



CBO MEMORANDUM

THE LINE ITEM VETO ACT
AFTER ONE YEAR

April 1998

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19980624 003



CONGRESSIONAL BUDGET OFFICE
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WASHINGTON, D.C. 20515



INTERNET DOCUMENT INFORMATION FORM

A . Report Title: The Line Item Veto Act After One Year

B. DATE Report Downloaded From the Internet: 22 Jun 98

**C. Report's Point of Contact: (Name, Organization, Address,
Office Symbol, & Ph #: Congressional Budget Office**

D. Currently Applicable Classification Level: Unclassified

E. Distribution Statement A: Approved for Public Release

**F. The foregoing information was compiled and provided by:
DTIC-OCA, Initials: __PM__ Preparation Date: 22 Jun 98**

The foregoing information should exactly correspond to the Title, Report Number, and the Date on the accompanying report document. If there are mismatches, or other questions, contact the above OCA Representative for resolution.

Since the early 1980s, when the Congress began seriously considering proposals to give the President authority to veto certain items in legislation, policymakers and others have argued strenuously over the potential effect of such an item veto at the federal level. The Line Item Veto Act, which went into force at the beginning of 1997, now offers one year of experience to evaluate that effect. This Congressional Budget Office (CBO) memorandum analyzes the act's first year of operation. CBO is issuing the memorandum as part of its general statutory responsibilities to the Congress and to fulfill its obligation under the Line Item Veto Act to monitor cancellations made by the President.

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SUMMARY

The Line Item Veto Act, which took effect on January 1, 1997 (and expires eight years later), marks a significant milestone in the federal budget process. It enables the President, for the first time, to cancel individual spending or tax-benefit provisions in legislation passed by the Congress without having to veto the entire legislation. (Because the President must first sign the legislation before canceling provisions, his cancellation authority does not represent a true item veto, despite its name). The President's cancellations take effect immediately and can be reversed only by a subsequent law.

After a year, opinion about the act remains sharply divided. Proponents view the President's cancellation authority as a significant tool for eliminating wasteful spending or tax provisions and maintaining fiscal discipline. Opponents see it as an unconstitutional delegation of legislative authority to the executive branch. In February 1998, the U.S. District Court for the District of Columbia declared the act unconstitutional on the grounds that it violates the Constitution's separation of powers doctrine. The Supreme Court has scheduled oral arguments on the case for late April and is expected to make a ruling sometime this year.

Procedures Under the Act

The Line Item Veto Act allows the President to cancel three broad types of spending or revenue provisions: dollar amounts of discretionary budget authority, items of new direct (also known as mandatory) spending, or limited tax benefits (ones for which there are only a few beneficiaries).

The framers of the act intended for that cancellation authority to be narrowly defined and subject to strict limits. Thus, in canceling provisions, the President must adhere to the definitions for those categories spelled out in the act. He must also certify that his cancellations will reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest.

Once the President has canceled a provision, the Congress has 30 session days (generally much longer than 30 calendar days) to disapprove the cancellation under fast-track legislative procedures. Those procedures remove various hurdles so the Congress can quickly move legislation to overturn the cancellation if a consensus forms to do so. Because the President can veto disapproval bills, such legislation needs at least a two-thirds majority to be successful.

To prevent canceled amounts from being spent on other activities, the Line Item Veto Act includes a deficit reduction "lockbox" procedure. Under that procedure, the statutory limits on discretionary spending (in effect through fiscal year 2002) are reduced by the amount of savings from cancellations in appropriation acts

that are not disapproved. Likewise, cancellations of direct spending or limited tax benefits are excluded from the pay-as-you-go scorecard for direct-spending and receipt legislation. As a result, the President's cancellations effectively lower the total amount that may be spent on programs and activities funded by the federal government.

1997 Cancellations

The cancellations made by the President last year will have a relatively small effect on the total federal budget, the Congressional Budget Office (CBO) estimates. The total five-year savings, excluding cancellations subsequently overturned by the Congress or the courts, amount to less than \$600 million. All but three of the 82 cancellations involved amounts provided in the appropriation acts for fiscal year 1998, and the majority concerned spending for national defense or military construction. The President cited various reasons for making his cancellations, but the most common one was that he had not requested the program or provision in his budget.

The only cancellations that provoked widespread opposition in the Congress were the ones affecting military construction. As a result, the Congress has considered and passed just one disapproval bill, which was to overturn those cancellations. Because of the lockbox procedure, CBO estimates, the remaining appropriation act cancellations will require lowering the statutory limits on 1998 discretionary budget authority by \$192 million and the limits on 1998 discretionary outlays by \$100 million.

With one exception, the President appeared to comply with the definitions and conditions of the Line Item Veto Act in 1997. That exception—the cancellation of a provision to create a special open season for the Federal Employees Retirement System—was challenged in court and was nullified by a District Court order earlier this year. The court ruled that the President had wrongly classified a proposed reduction in governmental receipts, which is not subject to cancellation, as discretionary budget authority, which may be canceled.

Issues in Evaluating the Act

One year of operation is probably not enough to fully evaluate the Line Item Veto Act. But experience in 1997 does highlight several areas of concern: the effectiveness of the act in fulfilling its purpose (deficit reduction), the effect of budget surpluses on the act's procedures, the degree to which the act has shifted the balance of power in budgetary matters, and difficulties in defining the provisions that can be canceled.

Effectiveness. The 1997 cancellations had a relatively small impact on the budget's bottom line, but that outcome may have resulted in part from temporary factors, such as last year's balanced budget agreement. Because the agreement took more than two years of tough negotiations to reach, the President may have been more reluctant to use his cancellation authority last year than would otherwise be the case. Moreover, those negotiations may have resolved some budget conflicts that would otherwise have been fought using cancellations and disapprovals.

A feature of the act, the lockbox mechanism, may also have made the President reluctant to cancel large sums, because such cancellations reduce the total amount of money available for government spending.

Other factors that bear on the effectiveness of the act may be difficult to observe or may arise over time as the President and the Congress adjust to their new budgetary relationship. For example, the threat of the President's cancellation authority, together with the lockbox mechanism, could restrain the Congress from including "pork-barrel" provisions in legislation or could simply shift special-interest spending to programs favored by the President. Alternatively, the Congress might modify the structure of spending and revenue legislation to protect certain provisions from being canceled—although there appears to be no evidence of that having happened last year. Studies at the state level have documented efforts by state legislatures over the years to limit the budgetary impact of governors' item-veto authority.

Budget Surpluses. CBO and the Office of Management and Budget are projecting budget surpluses (assuming current policies and economic conditions) for the entire period during which the Line Item Veto Act is scheduled to remain in effect. Because the act requires the President to certify that his cancellations will reduce the deficit, some observers have argued that a budget surplus would suspend the President's cancellation authority. The act itself is unclear on that question. Unless the act is modified, the President's judgment on this issue is likely to be the deciding one. In any event, the President's cancellation authority is optional; he is not required to exercise it or to reveal his reasons for not doing so.

Balance of Power. Some Members of Congress worry that the Line Item Veto Act has shifted too much power to the executive branch. Specifically, they fear that cancellation authority will increase the President's leverage in bargaining over legislation. The validity of that concern is not yet clear. On the one hand, the act gives the President authority over a broad range of spending and revenue measures. On the other hand, unbridled use of that authority could lead to a backlash in the Congress and among the public. There is also some reason to believe—given Congressional response to the military construction cancellations and given how the lockbox functions—that the President's new power may be inherently limited.

However, shifts in power can be slow and subtle. Much depends on the inclinations of whoever is President, budgetary and political conditions at the time, and similar factors.

