

CBO TESTIMONY

Statement of
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on
The Line Item Veto Act After One Year

before the
Subcommittee on Legislative and Budget Process
Committee on Rules
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NOTICE

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Chairman Goss, Congressman Frost, and members of the Subcommittee, thank you for inviting me to testify today on the first year of the Line Item Veto Act. The act, which took effect on January 1, 1997 (and expires eight years later), grants the President the authority to cancel certain new spending or limited tax-benefit provisions that he signs into law. Its basic purpose is to enable the President to eliminate wasteful, unnecessary, or special-interest budgetary provisions in order to reduce the federal budget deficit.

The Line Item Veto Act marks a significant milestone in the federal budget process. Its passage followed years of contentious debate over the wisdom of delegating this expanded authority to the President. Opinion remains sharply divided. Last month, the D.C. District Court declared the act unconstitutional; the Supreme Court is scheduled to review the District Court's ruling in April.

My testimony this morning will make the following points:

- o One year's experience is probably not sufficient to evaluate the fiscal impact of the Line Item Veto Act. Although the Congressional Budget Office (CBO) estimates that the overall budgetary effect of the President's 1997 cancellations is relatively small, that result may be due in part to temporary factors. Further, some effects may be difficult to observe, and others may arise as lawmakers gain more experience under the act.

- o CBO's most recent baseline estimates project budget surpluses for 1998 and the rest of the period during which the act is scheduled to remain in effect. Because the act's stated purpose is to reduce the deficit, some people have argued that a budget surplus would suspend the President's cancellation authority. The act itself is unclear on that question.

- o With one exception—the President's cancellation of the Federal Employees Retirement System (FERS) open-season provision—the mechanics of the act generally functioned as expected last year. In canceling the FERS provision, the President apparently misclassified governmental receipts as a form of spending. The cancellation was subsequently nullified by court order because such receipts generally are not subject to the President's cancellation authority.

- o If the act is declared unconstitutional, the Congress may consider other options for expanding the President's rescission authority.

The issues covered in this testimony are discussed in greater detail in a CBO memorandum, *The Line Item Veto Act After One Year*, which will be released later this month.

INTRODUCTION

Advocates of the Line Item Veto Act view the President's cancellation authority as a significant tool for eliminating wasteful budgetary provisions and maintaining fiscal discipline. The act enables the President to cancel individual provisions without having to veto an entire measure. Thus, supporters claim, the President can eliminate "pork-barrel" provisions that Members of Congress passed to benefit their own narrow constituencies. Supporters contend that the President, who is elected by the nation as a whole, is better able to decide whether particular budgetary provisions serve the national interest. Moreover, the act's "lockbox" mechanism, which lowers the statutory limits on discretionary spending for cancellations that are not overturned, precludes any savings from being spent elsewhere.

Opposition to the act focuses on the issues of effectiveness and constitutionality. Some opponents argue that any budgetary savings from the line-item veto would be minimal or effectively negated because the President's budgetary priorities would tend to replace those of the Congress. From that perspective, the national interest is better represented by a consensus of lawmakers. Another argument concerns the act's effect on the constitutional balance of power; it makes the case that the act's shifting of power to the President is an unconstitutional delegation of legislative authority.

Before the Line Item Veto Act, the President could only propose to cancel spending. Those proposals would go into effect permanently only if they were enacted into law. Under the act, by contrast, the President can unilaterally cancel certain spending and tax-benefit provisions that he has signed into law, and cancellations can be reversed only by a subsequent law. Because the President would probably veto any such legislation, disapproving or reversing a cancellation would most likely require the support of two-thirds of the Congress, the margin necessary to override a veto.

Over the years, much of the debate about the item veto has involved how items subject to the veto should be defined and identified. In the past, various item-veto proposals were considered more or less sweeping depending on the range of provisions that could be vetoed and on how much discretion the President would have to identify those provisions and determine the amount to be vetoed.

Under the Line Item Veto Act, the President may cancel three broad categories of spending or revenue law:

- o Any "dollar amount of discretionary budget authority," which is defined as a whole-dollar amount of budget authority provided and controlled in an annual appropriation act. The President can cancel amounts specified in an appropriation act, detailed in the conference

report or "governing committee report" on an appropriation act, or provided in an appropriation act but "required to be allocated" by a different law (such as an authorization law).

- o Any "item of new direct spending," defined as a provision of law that would increase budget authority or outlays for direct spending above baseline levels. (Direct, or mandatory, spending consists mainly of entitlement programs.) Under the act, the baseline must be calculated under current conventions, and the term "direct spending" has the same meaning that it has for other budget enforcement procedures.

