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A Presidential Item Veto

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Summary

During a news conference on November 4, 2004, President George W. Bush stated that he “would like to see the President have a line-item veto again, one that passed constitutional muster. I think it would help the executive branch work with the legislative branch to make sure that we’re able to maintain budget discipline.” The Supreme Court struck down an earlier version of item-veto authority (the Line Item Veto Act of 1996) in *Clinton v. City of New York*, 524 U.S. 417 (1998), but several statutory alternatives are available. Options to the Line Item Veto Act have been proposed over the years, including an amendment to the Constitution to grant the President item-veto authority. The line-item veto is listed among several budget reform proposals included in the FY2005 budget, but a more specific recommendation is expected to be developed by the Administration and submitted to Congress at the start of the 109th Congress. This report analyzes the statutory and constitutional alternatives that are likely to be considered and will be updated as necessary.

Background

In 1974, Congress passed legislation to place constraints on the presidential practice of refusing to spend appropriated funds. Impoundment of funds by the President had severely curtailed and in some cases terminated programs that Congress had enacted into law. Through this impoundment technique, the President was able to decide which laws to execute and which to nullify. Lawmakers criticized impoundment as a de facto item veto, in violation of the constitutional duty of the President to see that all laws are faithfully executed, and a threat to the legislative prerogative over the purse.¹

Impoundment Control Act

The Impoundment Control Act of 1974 recognizes two types of impoundment: “rescissions” and “deferrals.” Whenever the President wants to rescind (cancel) budget authority, he must transmit a special message to Congress and obtain the support of both

¹ For background on the impoundment dispute, see Louis Fisher, *Presidential Spending Power* (Princeton, N.J.: Princeton University Press, 1975), pp. 147-201.

houses within 45 days of continuous session. If denied congressional support during this time period, the President would have to make the budget authority available to executive agencies for obligation and expenditure.

The statute also requires the President to submit a special message whenever he decides to defer (delay) spending, subject to disapproval by either house. Because of the Supreme Court's decision in *INS v. Chadha* (1983), this type of legislative veto is no longer available to Congress to override deferrals. Decisions in federal court ruled that the one-House legislative veto in the Impoundment Control Act was tied inextricably to the deferral authority. The courts concluded that Congress would not have provided for this deferral authority without retaining the check of the one-house veto. Ruling that the authority and the check were inseverable, the deferral authority disappeared with the legislative veto. Congress promptly converted the judicial decision into statutory law.² As a result of litigation and congressional legislation, deferrals may now be made only for routine, not policy, reasons.

After a steep increase in budget deficits in the 1980s, Members of Congress began to debate ways of increasing the President's power to rescind appropriated funds. President Ronald Reagan repeatedly asked for item-veto authority. Congress considered a number of procedures to grant him this power, while at the same time protecting legislative interests.

Inherent Item Veto

In the 1980s, some newspapers and lawmakers argued that the President already possessed an "inherent" item veto and did not need to await statutory authority or a constitutional amendment.³ Advocates of this concept urged the President to exercise an item veto and provoke a legal challenge in the courts. Charles J. Cooper, then head of the Office of Legal Counsel in the Justice Department, wrote a lengthy memorandum finding no legal or constitutional support for an inherent item veto.⁴ In 1992, President George H. W. Bush announced that his White House Counsel and Attorney General had convinced him that there was no legal support for an inherent item veto.

Expedited Rescission

In 1992, 1993, and 1994, the House passed legislation to make it easier for the President to rescind funds. Instead of allowing Congress to ignore presidential recommendations for rescissions, "expedited rescission" required at least one House to vote on his proposals. If one house disapproved, the other House need take no action because approval by both houses would be necessary. Expedited rescission attracted support from some lawmakers who thought it would transfer less congressional power to the President than other reform ideas. The Senate took no action on the expedited

² *City of New Haven, Conn. v. United States*, 809 F.2d 900 (D.C. Cir. 1987); 101 Stat. 785, § 206 (1987), codified at 2 U.S.C. § 684.

³ For a conference devoted to this issue, see *Pork Barrels and Principles: The Politics of the Presidential Veto* (Washington, DC: National Legal Center for the Public Interest, 1988).

⁴ 12 Op. O.L.C. 128 (1988).

rescission bills passed by the House, preferring to explore two other approaches: “enhanced rescission” and “separate enrollment.”

Enhanced Rescission

Enhanced rescission would reverse the balance of power between the branches established by the Impoundment Control Act. Instead of the President seeking the approval of both Houses for rescissions, his proposals would become law unless Congress passed a resolution of disapproval. The President could then veto the disapproval resolution, forcing Congress to find a two-thirds majority in each house to override the President. Under the procedure followed to protect the Senate Budget Committee’s jurisdiction over budget process changes, a vote on enhanced rescission required 60 votes to waive a provision of the Budget Act. In 1992 and 1993, efforts to pass enhanced rescission in the Senate attracted votes of 44-54 and 45-52.