The experience of 1997 does suggest, however, that the Line Item Veto Act has increased the importance of the President's annual budget submission. Last year, the President used his budget as the number one reason for canceling provisions. So long as he makes the other certifications required by the act, nothing prevents the President from using that rationale.

Defining What May Be Canceled. Although the act spells out in some detail what types of provisions are subject to cancellation, those definitions contain ambiguities that could provoke disagreements in the future. The drafters of the act clearly stated that they wanted the President's cancellation authority to be narrow. But the Congress may not have much effective recourse if, because of differing interpretations of the act, that authority is used more broadly. To some extent, however, such disagreements are unavoidable given the detail and complexity of federal budget laws.

The Act's Future

With the constitutionality of the Line Item Veto Act up in the air, lawmakers face various questions. If the Supreme Court declares the act unconstitutional, can the Congress find other ways to achieve the goals of the act? Alternatives include amending the Constitution to grant the President item-veto authority; adopting an expedited rescission procedure, under which the President's proposed savings would be guaranteed an up-or-down vote by the Congress; or falling back on the original provisions of the Impoundment Control Act of 1974 (the legislation that the Line Item Veto Act amended), which are still in effect. The Congress rescinded a total of \$118 billion in budget authority under that act between 1974 and 1996, some of it at the request of the President.

If the Line Item Veto Act withstands constitutional challenge, lawmakers will face at least two broad sets of questions in weighing its performance. First, do the budgetary gains of the act outweigh the risks of shifting power to the President or other potential problems? And second, does the prospect of budget surpluses render the act irrelevant, or does the President's cancellation authority serve (or can it be modified to serve) other purposes than reducing the federal deficit?

INTRODUCTION

The Line Item Veto Act, which took effect at the beginning of 1997, gives the President significant new budgetary power. The act amended the Impoundment Control Act of 1974 to grant the President unilateral authority to "cancel in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit" in a law signed between January 1, 1997, and January 1, 2005.¹ Under the old Impoundment Control Act, the President could merely propose that spending be canceled, and those proposals would go into effect permanently only if enacted into law. Under the Line Item Veto Act, by contrast, the President's cancellations take effect immediately, and they can only be reversed by a subsequent law. Moreover, because the President would be likely to veto any reversal legislation, disapproving a cancellation is likely to require the support of two-thirds of the Congress (the margin necessary to override a veto).

The Line Item Veto Act supplements procedures in the Impoundment Control Act, however; it does not replace them. Thus, the President can cancel qualified spending or tax-benefit provisions under the Line Item Veto Act and also continue, as before, to propose rescissions or deferrals of budget authority under the original provisions of the Impoundment Control Act.²

Despite its name, the Line Item Veto Act does not actually grant the President a true item veto. Such a veto would allow the President to reject parts of a measure that had been approved by the Congress *before* signing the rest of it into law. Instead, the cancellation authority under the Line Item Veto Act is a postenactment authority: the President may cancel certain budget provisions only *after* signing into law the entire measure that contains them.³ Further, he may use his cancellation authority only on laws that he signs, not on any measure that he allows to become law without his signature or that becomes law over his veto.

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1. The Line Item Veto Act, which was signed into law on April 9, 1996, became Part C of the Impoundment Control Act of 1974. (Parts A and B are the earlier provisions of the Impoundment Control Act, as amended.)
 2. The Impoundment Control Act established procedures for the Congress to review and consider any impoundments (or withholdings) of budget authority proposed by the President. It divides impoundments into two types: rescissions and deferrals. A rescission is a cancellation of budget authority; a deferral is a delay in the obligation of budget authority. The President may propose to rescind budget authority provided by law, but any proposed rescission must be enacted into law to take effect permanently. The President may defer budget authority only for specified purposes (in general, for contingencies, to achieve economies or efficiencies, or as specifically provided by law). Deferrals remain in effect unless overturned by law or until the end of the fiscal year in which they are made (whichever occurs first). The President may propose rescissions or deferrals at any time.
 3. Proponents of the item veto generally agree that a law granting true item-veto authority would probably be unconstitutional. They concede that a constitutional amendment may be necessary to grant the President an item veto.

The signing requirement is significant for at least two reasons. First, as the conference committee for the Line Item Veto Act made clear, it "ensures that the President affirmatively demonstrates support for the underlying legislation from which specific cancellations are then permitted."⁴ Thus, the act of signing an entire measure into law could be viewed as a broad form of restraint on the President's cancellation authority. Second, the signing requirement may be pivotal for resolving the issue of the Line Item Veto Act's constitutionality. Legal challenges to the act have asserted in part that it violates the requirements in Article I, Section 7 of the Constitution for changing a law (referred to as the Bicameralism and Presentment Clauses).⁵ Respondents to those challenges argue that, on the contrary, the President is simply carrying out a properly delegated function as provided under a duly enacted statute.

The President, supported by the Office of Management and Budget (OMB), makes all of the estimates and calculations necessary to carry out his cancellation authority. (In that respect, the President's cancellation authority is similar to the sequestration procedures that enforce the statutory limits on discretionary spending and the pay-as-you-go requirement under the Balanced Budget and Emergency Deficit Control Act of 1985.) The Line Item Veto Act directs the Congressional Budget Office (CBO) to provide the House and Senate Budget Committees with estimates of any cancellations, but those estimates are only advisory.⁶

PROCEDURES UNDER THE ACT

After signing a law, the President has up to five days to cancel any qualified spending or tax-benefit provisions in it—provided he adheres to specific definitions and actions outlined in the Line Item Veto Act. Those cancellations may be overturned by another law, which the act refers to as a "disapproval bill." The Congress has a 30-day review period to consider a disapproval bill under fast-track legislative procedures. Through the deficit reduction "lockbox" mechanism established by the act, any savings from cancellations that are not overturned are intended to go toward reducing the deficit.

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4. U.S. House of Representatives, *Line Item Veto Act*, conference report to accompany S. 4, Report 104-491 (March 21, 1996), p. 20.
 5. "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . ."
 6. The conferees for the act stated that they "expect CBO and the Budget Committees to carefully monitor OMB's estimates of cancellations" (U.S. House of Representatives, *Line Item Veto Act*, p. 23).

What May Be Canceled

Much of the controversy surrounding past item-veto proposals involved how "items" should be defined and identified. Those 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 to determine the amount to veto.

Under the Line Item Veto Act, the President may cancel three broad categories of spending or revenue law: any dollar amount of discretionary budget authority, any item of new direct spending (also known as mandatory spending), or any limited tax benefit. Most earlier item-veto proposals would have applied only to discretionary budget authority in annual appropriation acts. Compared with those proposals, the Line Item Veto Act significantly broadens the range of budgetary provisions that may be affected. At least one of those three categories (as the act defines them) can be found in most major spending or revenue laws, including major authorization laws.

Despite their breadth, the three categories are intended to be clearly delineated and limited. The framers of the act acknowledged that it would delegate new powers to the President, but they also made clear their understanding that

these powers are narrowly defined and provided within specific limits. The conference report includes specific definitions, carefully delineates the President's cancellation authority, and provides specific limits on this cancellation authority. The delegation of this cancellation authority is not separable from the President's duties to comply with these restrictions.⁷

Dollar Amount of Discretionary Budget Authority. In general, a "dollar amount of discretionary budget authority" is a whole-dollar amount of budget authority provided and controlled in an appropriation act. The term is intended to parallel the meaning of "discretionary appropriations" as defined in the Deficit Control Act of 1985. However, it incorporates other features to increase the President's discretion in making cancellations.

