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FORUM

The New Line Item Veto Proposal: This Time Its Constitutional (Mostly)

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Aaron-Andrew P. Bruhl

The proposal, [passed last summer by the House](#) and [endorsed by a Senate committee](#), would allow the President to pull together lists of spending items from recently enacted laws and present the lists to Congress for speedy up-or-down votes on whether those items should be rescinded. The proposed mechanism would regulate each house's parliamentary procedures in great detail; amendments to the President's list are barred, as are filibusters and other stalling tactics.

Congress's decision to deal with overspending by using a statute that would intrude into the details of its parliamentary procedures may seem strange, but in fact Congress is using this approach in a large and growing number of contexts. The most prominent example is the "fast track" legislation providing for streamlined congressional consideration of trade agreements. The new line item veto proposal essentially carries over this fast track approach to rescission requests. It is an attractive solution for legislators who feel a need to be perceived as doing something—but not too much—about big deficits.

I contend that the proposed legislation is constitutional, but only because Congress would not be required to take it very seriously. If Congress decides to follow the expedited statutory procedures and approves a presidential rescission request, the resulting enactment would be valid under *Clinton v. City of New York*. But the far more interesting constitutional questions arise when Congress flouts the fast track procedures. Although the whole point of the statute is to guarantee quick up-or-down votes on the President's recommended rescissions, is Congress really required to follow those statutory rules? As a matter of constitutional law, it turns out that Congress cannot be bound to obey the statutory rules. Indeed, Congress recognizes its right to change the rules in an escape hatch tucked into the statute itself.

That is not to say the statute is meaningless, for it may well have political traction in practice. At least under present circumstances, Congress might well follow the procedures, but more for partisan ends than for the "good government" purposes the statute is supposed to serve.

I. The "Pork Problem" and Previous Failed Solutions

The standard argument for a line item veto is contestable in many ways, but it is at least straightforward and understandable. If Congress passed a bill that contained only a

spending program the President deemed wasteful, he could veto it. But Congress often passes massive omnibus bills that include many separate policies and programs. Legislators have incentives to fill these bills with narrow spending and tax measures that benefit their constituents or their campaign contributors but do not promote the overall public good. Because those special-interest items are bundled together with measures the President deems essential, he holds his nose and signs the whole bill. Thus the need for a line item veto, which permits the President to strike out squalid pork while still accepting the rest of the bill. Or so the argument goes.

The [1996 Line Item Veto Act](#) gave the President the authority to “cancel” certain spending items by sending a message to Congress. Congress could overturn the President’s cancellations only if it affirmatively enacted a disapproval bill. Because the President would be expected to veto any bill disapproving of his proposed cancellations, reversing the President’s cancellation decision would thus require a two-thirds supermajority in each house.

The Supreme Court struck down the 1996 Act in [Clinton v. City of New York](#). Justice Stevens’s opinion for the Court held that the cancellation procedure had allowed the President to “amend” acts of Congress by repealing them in part. And that is of course impermissible: Article I, Section 7 allows the amendment and repeal of statutes [only through bicameralism and presentment](#).

So ended the previous experiment with the line item veto.

II. The Current Solution: Expedited Rescission

The current proposal works a subtle but potentially important change in existing budget law. Under the Congressional Budget and Impoundment Control Act of 1974, the President is already allowed to suggest specific rescissions to Congress and—to allow Congress to consider those proposals before the spending takes effect—to freeze the funds for a period of forty-five days. But the rescission process under the 1974 Act is ineffective and seldom used: Congress can ignore the President’s rescission requests or package the rescissions in ways that frustrate passage, thus largely defeating the purpose of letting the President submit a remedial rescission request in the first place.

The key advantage of the new proposal, according to supporters, is that it requires Congress to vote up or down on a stand-alone bill containing the items the President seeks to cancel. The new legislation states that the President’s approval bill “shall” be introduced within five days of the President’s message and provides that the committee “shall report it to the House without amendment not later than the seventh legislative day after the date of its introduction”; the [rules of floor debate are streamlined](#) to provide for speedy consideration. [Amendments are barred](#). This approach, which was one of the proposals rejected back in 1996, is called “expedited rescission.”

Although the proposal still requires congressional action in order for a rescission to take effect, the special procedures promote rescission by subjecting the targeted items to an up-or-down vote on their own merits. Stripped of the excuse that a certain pork-laden bill was necessary because it also provided for ongoing military operations, legislators should find it harder to vote for million-dollar crawfish research initiatives. Moreover, beyond the results of any particular vote, the procedure would deter waste by creating a risk that a legislator’s own embarrassingly frivolous special project might be highlighted in a rescission bill.

According to its supporters, expedited rescission has one additional important virtue: this line item veto is supposed to be constitutional.

III. Is It Constitutional?

Is this mechanism constitutional? The answer is “yes, mostly.”

Let's begin with the “yes” portion of the answer. This statute would survive the constitutional holding of *Clinton v. City of New York*. Rather than “canceling” any provision of law, here the President merely proposes to Congress that it pass new legislation rescinding certain items of spending. Both houses of Congress vote on the approval bill, and the President then signs the bill, thus satisfying Article I, Section 7. True, the approval bill is given preferential parliamentary treatment, but the U.S. Code is filled with statutory frameworks for considering various types of legislation, and no court has ever held that the enactments emerging from those frameworks violate Article I, Section 7.