The 1992 Standoff

A rescission confrontation in 1992 between President George H. W. Bush and Congress illustrates how both branches participate in “pork-barrel” spending. The Bush Administration offered a rescission package of \$7.9 billion, focusing on what it considered to be frivolous programs (e.g., asparagus research, celery research, prickly pear research, Vidalia onion storage, and manure disposal).⁵ Congress responded by selecting as candidates for rescission a number of programs favored by the executive branch, including studies of the significance of holism in German-speaking society and research on why people fear going to the dentist.⁶ Congress also took aim at National Science Foundation research grants for “monogamy and aggression in fish in Nicaragua; the well-being of middle-class lawyers; status attainment in Chinese urban areas; sexual mimicry of swallowtail butterflies; and song production in freely behaving birds.”⁷ The list of congressional rescissions came to \$8.2 billion. After settling on a compromise bill, the Administration abandoned its plans to submit additional rescission packages.

Line Item Veto Act of 1996

On September 27, 1994, more than 300 Republican candidates for the House of Representatives released a “Contract with America,” setting forth a legislative agenda. It included an item-veto for the President. The particular version the House preferred was enhanced rescission. Joint hearings by the two chambers suggested that an item veto would not yield the rescission of large amounts of funds. Based on the experience of governors at the state level, the impact was more likely to be a preference for presidential spending priorities over those voted by Congress.⁸ As enacted, the Line Item Veto Act (P.L. 104-130) authorized the President to cancel discretionary appropriations, any new

⁵ *Public Papers of the Presidents, 1992-93, I*, p. 479; *CQ Weekly Report*, Mar. 28, 1992, pp. 792-793.

⁶ “House Rearranges Bush’s Budget Cuts,” *Washington Post*, May 8, 1992, p. A8.

⁷ S.Rept. 102-274, 102nd Cong., 2nd sess. 47 (1992).

⁸ “Line-Item Veto,” joint hearing before the House Committee on Government Reform and Oversight and the Senate Committee on Governmental Affairs, 104th Cong., 1st sess. (1995).

item of direct spending (entitlements and other mandatory programs), and certain limited tax benefits. Congress would have to pass a resolution of disapproval within 30 days. The President could veto that resolution and force an override vote in each House.

Canceling Items in Committee Reports

The Line Item Veto Act addressed a central problem in the way that Congress writes appropriations bills. An “item veto” statute, by itself, would not give the President an item veto for the simple reason that Congress usually does not put items in appropriations bills. Unlike the states, where small amounts are included within bills, subject to the governor’s item veto, Congress appropriations large lump-sums, giving agencies significant discretion over the expenditure of funds. The Line Item Veto Act was written in such a way as to allow the President to reach into the appropriations accounts to cancel projects identified in conference reports. The statute defined “dollar amount of discretionary budget authority” to mean the dollar amount specified in an appropriations law or “in any table, chart, or explanatory text included in the statement of managers of the governing committee report accompanying such law.”

Separate Enrollment

After the House passed the Line Item Veto Act, the Senate committees of jurisdiction (Budget and Governmental Affairs) could not agree on whether to recommend enhanced rescission or expedited rescission. They reported both to the floor.⁹ Those bills were then pulled back in favor of “separate enrollment,” a process that required a clerk to take an appropriations or authorization bill (containing new direct spending and targeted tax benefits), after they had passed both houses, and break the bill into unnumbered paragraphs (containing dollar amounts) and numbered sections (containing provisos or conditions), with each part made into a bill and presented to the President. To protect against attacks that the procedure did not comply with the constitutional requirements of bicameralism and presentment, the “mini-bills” would first be sent back to each chamber and voted on en bloc.¹⁰ When the line-item veto emerged from conference in 1996, the separate enrollment procedure was rejected in favor of enhanced rescission.

Dollar Savings

Implementation of the Line Item Veto Act offered support to the predictions of experts who testified at the 1995 joint hearings. Overall savings were modest. President Clinton used the statutory authority to cancel a number of discretionary appropriations, new items of direct spending, and targeted tax benefits. The total savings, over a five-year period, came to less than \$600 million. His cancellations for FY1998 were about \$355 million out of a total budget of \$1.7 trillion.¹¹ The totals would have been higher had all of his recommendations been accepted. Congress disapproved his cancellation of 38

⁹ S.Rept. 9, 104th Cong., 1st sess. (1995); S Rept. 10, 104th Cong., 1st sess. (1995); S.Rept. 13, 104th Cong., 1st sess. (1995); S.Rept. 14, 104th Cong., 1st sess. (1995).