In general, 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). That third source involves the act's so-called "look-through" procedure. Authorization or other nonappropriation laws sometimes

7. U.S. House of Representatives, *Line Item Veto Act*, p. 19.

set aside, or earmark, amounts provided in annual appropriation acts for certain specified purposes—amounts known as authorization earmarks. The Line Item Veto Act in effect permits the President to look through the appropriation act to an earmark in an authorization law and cancel the amount provided in the appropriation act that is required to be spent by that authorization law.⁸

Further, when one of those three sources specifies a quantity of goods to be procured rather than an amount of budget authority to be obligated, the President is authorized to cancel only the total procurement cost of that quantity of goods. The total procurement cost is "the product of the estimated procurement cost and the total quantity of items" specified or required to be allocated.

The President may cancel only entire dollar amounts of discretionary budget authority, not a portion of any such amount. However, if an earmarked amount or some other amount within a lump-sum appropriation is canceled, the lump-sum appropriation and any other amounts covering that earmark are reduced by the canceled amount. Those commensurate reductions in the related lump-sum appropriation are intended to ensure that all related amounts reflect the President's cancellation.

The term "dollar amount of discretionary budget authority" excludes direct spending, rescissions or cancellations included in an appropriation act, and limitation language (general provisions or nonbudgetary policy language) provided in an appropriation act.

Item of New Direct Spending. An "item of new direct spending" is a provision of law that is estimated to increase budget authority or outlays for direct spending above baseline levels. The Line Item Veto Act defines direct spending in the same way as the Deficit Control Act: to include budget authority provided by a law other than an appropriation act, entitlement authority, and the Food Stamp program. The baseline must also be calculated as provided under the Deficit Control Act. However, the Line Item Veto Act is silent about the number of fiscal years that the baseline should cover for purposes of the President's cancellation authority.

The authority to cancel a new direct-spending provision is not affected by the net spending or revenue effect of the law that includes the provision. In other words,

8. The conference report on the act gives the following example of how the look-through procedure might work: "An example . . . is found in section 132 of Public Law 104-106, the National Defense Authorization Act for Fiscal Year 1996. Section 132 states that 'Of the amounts appropriated for Fiscal Year 1996 in the National Defense Sealift Fund, \$50,000,000 shall be available only for the Director of the Advanced Research Projects Agency for advanced submarine technology activities.' In this example the President could 'look through' the appropriation law to the authorization law that mandates that \$50 million is available only for advanced submarine technology activities, and could cancel the entire \$50 million" (U.S. House of Representatives, *Line Item Veto Act*, p. 33).

an item of new direct spending may be canceled even if it is offset or is part of a law that does not increase the deficit.

Limited Tax Benefit. In general, a "limited tax benefit" is a revenue-losing provision that provides a tax deduction, benefit, credit, exclusion, or preference to 100 or fewer beneficiaries, or any tax provision that provides "temporary or permanent transitional relief for 10 or fewer beneficiaries in any fiscal year." A revenue-losing provision is defined as an amendment to the Internal Revenue Code that reduces federal tax revenues in either one of two periods: the first fiscal year for which the provision is effective, or the five fiscal years beginning with the first year for which the provision is effective. The Line Item Veto Act also outlines several specific exceptions to the general definition of limited tax benefits (see sections 1026(9)(B) and (C) of the act).

The President's cancellation authority over limited tax benefits may be restricted. Under the act, the Joint Committee on Taxation (JCT) must review any revenue or reconciliation measure about to be reported from a House/Senate conference committee and must provide the conference committee with a statement identifying any limited tax-benefit provisions in the measure (or declaring that no such provisions exist).⁹ The contents of the JCT statement can be set forth as a separate section in the revenue or reconciliation measure. If that section is included, the President may cancel only those provisions that it identifies. If it states that the measure does not contain any limited tax benefits, the President may not cancel any supposed tax benefits in the measure.

The Meaning of "Cancel." The Line Item Veto Act defines the term "cancel" somewhat differently for each of the three categories of law that may be canceled. For a dollar amount of discretionary budget authority, cancellation means rescinding the entire dollar amount.¹⁰ For an item of new direct spending, to cancel generally means to prevent the specific budget authority or legal obligation that is provided by law "from having legal force or effect." For a limited tax benefit, cancellation means preventing the specific provision of law that provides the benefit from having legal force or effect. In each case, according to the act's conferees, the word cancel is

9. For further discussion of how limited tax benefits are defined and treated under the act, see Joint Committee on Taxation, *Staff Analysis of Provisions Contained in Line Item Veto Act (P.L. 104-130) Relating to Limited Tax Benefits*, JCS-1-97 (January 6, 1997).

10. The conferees for the act note that "[t]he term rescind is clearly understood through long experience between the Executive and Legislative branches with respect to appropriated funds. The conferees do not intend that any new interpretation be applied to the term rescind, but rather intend to narrow the scope of cancellation authority as compared with the authority provided under section 1012 of the Budget Act" (U.S. House of Representatives, *Line Item Veto Act*, p. 29). "Section 1012" refers to the section of the Impoundment Control Act that outlines the requirements that the President must follow both for proposing a rescission and for making proposed rescissions available for obligation if not enacted into law.

intended to be interpreted narrowly and not used as grounds for any attempt "to rewrite the underlying law, nor to change any provision of that law."¹¹

The Cancellation Process

To ensure that cancellation authority is "narrowly defined" and subject to "specific limits," the act requires the President to apply specified criteria and adhere to certain conditions in deciding whether to cancel a qualified spending or tax-benefit provision.¹² The conferees further stated that

[t]o the extent the President broadly applies this new cancellation authority or reaches beyond these limits to expand the application of this new authority, the President will be reaching beyond the delegation of these authorities.¹³

The President must certify that a cancellation he makes will reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest.¹⁴ He must also consider the legislative history and overall purposes of the underlying law and any additional information referred to in that law or elsewhere. Moreover, he must use the definitions in the Line Item Veto Act for the three types of provisions that may be canceled.

When canceling a provision, the President must identify the cancellation in a "special message" to the Congress transmitted within five days (excluding Sundays) of signing the law from which the cancellations are made. For each law only a single special message may be transmitted, regardless of the number of cancellations made from it. Cancellations take effect as soon as the Congress receives the special message and remain in effect unless overturned by a subsequent law. (If the Congress is not in session, the Line Item Veto Act requires the special message to be delivered to the Clerk of the House and the Secretary of the Senate.) Special messages must

11. Ibid., p. 20.

12. Ibid., p. 19.

13. Ibid.

14. Because the President must certify that his cancellations will reduce the deficit, some people have speculated that the cancellation authority does not apply if the budget is in surplus. That issue is discussed below in the section titled "Effect of Budget Surpluses."

be printed in the next issue of the *Federal Register* after they are transmitted to the Congress.¹⁵

According to the act, a special message from the President must include the following information:

- o The budgetary amount of the cancellation and a separate reference number for each cancellation;
- o The President's certification that it meets the three general criteria;
- o The reasons for the cancellation;
- o The estimated fiscal, budgetary, and economic effect of the cancellation;
- o All other relevant information bearing on the cancellation and its effect on the specific programs involved;
- o The adjustments, if applicable, that will be made to the discretionary spending limits; and
- o For spending cancellations, the affected federal account, department, entity, or function, and the affected states or Congressional districts (including the total number of cancellations affecting that particular state or district).

The Disapproval Process

The Line Item Veto Act sets up a 30-day, fast-track process so the Congress can quickly consider legislation disapproving any cancellations. The 30-day review period begins on the first "calendar day of session" after a special message is received and ends when 30 calendar days of session have elapsed. A calendar day of session is defined as a day on which both the House and Senate are in session. Thus, with Congressional recesses, adjournments, and other nonsession days, the 30-day review period typically extends well beyond 30 calendar days. Each special message has its own 30-day review period.