- o Any "limited tax benefit," which is defined as a revenue-losing provision that provides a tax deduction, benefit, credit, exclusion, or preference to 100 or fewer beneficiaries, or a tax provision that provides "temporary or permanent transitional relief for 10 or fewer beneficiaries." The act establishes procedures to restrict the President's cancellation authority over limited tax benefits. It requires the Joint Committee on Taxation (JCT) to provide a statement identifying any limited tax benefits (or declaring that none exist) for any revenue measure pending before a House/Senate conference committee. The JCT statement may be included as a separate section of the measure. If it is, the President can cancel only the limited tax benefits that it identifies.

BUDGETARY EFFECTS OF 1997 CANCELLATIONS

CBO estimates that the cancellations made by the President in 1997 would have only a small effect on total spending or revenue levels. The President made 82 cancellations from 11 laws (two reconciliation acts and nine regular appropriation acts). CBO estimates that, in total, those cancellations would save about \$355 million in fiscal year 1998 and just under \$1 billion for the five-year period through 2002 (see Table 1). By comparison, total federal spending and revenues in 1998 are both estimated to be nearly \$1.7 trillion. The Congress and the courts have overturned some of the President's cancellations, thereby lowering the total five-year savings by more than one-third, to less than \$600 million.

Most of the President's cancellations (79 of the 82) were applied to appropriation acts. Of those, two-thirds came from the military construction and Department of Defense acts; they accounted for 90 percent of the dollar reduction in 1998 discretionary appropriations made by the President's cancellations. However, that amount is still minor compared with total defense appropriations. Two-thirds of the defense cancellations (those from the military construction act) were subsequently overturned by the Congress.

The experience of last year may not provide an appropriate test of the President's use of the line-item veto, in part because of the passage of the balanced

TABLE 1. CANCELLATIONS MADE BY THE PRESIDENT IN 1997 UNDER THE LINE ITEM VETO ACT (By fiscal year, in millions of dollars)

Cancellation Number(s) 97-	Act	Budget Category	Amount Canceled				
			1998	1999	2000	2001	2002
Spending Cancellations							
1	Balanced Budget Act of 1997	BA	-200	0	0	0	0
		O	-200	0	0	0	0
4-41	Military Construction Appropriations Act, 1998 ^a	BA	-287	0	0	0	0
		O	-28	-102	-79	-46	-16
42-55	Defense Appropriations Act, 1998	BA	-144	0	0	0	0
		O	-73	-49	-12	-4	-4
56	Treasury Appropriations Act, 1998 ^b	BA	2	12	13	13	14
		O	2	12	13	13	14
57-64	Energy and Water Appropriations Act, 1998	BA	-19	0	0	0	0
		O	-12	-4	c	0	0
65-71	Veterans, HUD Appropriations Act, 1998	BA	-16	0	0	0	0
		O	-7	-6	-1	0	0
72-74	Transportation Appropriations Act, 1998	BA	-6	0	0	0	0
		O	-2	-3	0	0	0
75-76	Interior Appropriations Act, 1998	BA	-2	-1	-1	-1	-1
		O	-2	-1	-1	-1	-1
77-81	Agriculture Appropriations Act, 1998	BA	-2	0	0	0	0
		O	c	-2	c	c	0
82	Commerce, Justice Appropriations Act, 1998	BA	-5	0	0	0	0
		O	<u>-4</u>	<u>-1</u>	<u>c</u>	<u>0</u>	<u>0</u>
Total Spending Cancellations		BA	-677	11	12	12	13
		O	-326	-156	-80	-39	-7
Tax-Benefit/Revenue Cancellations							
2-3	Taxpayer Relief Act of 1997	REV	25	136	8	5	4
56	Treasury Appropriations Act, 1998 ^b	REV	<u>4</u>	<u>35</u>	<u>37</u>	<u>37</u>	<u>38</u>
Total Tax-Benefit/Revenue Cancellations		REV	29	171	45	42	42
All Cancellations							
Total Budgetary Effect of All Cancellations ^d		e	-355	-327	-125	-81	-49

(Continued)

TABLE 1. CONTINUED

Cancellation Number(s) 97-	Act	Budget Category	Amount Canceled				
			1998	1999	2000	2001	2002
Cancellations Overturned							
4-41	Military Construction Appropriations Act, 1998 ^a	BA	287	0	0	0	0
		O	28	102	79	46	16
56	Treasury Appropriations Act, 1998 ^b	BA	-2	-12	-13	-13	-14
		O	-2	-12	-13	-13	-14
		REV	<u>-4</u>	<u>-35</u>	<u>-37</u>	<u>-37</u>	<u>-38</u>
Total Budgetary Effect of Cancellations Overturned ^d		e	30	125	103	70	40
All Cancellations Except Those Overturned							
Net Budgetary Effect of Cancellations as of February 1998 ^d		e	-325	-202	-22	-11	-9

SOURCE: Congressional Budget Office.