¹⁰ Section 4 of S. 4, reprinted at 141 *Congressional Record* 8941 (1995).

¹¹ “The Line Item Veto,” hearing before the House Committee on Rules, 105th Cong., 2nd sess. 13 (1998). Testimony by June E. O’Neill, Director of the Congressional Budget Office.

projects in the military construction appropriations bill, which would have saved \$290 million over a five-year period. Hearings by the Senate Appropriations Committee received testimony from the military services, contradicting the claims and arguments offered by the Administration.¹² President Clinton vetoed the disapproval resolution, but a strong bipartisan majority overrode him, 78 to 20 in the Senate and 347 to 69 in the House. The Administration also reversed itself on one cancellation package, concluding that it lacked authority to use item-veto authority in this instance.¹³

Statute Invalidated

In 1998, by a 6 to 3 vote, the Supreme Court held that the Line Item Veto Act violated the Presentment Clause of the Constitution. The Court rejected the argument that the President's power to cancel items was a mere exercise of discretionary authority granted by Congress. Instead, the cancellation authority represented the repeal of law that could be accomplished only through the regular legislative process, including bicameralism and presentment. In the two cancellations that reached the Court, Congress did not pass a resolution of disapproval. As a result, the Court concluded that "the President has amended two Acts of Congress by repealing a portion of each." *Clinton v. City of New York*, 524 U.S. 417 (1998).

Statutory Options

Writing for the majority, Justice John Paul Stevens stated that if there is to be a new procedure "in which the President will play a different role in determining the final text of what may 'become a law,' such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution." However, a number of statutory procedures used in the past, without raising constitutional questions, offer the President substantial discretion over the expenditure of funds. Congress may pass lump-sum appropriations that provide funds "not exceeding" amounts specified in the statute. Funds may be made available for expenditure unless the President determines that certain factors, identified in the statute, prevent the funds from having legal force or effect. In these cases the President would not be repealing or amending the statute; he would be following the law and exercising authority given him.

Relying on the 1974 Procedure

The Impoundment Control Act remains available as a tool for rescinding appropriated funds. From 1974 to 1999, the most recent year for which cumulative figures are available, the executive branch requested some \$76 billion in rescissions. Of that amount, Congress approved \$25 billion. During that same period, Congress chose to initiate nearly \$110 billion in rescissions.¹⁴ The Impoundment Control Act requires the

¹² *Public Papers of the Presidents*, 1997, II, p. 1301; 143 *Congressional Record* 22133-22134 (1997) (statement by Senator Stevens).

¹³ "Clinton Recants on Item Veto of Pension Switch," *Washington Post*, Dec. 20, 1997, p. A1.

¹⁴ U.S. Government Accountability Office, "Summary of Proposed and Enacted Rescissions, Fiscal Years 1974-1999," OGC-00-19 (Washington: Mar. 9, 2000).

readiness of the President to submit rescission proposals to Congress and lobby successfully for their enactment.

Modified Separate Enrollment

Separate enrollment would be less burdensome if the mini-bills were restricted to items in dispute between Congress and the President. Suppose that an appropriations bill is in conference and the White House announces that the President objects to 30 items. Those could be stripped from the bill and the balance passed by both branches and submitted to the President, who would sign the bill into law. The 30 items in contention would be put in separate bills, passed by both chambers, and submitted to the President, who would veto them, subject to a congressional override. However, this process would not allow the President the opportunity to do what he did under the Line Item Veto Act: reach into committee reports and cancel programs at that level.

Conclusions

Granting the President an item veto would introduce a new and uncertain dynamic to executive-legislative relations. Because of informal and private communications between the branches, it would be difficult to maintain clear accountability for fiscal decisions. Members would vote with new incentives, subjected to pressures and calculations that did not exist before.

When the President possesses only general veto authority, Congress is under both external and internal pressure to produce a budget that both sides can live with. Availability of an item veto may diminish the incentives for lawmakers to closely control substantive provisions and the level of appropriations. They would be free to insert more items than before, knowing that the President could strike them from the bill. Instead of negotiating in good faith to produce a political accommodation, the objective might be to “add on” controversial items, shift decisions to the executive branch, and invite further conflict through presidential rescission proposals and override votes.

In deciding to transfer item-veto authority to the President, Members of Congress will again consider the extent to which they intend to exercise the congressional power of the purse. Would Members have to vote up or down on a presidential proposal, or could they consider a legislative alternative (as in 1992)? Item-veto authority would give the President additional leverage to influence the votes and independence of Members. A shift of power may imply that Congress is less able than the President and his aides to take responsible action over the budget.