15. Cancellation notices are also available on-line at the Government Printing Office Web site (www.access.gpo.gov/nara/nara004.html).

Only a disapproval bill as defined under the Line Item Veto Act is eligible for the fast-track procedures. For a bill to qualify as a disapproval bill, it must:

- o Be introduced no later than five calendar days of session after the Congress receives the special message,
- o Conform to a specified structure set forth in section 1026 of the Line Item Veto Act, and
- o Include only cancellations made in a single special message submitted by the President. (In the House, a disapproval bill when introduced must include all the cancellations in the relevant special message. In the Senate, a disapproval bill when introduced may include one or more cancellations from a single special message but is not required to include them all.)

The Congress is allowed to consider one disapproval bill under the fast-track procedures for each special message (although the House and Senate may also consider a companion bill originating in the other chamber for the same special message). In the House, a disapproval bill may no longer be considered under fast-track procedures after the 30-day review period runs out. In the Senate, a disapproval bill "which began consideration" under those procedures may still be considered under them after the 30-day period expires.¹⁶

The fast-track procedures allow the Congress to set aside various procedural hurdles so it can move quickly to overturn a cancellation if a consensus forms. The procedures establish an expedited timetable for each stage of Congressional action on a disapproval bill. Amendments are generally prohibited, except for those that would strike one or more cancellations or (in the Senate only) would add a cancellation included in the special message but excluded from the original disapproval bill.

The President may not use his cancellation authority on a disapproval bill. Of course, he can use his regular veto authority to reject a disapproval bill in its entirety. Conversely, the Congress could include a disapproval of a cancellation in a measure that is not a disapproval bill, but such a measure would be subject to

16. U.S. House of Representatives, *Line Item Veto Act*, p. 24. The House may, of course, adopt a special rule to set aside regular procedures and expedite action on most legislation, including a disapproval bill. The Senate does not employ special rules. Given the Senate's tradition of unlimited debate, fast-track procedures are generally more significant for that chamber.

regular legislative procedures and, possibly, to the President's cancellation authority.¹⁷

The Deficit Reduction Lockbox

Cancellations that are not overturned by the Congress become subject to the deficit reduction "lockbox" procedure of the Line Item Veto Act. That procedure modifies existing statutory deficit controls—the caps on discretionary spending and the pay-as-you-go (PAYGO) requirement for new direct-spending and revenue legislation—to ensure that the projected savings from any surviving cancellations are used to reduce the deficit.

In general, the discretionary spending caps and the PAYGO requirement cover different types of budget laws. The discretionary spending caps limit spending that is provided and controlled in annual appropriation acts. The PAYGO requirement ensures that new direct-spending or revenue legislation does not increase the deficit. Spending or revenue laws that violate those requirements automatically trigger an offsetting sequestration, or across-the-board spending cut, in nonexempt programs, usually after the end of a Congressional session.¹⁸

The Line Item Veto Act sets up separate lockbox procedures for cancellations made from the laws covered by each process. For cancellations made from appropriation acts, OMB must estimate the savings in budget authority and outlays and include those savings in its overall estimate of the appropriation act (which, under the Deficit Control Act, must be made no later than seven days after the appropriation act becomes law). OMB must also calculate a corresponding reduction in the discretionary spending limits for each applicable fiscal year. Ten days (excluding Sundays) after the 30-day Congressional review period expires, OMB must reduce the discretionary spending limits by the amount of any cancellations that

17. Section 1023 of the act (titled "Cancellation Effective Unless Disapproved") seems to require a formal disapproval bill to overturn a cancellation. If so, then a cancellation could not be disapproved in an unrelated law, such as an appropriation act. However, other provisions of the Line Item Veto Act and the statement of managers in the conference report make it clear that the drafters of the act did not intend to strictly limit Congressional action on disapprovals to formal disapproval bills.

18. For additional background on statutory budget enforcement procedures and sequestration, see Congressional Budget Office, *The Economic and Budget Outlook: Fiscal Years 1998-2007* (January 1997), pp. 79-81.

are not overturned.¹⁹ Those reductions are reflected in the next sequestration report that OMB is required to submit under the Deficit Control Act.²⁰

Because appropriation acts are usually enacted near the end of a Congressional session, appropriation cancellations would most likely not be “locked up” until later in the following year (since the 30-day review period could be lengthened considerably by an end-of-session Congressional adjournment). However, OMB is required to include the savings from the canceled amounts in its estimates of the appropriation acts at the time they are enacted. That delay in lowering the discretionary caps could temporarily create room under the caps for other appropriation laws (such as supplemental appropriations) enacted in the interim. However, Congressional scorekeeping practices and enforcement procedures would generally prevent the Congress from considering such appropriations.²¹

For cancellations of items of new direct spending or limited tax benefits, OMB is directed to exclude the deficit decrease associated with the cancellation from the PAYGO calculations. (OMB also is directed to exclude disapproval bills that overturn such cancellations.) Thus, no savings are recorded that could be used later to offset legislation increasing the deficit.

Once the cancellation amounts have been locked up, no procedure exists under the act for unlocking them. If a disapproval bill is enacted after the discretionary spending limits have been lowered for the cancellations (in other words, once 10 days have elapsed after the 30-day period), OMB is not required to then raise the limits for that disapproval bill. Further, because the limits would already have been reduced, the costs of the disapproval bill would probably have to be offset to avoid a sequestration after the end of the session.

Finally, CBO is directed to provide the House and Senate Budget Committees with its estimates of the savings from cancellations as soon as practicable after the

19. The 10-day period is added to ensure that the President has the full time allotted under the Constitution to sign or veto a bill before the lockbox adjustment is made.

20. Three sequestration reports must be issued annually for the upcoming fiscal year: a preview report when the President submits his annual budget (on the first Monday in February), an update report in August, and a final report within 15 days of the end of a Congressional session. In addition, if an appropriation (such as a supplemental appropriation) is enacted that causes the caps for the current fiscal year to be exceeded, OMB must submit a “within-session” sequestration report within 10 days of its enactment.

21. As the conference report on the act states, “[u]nder existing congressional scoring conventions, CBO and the Budget Committees only score the budgetary impacts that directly result from legislation. The cancellation of an item will represent an administrative action and will not be scored as savings. Therefore, the savings from a cancellation will not be available as an offset for congressional scoring purposes” (U.S. House of Representatives, *Line Item Veto Act*, p. 24).

President makes them. As with CBO's estimates under the Deficit Control Act, the estimates of the President's cancellations are only advisory.

1997 CANCELLATIONS AND RELATED ACTIONS

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) last year. CBO estimates that, in total, those cancellations would save about \$355 million in fiscal year 1998 and just under \$1 billion 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, lowering the total five-year savings by more than one-third, to less than \$600 million.

The President used his cancellation authority for the first time on August 11, 1997, cutting three provisions from the two reconciliation acts that carried out the 1997 balanced budget agreement. Cancellation 97-1 struck a provision from the Taxpayer Relief Act of 1997 that permitted certain multinational financial-services firms to defer taxes on foreign earnings. Cancellation 97-2 cut a provision from the act that would have allowed gains from the sale of stock in certain farm processing facilities to be deferred. The two provisions were among 79 limited tax benefits that the Joint Committee on Taxation identified in the Taxpayer Relief Act. (As provided under the Line Item Veto Act, the conferees included that list as a separate section of the Taxpayer Relief Act.)²² The President's third cancellation deleted a provision from the Balanced Budget Act of 1997 that would have allowed New York State to treat certain medical-provider taxes as Medicaid matching funds, thereby increasing federal outlays.

