any special interest.

The Budget Committee measure adopts this very restrictive approach with respect to new tax breaks 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]

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 "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

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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."

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.

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]

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 Constitution 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.

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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.*

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 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.
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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.[14]

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[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.

[14] 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.