NOTES: Numbers may not add up to totals because of rounding.

BA = budget authority; O = outlays; REV = revenues; HUD = Department of Housing and Urban Development.

- a. On February 25, 1998, the Congress enacted a disapproval bill (H.R. 2631) over the President's veto that nullified all 38 cancellations made from the 1998 Military Construction Appropriations Act.
- b. On January 6, 1998, the D.C. District Court invalidated cancellation 97-56 (the FERS open-season provision). CBO estimates that the cancellation would have increased on-budget direct spending and revenues. The spending and revenue effects of the cancellation are identified separately in this table.
- c. Less than \$500,000.
- d. Negative numbers indicate a decrease in the deficit or an increase in the surplus.
- e. Outlays minus revenues (excludes budget authority).

budget agreement. That agreement took more than two years of difficult negotiations to reach. As a consequence, the President may have been more reluctant to exercise his cancellation authority than would otherwise be the case. Moreover, the negotiations themselves may have involved agreements on provisions that the President might have been inclined to cancel.

To the extent that the Line Item Veto Act shifts power from the Congress to the President, it may change behavior in subtle ways that are difficult to observe. For example, the threat of the President's cancellation authority, in conjunction with the act's lockbox mechanism, could restrain the Congress from including some of the so-called pork-barrel provisions that it might otherwise have incorporated. Or the Congress might accommodate some of the President's priorities, thereby increasing the total share of special-interest spending. Alternatively, it might modify the structure of spending and revenue legislation to protect certain provisions and effectively circumscribe the President's authority (although there does not appear to be any evidence of that happening in 1997). For example, the Congress could consolidate appropriation earmarks into larger lump-sum appropriations, thereby reducing the number of items subject to cancellation. Studies of the item veto at the state level have documented those and similar devices employed by state legislatures over the years to limit the budgetary impact of governors' item-veto authority.

Moreover, the President's inclination to exercise his cancellation authority may depend on a host of political factors, including whether he and the Congressional majorities are of the same or opposing political parties.

EFFECT OF PROJECTED SURPLUSES

The Line Item Veto Act states that the President must determine, among other things, that a cancellation "will reduce the Federal budget deficit." However, CBO is now projecting budget surpluses beyond the scheduled duration of the act. Estimates by the Office and Management Budget (OMB) reflect the same general trend, and the President has proposed a balanced budget for fiscal year 1999.

Some observers believe that the President's cancellation authority may not remain in effect if the budget is in surplus. The act itself is unclear on that question.

Although the act requires the President to certify generally that his cancellations will reduce the deficit, it does not require him to specify in which fiscal years deficits must be reduced. Further, the act does not explicitly suspend the President's authority if a surplus develops; in fact, it does not use the term "surplus." Consequently, it is unclear, for example, whether a projected surplus would be

enough to suspend the President's authority, or whether there must have been an actual surplus in the previous fiscal year.

Those and other ambiguities make the legal significance of the act's deficit criterion unclear. Unless the act is modified, the President's judgment on this matter will most likely be the deciding one. In any event, his cancellation authority is optional. The act does not require him to exercise that authority or to reveal his reasons for not doing so.

HOW THE ACT HAS FUNCTIONED

In a formal sense, the Line Item Veto Act largely functioned last year as expected. With one exception, the President appeared to comply with the terms and conditions of the law. Estimates by OMB and CBO of the cancellations were generally similar. (The act directs CBO to prepare advisory estimates of any cancellations, but the President's estimates and determinations are controlling.) The fast-track procedures under which the Congress considers disapproval bills worked as anticipated; they permitted the Congress to disapprove the President's military construction cancellations once a strong consensus had formed to do so. The one exception, the cancellation of the FERS open-season provision, was challenged in court and was nullified by a District Court order earlier this year.

Criteria for Cancellations

Some Members and observers took exception to the President's reasons for making various cancellations. Some critics felt he should apply more rigorous, uniform criteria. Others felt he should inform the Congress of his reasons in advance of his cancellations. Some were also concerned that the President used his own budget submission too frequently in deciding whether to cancel particular provisions.