The other 79 cancellations made in 1997 affected provisions in the appropriation acts for fiscal year 1998. Those cancellations totaled \$477 million of 1998 budget authority (see Table 2). Two-thirds of the cancellations came from the military construction and Department of Defense acts; they accounted for 90 percent of the reduction in 1998 budget authority. (However, that amount is still minor compared with total defense appropriations.) The rest of the cancellations came from seven appropriation laws, while four such laws—for the District of Columbia; foreign operations; the Departments of Labor, Education, and Health and Human Services; and the legislative branch—avoided the item-veto pen altogether.

22. See title XVII of the Taxpayer Relief Act. Another limited tax benefit was identified in the Balanced Budget Act of 1997 (in section 9304), making a total of 80 limited tax benefits in the two acts that the President could have canceled. No other laws enacted in 1997 included a JCT statement on limited tax benefits.

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	-14	0	0	0	0
		O	-7	-6	-1	-1	c
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	-4	-1	c	0	0
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 March 31, 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).

TABLE 2. SPENDING CANCELLATIONS IN FISCAL YEAR 1998 APPROPRIATION ACTS AS A PERCENTAGE OF TOTAL DISCRETIONARY APPROPRIATIONS
(In millions of dollars)

Appropriation Act	Number of Cancellations	Amount of 1998 Budget Authority Canceled	Total 1998 Discretionary Budget Authority	Amount Canceled as a Percentage of Total 1998 Discretionary Budget Authority
Agriculture	5	-2	13,751	0.01
Commerce, Justice, State	1	-5	31,280	0.02
Defense	14	-144	247,512	0.06
District of Columbia	0	0	855	0
Energy and Water				
Development	8	-19	20,732	0.09
Foreign Operations	0	0	13,147	0
Interior	2	-2	13,799	0.01
Labor, Education, HHS	0	0	80,403	0
Legislative Branch	0	0	2,251	0
Military Construction	38	-287	9,183	3.13
Transportation	3	-6	12,411	0.05
Treasury, Postal ^a	1	2	12,735	0.02
Veterans, HUD	<u>7</u>	<u>-14</u>	<u>68,575</u>	0.02
Total	79	-477	526,634	0.09

SOURCE: Congressional Budget Office.

NOTES: Table does not include actions overturning cancellations.

HHS = Department of Health and Human Services; HUD = Department of Housing and Urban Development.

a. Cancellation 97-56 would increase on-budget direct spending and revenues (the revenue effects are not included).

In percentage terms, the cancellations did not significantly affect any appropriation act except the one for military construction. The President canceled 3.1 percent of the \$9.2 billion in 1998 discretionary budget authority provided in that act. The other appropriation acts did not have more than 0.09 percent of their new budget authority canceled. Even the \$144 million canceled from the defense appropriation act represented only 0.06 percent of the total discretionary budget authority for 1998 provided in the act.

On February 25, 1998, the Congress enacted legislation (H.R. 2631) disapproving the President's military construction cancellations over the President's veto.

That law disapproved all 38 cancellations made from the military construction act (cancellations 97-4 through 97-41). On January 6, 1998, the D.C. District Court, pursuant to an agreement between the Justice Department and the National Treasury Employees Union (NTEU), issued an order invalidating cancellation 97-56, which affected a provision in the 1998 Treasury appropriation act to establish a special open season for the Federal Employees Retirement System (FERS). The Court declared that the President lacked the authority to cancel the provision (that cancellation is discussed in greater detail below).

Two of the President's first three cancellations have prompted legal challenges that may ultimately decide the fate of the Line Item Veto Act.²³ The City of New York and others filed suit against the President on October 16, 1997. They claim that cancellation 97-3 is unconstitutional: "the [Line Item Veto] Act grants powers to the President that contravene the constitutional process for making federal law."²⁴ The Snake River Potato Growers filed suit five days later against Treasury Secretary Robert Rubin for cancellation 97-2, claiming "that the Line Item Veto Act violates Article I of the U.S. Constitution by giving the President an impermissible unilateral power to revise and repeal federal law."²⁵ A third legal challenge was filed by the NTEU against the President's cancellation of the FERS open season, but that challenge was dismissed as part of the court order invalidating the cancellation.

On January 15, 1998, the D.C. District Court heard oral arguments on the two remaining legal challenges, which were consolidated into a single case. On February 12, the Court declared the Line Item Veto Act unconstitutional, stating that it "violates the provisions of Article I, section 7 of the United States Constitution and the separation of powers doctrine."²⁶ Both sides in the case requested an expedited review by the Supreme Court. Accordingly, the Supreme Court has scheduled oral argument on the case for April 27.

23. An earlier, unsuccessful legal challenge was filed by several current and former Members of Congress (Byrd et al. v. Raines et al.) shortly after the Line Item Veto Act went into effect. On April 10, 1997, the U.S. District Court for the District of Columbia declared the act unconstitutional because it "effectively permits the President to repeal duly enacted provisions of federal law" [Byrd v. Raines, 956 F. Supp. 25, 27 (D.D.C. 1997)]. On June 26, the Supreme Court reversed the District Court ruling, holding that the plaintiffs lacked standing. The Supreme Court vacated the District Court opinion and dismissed the complaint; it did not rule on the constitutional issues (the merits) of the case [Byrd v. Raines, --U.S.--, 117 S.Ct. 2312 (1997)].

24. Complaint for Declaratory Relief at 10, *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998) (No. CIV 97-2393), *prob. juris. noted*, 66 USLW 3575 (U.S. February 27, 1998) (No. 97-1374).

25. Complaint for Declaratory Relief at 2, *Snake River Potato Growers, Inc. v. Rubin*, 985 F. Supp. 168 (D.D.C. 1998) (No. CIV 97-2463), *prob. juris. noted sub nom*, *City of New York v. Clinton*, 66 USLW 3575 (U.S. February 27, 1998) (No. 97-1374).

26. *City of New York v. Clinton*, 985 F. Supp. 168, 182 (D.D.C. 1998), *prob. juris. noted*, 66 USLW 3575 (U.S. February 27, 1998) (No. 97-1374).

Sources and Reasons for the Cancellations

The Line Item Veto Act grants the President broad authority to cancel provisions based both on the text of a law and (for dollar amounts of discretionary budget authority) on the conference report and managers' statement accompanying an appropriation act. For the bulk of last year's cancellations—75 of the 82 total—the President cited an amount specified in the accompanying conference report as the basis for his veto. In one case (cancellation 97-44), he cited both the conference report and the House committee report. In another instance (cancellation 97-82), the President referred both to the conference report and to the enrolled act. The President canceled the five remaining provisions directly from the law (cancellations 97-1 through 97-3, 97-56, and 97-76); he did not use his look-through authority to cancel discretionary appropriations.²⁷

As noted earlier, the Line Item Veto Act requires that any cancellation must reduce the federal budget deficit, not impair any essential government functions, and not harm the national interest. In his special messages, the President included a separate section for each cancellation stating that "this cancellation will reduce the Federal budget deficit, will not impair any essential Government function, and will not harm the national interest." The act also requires the President to declare "the reasons for the cancellations."²⁸ He outlined those reasons for each cancellation.

Several themes pervaded the President's stated reasons for canceling items. The President claimed that some of the items fell outside the normal scope of operations of the agency in question or the federal government. He maintained that certain items would have duplicated current federal programs or other funding. And he asserted that other provisions would have circumvented the normal legislative process for obtaining funds. But the reason the President gave most often for canceling funding is that he had not requested it in his budget submission.