Challengers might, however, attempt a different line of attack, which brings us to the “mostly” part of the answer. Isn't there a problem, they would say, with requiring Congress to follow a quick, fixed timetable and to vote on an unamendable package put together by the President himself? After all, Article I, Section 7 envisions Congress as the body that packages legislation and presents take-it-or-leave-it propositions to the President. How does the President have any business forcing Congress to hold votes on proposals of his choosing on a schedule of his liking?

Those are very good questions and they bring us to the important issue of what would happen if Congress did not follow the statutory procedures. True, the proposal is full of mandatory language stating that Congress “shall” speedily consider the President's approval bill, “shall not” amend it, and so forth. Indeed, that is the whole point of the new law. But is Congress really required to follow the expedited procedures set forth in the statute?

One easy answer to that question is that, even if Congress were to violate the statute by failing to honor the fast track procedures, no court would force it to comply because the case would present a nonjusticiable political question. But even if no court would intervene, the antecedent—and constitutionally important—question remains: is it legal for Congress to ignore the statutory procedures?

As it happens, Congress has considered the matter and has recognized that there is a problem with mandating compliance with statutory procedures. Indeed, although it is easy to overlook, Congress has provided itself an escape hatch in the new legislation. A section near the end of H.R. 4890, labeled “technical and conforming amendments,” [incorporates by reference](#) a provision from a prior statute stating that Congress enacts its special parliamentary procedures “with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner, and to the same extent as in the case of any other rule of such House.”

The above language is puzzling, for it appears to nullify the binding commitment that is supposed to be the new act's entire purpose. Why would Congress pass a law that depends on tying its own hands and then untie them in the next breath? Perhaps part of the answer is that Congress is not really serious about the proposal. But, more charitably, it may also be true that Congress believes that, try as it might, it cannot tie its hands with binding statutory procedures. Despite all the mandatory language stating that certain actions “shall” be taken, Congress has long held that the Constitution allows the houses unilaterally to deviate from statutory rules, as [the committee reports](#) on this proposal in fact recognize.

But legally binding force is not the only thing that matters, or perhaps even the most important thing. Parliamentary rules set forth in statutes often attract compliance in practice. Congress has passed dozens of these statutes because they do, oftentimes, work. Except when they don't, that is. As a result, one of the most interesting questions related to the new proposal is what institutional circumstances would promote compliance with these procedures.

IV. But Would It Work?

Congress's record of compliance with statutory rules is mixed. On the one hand, Congress has on numerous occasions evaded statutory rules. [It can change those rules formally, such as by following a special rule reported by the House Rules Committee, or informally, as congressional leaders in key gatekeeping positions may simply decide to ignore the statutory procedures.](#) On the other hand, one of the most important regimes of statutory rules, the fast track system for trade agreements, [has a strong record of compliance.](#) In the most recent major test of the fast track procedures, the Senate did not filibuster the bill implementing the Central American Free Trade Agreement, even though the margin was razor-thin and some senators fiercely opposed passage. Statutory rules can attract compliance either because they simply match what a majority of legislators would like to do anyway or because the rules carry some normative force as a pre-existing agreed method for handling contentious legislation.

How likely is it that Congress would obey the expedited rescission procedures? It is impossible to know for sure, but we can make some predictions about circumstances under which compliance would be more and less likely.

There will almost certainly be a relationship between compliance with the procedures and legislators' feelings about the underlying rescissions. We should expect that the procedures are most likely to be followed when legislators like the underlying rescissions. That should be most of the time, according to the theory of expedited rescission, either because the legislators genuinely wish that the bill they passed was not so larded with pork or because, politically, they need to appear budget-conscious. But we should remember that constituents often appreciate public works projects in their district, so sometimes they would applaud retaining the pork. Plus, the interest groups that contribute to congressional electoral campaigns obviously like the special projects they lobbied to insert. With regard to special-interest-based pork, the most attractive result for its congressional sponsors might be to let the rescission bill die through legislative inaction; the contributors would get their pork, but the legislators would not have to publicly support the projects. Either way, a rescission bill that included many items from many legislators' districts would likely face stiff opposition.

Fortunately for the President, the new proposal lets him improve his odds of success by submitting multiple rescission proposals, each with shorter lists of wasteful items. [He can submit five or, in the case of omnibus reconciliation or appropriations bills, ten separate rescission proposals for each bill Congress passes.](#) We have every reason to conclude that the pork he is most likely to target is pork sponsored by his political opposition. Similarly, congressional leaders in each house will be most likely to follow the expedited procedures when the President's rescissions target members of that house's minority party. Putting the pieces together, the rescission procedures should be most powerful when there is unified government. Of course, in time it may come to pass that the President rarely proposes rescissions because legislators will support the President's favored bills in exchange for promises that their pork will be safe. Still, however, the most likely targets for those rescissions that do occur are projects sponsored by legislators who are both not of the President's party and not in the congressional majority.

In the current configuration in Washington, that means rescissions will most likely target Democrats and their projects. Is it any wonder, then, that Congress's Republican majority is attracted to a measure that at first glance appears to erode its legislative prerogatives? And is it any wonder that the legislation contains a [sunset provision](#) that would terminate the line item veto authority several years down the road, so as to limit the damage should Republicans eventually find themselves facing a President Hillary Clinton, and perhaps as a congressional minority?

The short of it, then, is that this new fast track procedure may ultimately “work” very well—in the sense that the ruling party will find it an advantageous tool for serving partisan ends.

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