However, nothing in the Line Item Veto Act requires the President to employ particular rationales. The act simply requires him to certify that his cancellation "will reduce the Federal budget deficit; not impair any essential Government functions; and not harm the national interest." In addition, he must declare "the reasons for the cancellation." For each 1997 cancellation, the President included a statement certifying that the cancellations met those three broad standards and explaining his reasons for making them.

With respect to the military construction cancellations, many Members felt that the President did not apply his reasons fairly. They also believed that the President relied on erroneous information. The President later acknowledged that some projects were canceled on the basis of outdated information but did not agree that all of the cancellations suffered from that problem. Under the act, once a cancellation is made, it can only be reversed by the enactment of a disapproval bill.

The FERS Open-Season Cancellation

On October 16, 1997, the President canceled a provision in the 1998 Treasury and General Government Appropriations Act that authorizes a new open season for federal employees covered by the Civil Service Retirement System to switch to the Federal Employees Retirement System. Unlike the other cancellations made in 1997, this one drew attention for the manner in which the President exercised his cancellation authority. The National Treasury Employees Union (NTEU) filed a legal challenge to the cancellation in part on the grounds that the President had exceeded his authority. On January 6, 1998, the D.C. District Court, pursuant to a settlement between the NTEU and the Justice Department, issued an order nullifying the cancellation.

The effects of the FERS open-season provision are complicated (as CBO testified to the Subcommittee on Civil Service of the House Committee on Government Reform and Oversight last November). Unlike other activities canceled in appropriation acts, that provision changes mandatory spending and revenue levels and affects both on-budget programs (federal retirement) and off-budget programs (Social Security and the Postal Service). At issue in the legal challenge was whether the President misclassified a projected loss of receipts from the provision as an increase in discretionary budget authority, which could then be canceled.

In his cancellation message, the President estimated that the provision would lower employee contributions to the Civil Service Retirement and Disability Trust Fund by \$854 million from 1998 to 2002. For purposes of his cancellation, the President classified those lower expected receipts as dollar amounts of discretionary budget authority. The Line Item Veto Act, however, does not support such a classification. Instead, it anticipates that a cancellation made from an appropriation act will involve only spending provided in that act.

OPTIONS IF THE ACT IS INVALIDATED

Several legal challenges to the constitutionality of the Line Item Veto Act have been heard. On February 12, the D.C. District Court declared the act unconstitutional on the grounds that it "violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upsets the balance of powers." The District Court's ruling has been appealed to the Supreme Court, which is scheduled to hear the case in April. If the Line Item Veto Act is ultimately declared unconstitutional, lawmakers will face the question of whether to pursue other alternatives that would accomplish their original objectives.

Amending the Constitution to grant the President line-item veto authority is one option, although one that is difficult to carry out. Another option, proposed in

the past, would establish a so-called expedited rescission process. Under expedited rescission, fast-track legislative procedures could be created to ensure that the President's proposed spending cuts or tax-benefit repeals would receive an up-or-down vote by the Congress. But the President's proposals would go into effect only if enacted into law. Although the President would not have unilateral authority to cancel provisions of law, his proposals could not be ignored by the Congress.

Of course, whatever the final judicial outcome, the original provisions of the Impoundment Control Act of 1974, which the Line Item Veto Act amended, would remain in effect. According to the General Accounting Office, Presidents proposed about \$75 billion in rescissions under the 1974 law between fiscal years 1974 and 1996. The Congress agreed to only about one-third of those proposed rescissions (about \$25 billion) but initiated another \$93 billion of rescissions, bringing the total amount rescinded during that period to around \$118 billion.

CONCLUSION

Firm conclusions about the effects of the Line Item Veto Act cannot be drawn from one year's experience. The President's 1997 cancellations were relatively small, but political and budgetary conditions can change significantly from year to year. If implemented aggressively, the act gives the President authority to bring about

potentially large budgetary savings. However, if used too aggressively, that authority could lead to a backlash from the Congress and the public. The Congress has already demonstrated its willingness to act decisively on cancellations with which it overwhelmingly disagrees. Further, as lawmakers gain more experience with the act, they are likely to develop new techniques for restricting the President's authority.

The framers of the act, appreciating the significance of the authority they were delegating, chose to make it expire after eight years. If the act withstands constitutional challenge, the question lawmakers will face as they evaluate its performance is similar to the one they addressed upon its enactment: do the budgetary gains of the act outweigh the risks of shifting power to the President? If the act has only a limited effect on spending or revenue levels, policymakers should ask whether those small savings justify the transfer of power or other potential problems. If, by contrast, the President uses his cancellation authority aggressively, lawmakers should ask whether significant budgetary changes should be made in such a manner.