For each of the 38 military construction cancellations, the President stated three reasons: the canceled item was not requested in the President's fiscal year 1998 budget; it "would not substantially improve the quality of life of military service members and their families;" and "architectural and engineering design of this project has not started, making it unlikely that these funds can be used for construction during [fiscal year] 1998." For all but one of the cancellations from the defense appropriation act, the President cited the fact that he had not requested the project in his budget. He also repeatedly alluded to a Department of Defense determination that

27. For a discussion of the effect of the Line Item Veto Act on authorizing legislation, see Lou Fisher, *Line Item Veto Act of 1996: Impact on Authorizing Committees*, CRS Report for Congress 98-12 GOV (Congressional Research Service, December 29, 1997).

28. Section 1022(b)(1)(C) of the Line Item Veto Act.

the canceled item would not significantly contribute to the United States' military capacity.

Members of Congress disputed some of the President's reasons. Senators Daniel Moynihan and Alfonse D'Amato, for example, challenged the President's contention that the New York Medicaid provision would have granted the state preferential or unjustified treatment.²⁹ Some Members felt that the President's reconciliation act cancellations generally violated the balanced budget agreement. The President countered that, in his view, all three provisions were "outside the scope of the budget negotiating process."³⁰

With regard to the military construction cancellations, numerous Members argued that the President had received outdated or incorrect information. The President later admitted that some of the projects "were canceled based on outdated information." He offered to "[work] with the Congress to restore funding for those projects that were canceled as a result of data provided by the Department of Defense that was out of date."³¹

Some Members expressed particular concern that the President had used his own budget request too frequently as a reason for making cancellations. Instead, they asserted, the President should apply standardized criteria so that Members and other parties would know in advance whether the President was likely to cancel a particular project.

However, beyond the three broad determinations he must make under the act to justify any cancellation, the President is not required to use standardized criteria for making cancellations or to notify the Congress in advance of his reasoning. As the conferees for the Line Item Veto Act stated, the information required as part of the President's special message is intended "to ensure that the Congress and the public receive sufficient information with which to judge the President's action."³² The Congress may disagree with that action and move to overturn it, but the

29. Floor statements of Senators Moynihan and D'Amato, *Congressional Record*, September 3, 1997, pp. S8725-S8728.

30. William J. Clinton, "Remarks on Line Item Vetoes of the Balanced Budget Act of 1997 and the Taxpayer Relief Act of 1997 and an Exchange with Reporters," August 11, 1997, in *Weekly Compilation of Presidential Documents*, vol. 33, no. 33 (August 18, 1997), pp. 1225-1228.

31. William J. Clinton, "Message to the House of Representatives Returning Without Approval Legislation to Override a Line Item Veto," November 13, 1997, in *Weekly Compilation of Presidential Documents*, vol. 33, no. 46 (November 17, 1997), p. 1801.

32. U.S. House of Representatives, *Line Item Veto Act*, p. 21.

President's cancellation authority is not diminished by the reasoning he uses to employ it.

Disapproval Actions

On September 3, 1997, the first 30-day Congressional review period began under the Line Item Veto Act. That was the first day on which both the House and Senate were in session following the President's cancellations from the Balanced Budget and Taxpayer Relief Acts of 1997 (made on August 11).

Each special message after that triggered another, separate 30-day period for a disapproval bill on that message to be considered. Those messages were tied to appropriation acts that became law in October and November. Because the Congress ended its 1997 session on November 13, none of the 30-day review periods for the appropriation acts expired before the end of the session. Each one either resumed or began on January 27, 1998, when the House and Senate reconvened for the second session of the 105th Congress. (Three of the acts—for the Interior, Agriculture, and Commerce and Justice Departments—were signed after the first session ended.)

Of all of the President's cancellations last year, only his military construction cancellations prompted widespread opposition in the Congress. Accordingly, the Congress considered and passed just one disapproval bill, which was to overturn those cancellations. In addition, the House passed a bill (H.R. 2513) that, although not a disapproval bill, would restore and modify the two limited tax-benefit provisions that the President canceled last August from the Taxpayer Relief Act. The Senate has not acted on that bill.

On November 9, the Congress cleared H.R. 2631, a bill overturning the President's cancellations from the Military Construction Appropriation Act for 1998. Both the House and Senate approved their respective versions of the measure by veto-proof majorities.³³ Nonetheless, the President vetoed the measure on November 13, the final day of the 1997 session. The Congress's subsequent adjournment suspended the Congressional review period for the military construction special message until the body reconvened on January 27, 1998. On February 25, the Congress voted to override the President's veto by the requisite two-thirds vote, and the disapproval bill became law. It restored \$287 million in canceled budget

33. The Senate initially passed a companion measure, S. 1292, on October 30 by a vote of 69 to 30. That measure disapproved all but four of the 38 military construction cancellations. On November 8, the House passed H.R. 2631, which disapproved all of the military construction cancellations, by a vote of 352 to 64. The following day, the Senate approved H.R. 2631 by voice vote without amendment, clearing the measure for the President. (It later set aside S. 1292.)

authority—or roughly one-third of the total budget authority canceled by the President (and over half of the total discretionary budget authority canceled).

In general, Members cited three main reasons for disapproving the military construction cancellations. First, some Members asserted that the cancellations violated the recent balanced budget agreement because the President was not following through on his pledge to support the level of total defense spending specified in the agreement. Second, Members disputed the President's reasons for the cancellations and said they were not applied evenly in all cases. Finally, Members were concerned that the President had used outdated information in making his cancellations.³⁴ Although the President acknowledged that some of the information was erroneous, he did not agree that the fact justified overturning all or even most of the cancellations.

Lockbox Actions

The current caps on discretionary spending will be reduced by the total amount of cancellations from 1998 appropriation acts that were not overturned. Those lockbox adjustments to the caps will be reflected in the next OMB sequestration report issued after the reductions were made.

The sequestration preview report in the President's 1999 budget (the first of three regular sequestration reports to be issued this year) identified the total savings from appropriation act cancellations in 1997 but made no cap adjustments for them.³⁵ When the report was issued, on February 2, 1998, none of the 30-day Congressional review periods for those cancellations had expired. The next regular sequestration report will be issued this August and should reflect all remaining cancellations. By then, all of the 30-day review periods for the 1997 cancellations will have expired.

As of March 31, 1998, 39 of the President's cancellations had been overturned or nullified within their respective 30-day periods and thus will not be included in the lockbox adjustments. OMB and CBO estimate that the remaining cancellations would require lowering the caps on 1998 discretionary budget authority by just over \$190 million and the caps on 1998 discretionary outlays by about \$100 million (see Table 3).

34. For Senate debate on the measure, see the *Congressional Record*, October 30, 1997, pp. S11410-S11434; for House debate, see the *Congressional Record*, November 8, 1997, pp. H10374-H10384.

35. See "Budget Enforcement Act Preview Report" in *Budget of the United States Government, Fiscal Year 1999: Analytical Perspectives*, pp. 261-263.

TABLE 3. ESTIMATED ADJUSTMENTS TO THE DISCRETIONARY SPENDING CAPS
REQUIRED FOR THE 1997 CANCELLATIONS (By fiscal year, in millions of
dollars)

Agency	Budget Category	Adjustment Amounts				
		1998	1999	2000	2001	2002
Defense Caps						
CBO	Budget Authority	-144	0	0	0	0
	Outlays	-73	-49	-12	-4	-4
OMB	Budget Authority	-144	0	0	0	0
	Outlays	-71	-50	-14	-5	-2
Nondefense Caps						
CBO	Budget Authority	-48	-1	-1	-1	-1
	Outlays	-27	-17	-2	-2	-1
OMB	Budget Authority	-49	-1	-1	-1	0
	Outlays	-19	-22	-5	-4	-2
Violent Crime Reduction Caps						
CBO	Budget Authority	0	0	0	0	0
	Outlays	0	0	0	0	0
OMB	Budget Authority	0	0	0	0	0
	Outlays	0	0	0	0	0
Total Discretionary Spending Caps						
CBO	Budget Authority	-192	-1	-1	-1	-1
	Outlays	-100	-66	-14	-6	-5
OMB	Budget Authority	-193	-1	-1	-1	0
	Outlays	-90	-72	-19	-9	-4

SOURCES: Congressional Budget Office; Office of Management and Budget.

NOTES: The adjustment amounts exclude cancellations nullified as of March 31, 1998.

The Balanced Budget Act of 1997, which extended the statutory caps on discretionary spending through 2002, established separate limits for defense and nondefense discretionary spending for 1998 and 1999, and separate limits for violent crime reduction discretionary spending for 1998, 1999, and 2000. The act combines defense and nondefense discretionary spending (excluding violent crime reduction) under a single set of limits for 2000, and combines all discretionary spending under consolidated limits for 2001 and 2002. (Thus, totals for 1998 and 1999 are given for informational purposes only.)

A Case Study: The FERS Open-Season Cancellation

Unlike the other cancellations made in 1997, one drew widespread attention for the manner in which the President exercised his cancellation authority.³⁶ On October 16, 1997, the President canceled a provision in the 1998 Treasury and General Government Appropriations Act that authorizes a new "open season" during which federal employees covered by the Civil Service Retirement System can switch to the Federal Employees Retirement System. The National Treasury Employees Union filed a legal challenge to the cancellation, in part on the grounds that the President had exceeded his authority under the Line Item Veto Act. On January 6, 1998, the D.C. District Court issued an order nullifying the cancellation, stating that the President "lacked authority under the Line Item Veto Act" to make it and restoring the original provision of law.³⁷

The budgetary effects of the FERS open-season provision are complicated.³⁸ Unlike the other projects and activities canceled in appropriation acts, this provision changes direct-spending and revenue levels and affects both on-budget programs (federal retirement) and off-budget programs (Social Security and the Postal Service).

One of its major budgetary effects is to reduce federal employee contributions to the Civil Service Retirement and Disability Trust Fund. In his special message, the President estimated that those reduced employee contributions would lower receipts to the trust fund by \$854 million between 1998 and 2002. For purposes of the Line Item Veto Act, the President classified those lower receipts as dollar amounts of discretionary budget authority (see Table 4).³⁹

36. For example, see the colloquy between Senators Ted Stevens and Pete Domenici in the *Congressional Record*, November 13, 1997, pp. S12570-S12572.

37. Amended Complaint for Declaratory and Injunctive Relief at 2, National Treasury Employees Union v. United States, No. CIV 97-2399 (D.D.C. January 6, 1998). The NTEU complaint also challenged the Line Item Veto Act on constitutional grounds, but the Court dismissed that challenge as moot after ruling on the question of the President's authority under the act.

38. See the statement of Paul N. Van de Water, Assistant Director for Budget Analysis, Congressional Budget Office, before the Subcommittee on Civil Service, House Committee on Government Reform and Oversight, November 5, 1997.

39. Office of Management and Budget, "Cancellation No. 97-56: Cancellation of Dollar Amount of Discretionary Budget Authority," *Federal Register*, vol. 62, no. 201 (October 17, 1997), p. 54338. In his cancellation message, the President also asserted that the provision "would require the employing agencies to absorb increased retirement costs, using funds that otherwise would be available for payroll and other agency needs," but he did not specify those amounts in the message.

TABLE 4. COMPARISON OF CBO AND OMB ESTIMATES OF THE FERS OPEN-SEASON CANCELLATION (By fiscal year, in millions of dollars)

	Budget Category	Amount Canceled				
		1998	1999	2000	2001	2002
CBO	Budget Authority	2	12	13	13	14
	Outlays	2	12	13	13	14
	Revenues	4	35	37	37	38
OMB	Budget Authority	-8	-183	-209	-221	-233
	Outlays	-8	-183	-209	-221	-233
	Revenues	0	0	0	0	0
Total Budgetary Effect ^a						
	CBO	b	-23	-24	-24	-24
	OMB	b	-183	-209	-221	-233

SOURCES: Congressional Budget Office; Office of Management and Budget.

NOTE: CBO's estimate includes the on-budget direct-spending and revenue effects of the cancellation. OMB's estimate includes certain on-budget revenue effects that were classified as dollar amounts of discretionary budget authority for purposes of the Line Item Veto Act.

- a. Negative numbers indicate a decrease in the deficit or increase in the surplus.
- b. Outlays minus revenues (excludes budget authority).

The Line Item Veto Act, however, does not appear to support such a classification. It permits receipts to be canceled only if they qualify as limited tax benefits.⁴⁰ Reduced retirement contributions by federal employees are not limited tax benefits as the act defines them. Thus, in its legal challenge, the NTEU asserted that

the cancellation here challenged by plaintiffs [NTEU] is not authorized by the Act. Reductions in employee contributions to the Civil Service Retirement and Disability Fund are not amounts of "discretionary budget authority," and the President acted contrary to the Act in treating them as such.⁴¹

40. Offsetting receipts and collections, by contrast, are classified as negative budget authority and outlays. Cancellation 97-76, for example, canceled a provision that would have decreased offsetting collections and that thus was counted as an increase in budget authority.

41. Amended Complaint for Declaratory and Injunctive Relief at 2, National Treasury Employees Union v. United States, No. CIV 97-2399 (D.D.C. January 6, 1998).

CBO's estimate of the President's cancellation shows a smaller budgetary effect than the President projected (mainly because it assumes that fewer employees would switch to FERS). Unlike the President's special message, however, CBO classifies the projected change in employee contributions caused by the cancellation as an increase in revenues. CBO's estimate of the cancellation also projects an increase in on-budget direct spending (because of lower agency retirement contributions, which are counted as a decrease in offsetting receipts) and additional revenues from higher income tax payments by federal employees. Thus, CBO estimates that the President's cancellation would have resulted in net on-budget savings of about \$100 million over five years, rather than the \$854 million in savings that the President estimated.

Because of the lockbox mechanism, however, one effect of the President's cancellation would have been to reduce the discretionary spending limits for both budget authority and outlays by \$854 million over five years. No procedure exists under the Line Item Veto Act to change those adjustments later on. However, because of the District Court order invalidating the cancellation, the cap adjustments will not be made.

For the purposes of the Line Item Veto Act, both the President and CBO estimated only the on-budget effects of the cancellation. (Off-budget effects are not counted for budget enforcement procedures generally.) In the case of the FERS provision, the employee contributions lost to the Civil Service trust fund do not lower total federal receipts, but instead are shifted to the Social Security trust funds. However, the Line Item Veto Act does not specify how to treat off-budget spending and revenue changes made by a cancellation.

SELECTED ISSUES IN EVALUATING THE LINE ITEM VETO ACT

The Line Item Veto Act alters the relationship between the President and the Congress on budgetary lawmaking. The act's framers, appreciating the significance of the authority they were delegating and its potential effect on the lawmaking process, chose to make the act expire after eight years so that policymakers would have to reevaluate it in the light of experience.⁴²

One year's experience is probably not enough to draw any lasting conclusions about the act, but it does suggest at least four broad issues that bear watching. First, is the President's cancellation authority effective? In other words, will it accomplish the basic purpose for which it was established, reducing the deficit? Second, if sustained budget surpluses are projected, does the President's cancellation authority

42. U.S. House of Representatives, *Line Item Veto Act*, p. 19.

remain in effect? Third, does the act shift too much power from the Congress to the President? Although both proponents and critics agree that a shift has occurred, they disagree on its magnitude and significance. Finally, does the act clearly define what types of provisions can be canceled or leave room for disagreement?

Effectiveness

Last year, the President's cancellations were insignificant compared with the total level of spending and revenues. Does that mean the President's authority is less effective than contemplated, or did other, perhaps temporary, conditions affect his use of that authority? The answer may be a combination of the two.

On the temporary side, last year's experience may not be an appropriate test of the item veto in part because of the passage of the balanced 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 would otherwise have been inclined to cancel.

A structural feature of the item veto—the act's lockbox mechanism, intended to preclude canceled amounts from being spent on other activities—may also make the President reluctant to cancel large sums. Because the discretionary spending caps are reduced by the amount of savings from appropriation act cancellations, such cancellations effectively lower the total amount that can be spent on all programs and activities funded through annual appropriation acts.

In general, the Line Item Veto Act 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 lockbox mechanism, could restrain the Congress from including some of the "pork-barrel" provisions that it might otherwise have incorporated. Or the Congress might accommodate some of the President's priorities, thereby increasing the total amount 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.⁴³

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 parties.

Effect of Budget 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 annual budget surpluses beyond the scheduled duration of the act. Estimates by 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 does not remain in effect if the budget is in surplus, but that is far from certain. 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 will 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" at all. 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.

Balance of Power

Evaluating any shift in the balance of power between the President and the Congress is largely subjective. Did the President attempt to coerce Members (explicitly or implicitly) by promising to withhold certain cancellations in exchange for support on other matters? Were "recalcitrant" Members punished with cancellations? Did the

43. See, for example, Lou Fisher, *State Techniques to Blunt the Governor's Item-Veto Power*, CRS Report for Congress 96-996 GOV (Congressional Research Service, December 12, 1996).

President pick out Republican Members to bear the brunt of his cancellations? Any evidence is either inconclusive or largely anecdotal.

Most observers agree that the Line Item Veto Act gives the President new authority that is likely to shift budgetary power away from the Congress. That authority can be applied broadly. Most earlier proposals to grant the President item-veto authority would have applied only to appropriation acts. Under the Line Item Veto Act, the President's cancellation authority potentially applies to a wide range of measures—appropriation acts (including regular, supplemental, and continuing appropriations), authorization acts, reconciliation acts, certain revenue measures, and other budgetary legislation—and could eventually affect many different federal programs or activities.

Many observers have speculated that the President's cancellation authority is likely to give him additional leverage during legislative bargaining. The threat of cancellations will hover over House and Senate action on each affected budgetary measure, they argue, and the significance of that threat is likely to mount with each stage of legislative action, particularly as a Congressional session draws to a close.

Are those concerns valid? The answer, if there is one, is complicated. Unbridled or unrestrained use of the President's cancellation power could lead to a backlash in the Congress and among the public. There is also some reason to believe—given Congressional response to the military construction cancellations and given how the lockbox functions—that the President's new power may be inherently limited. However, shifts in power can also be subtle and occur slowly. Much depends on the inclinations of the President, budgetary and political conditions, and other factors.

Last year's experience does seem to indicate, however, that the President's budget has become more important as a result of the Line Item Veto Act. In 1997, the President used his budget submission as the number one reason for canceling provisions. Nothing in the act prevents him from doing so, as long as he can make the other determinations that it requires.

Difficulties in Defining Provisions That May Be Canceled

Some of the most vexing issues likely to be raised under the Line Item Veto Act will involve the definitions of the three categories of spending and revenue law that may be canceled. In defining those categories, the act introduces significant new terminology into the budget process. Although those terms are defined in the act or elsewhere in budget statutes, a number of potential ambiguities exist.

In 1997, the President's use of the act's terminology was relatively uncontroversial (except for the dispute about whether the receipts that would decline under the FERS open season constitute discretionary budget authority). However, the act's definitions pose several potential difficulties.

For example, the act allows the President not only to cancel discretionary budget authority specified in an appropriation law (or accompanying reports) but also, under the look-through procedure, to cancel discretionary budget authority earmarked in an authorizing statute. That practice could complicate the annual appropriation process. For instance, it is unclear whether the President's cancellation authority under the look-through procedure must be exercised when the appropriation law is enacted or may be used when the authorizing statute is signed into law. Thus, cancellations could conceivably be made on the basis of authorizing statutes that affected appropriations enacted weeks or months earlier.

The language permitting cancellations based on authorization earmarks may create other difficulties. The act generally defines an authorization earmark as an amount "required to be allocated for a specific program, project, or activity in a law (other than an appropriation law) that *mandates the expenditure* of budget authority from accounts, programs, projects, or activities for which budget authority is provided in an appropriation law" (emphasis added). Although the act specifically excludes direct (or mandatory) spending from the definition of "dollar amount of discretionary budget authority," the meaning of the phrase "mandate the expenditure of" is sufficiently ambiguous to create potential controversy over how to classify the budgetary effect of certain provisions. One possible outcome is that the range of provisions subject to the President's cancellation authority could be greatly expanded.

Ambiguities in the definition of "item of new direct spending" could also create problems. The act defines such an item as a provision of law that increases direct spending above baseline levels. But it does not specify what "provision" means, the number of years the baseline estimates should cover, or whether an increase in any year qualifies even if the provision decreases total spending over time. OMB and CBO frequently disagree about whether or how much various legislative provisions would affect baseline spending levels. Sometimes those disagreements involve relatively large sums or even the direction of the sums (that is, whether spending will increase or decrease). Thus, the Congress could enact a provision that CBO estimates would decrease spending, but if OMB later determined that the same provision would increase direct spending, it could subsequently be canceled by the President.

Long and complex direct-spending measures, such as reconciliation acts, could raise additional problems. Reconciliation measures generally reduce the deficit overall but usually contain individual provisions that boost spending or have no

budgetary effect. Thus, when applied to reconciliation acts, the Line Item Veto Act could raise some of the same problems and questions that the Senate has confronted over its Byrd Rule (to curb the addition of extraneous matter to reconciliation legislation). For example, could the President gerrymander various provisions in a way that created a budgetary effect where none was intended? Even though the drafters of the act stated explicitly that they intended the President's cancellation authority to be narrow, the Congress may have little effective recourse if the President decides to exercise his new authority more expansively. At a minimum, the threat of his doing so could give him additional leverage in the legislative process.

With respect to limited tax benefits, disagreement over the President's cancellation authority could arise if the Congress did not include the JCT statement in a revenue or reconciliation measure. The President is legally bound to abide by that statement only if it is included in the affected revenue or reconciliation law.

To some extent, those and other definitional problems are unavoidable given the nature of the President's cancellation authority. Modern spending and revenue laws are inherently complex and detailed. Any procedure for effectively unraveling those laws, such as the President's cancellation authority, will also be complex. It is unlikely that lawmakers could craft any such procedure that would anticipate every twist and turn of budgetary lawmaking.

THE ACT'S FUTURE

The President's cancellations under the Line Item Veto Act were relatively small in 1997, but that could change in future years with shifting political and budgetary conditions. 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 political backlash. 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 Supreme Court is scheduled to hear the pending legal challenge to the constitutionality of the Line Item Veto Act in late April and is expected to rule on that challenge later this year. If the Line Item Veto Act is ultimately declared unconstitutional, lawmakers will face the question of whether to pursue other alternatives to accomplish their original objectives.

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

past, would be to establish an expedited rescission process. Under expedited rescission, fast-track legislative procedures could be created to ensure that the President's proposed cuts in spending or repeals of tax benefits received 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 judicial outcome awaits the Line Item Veto Act, the original provisions of the Impoundment Control Act of 1974, which it amended, will remain in effect. According to the General Accounting Office, Presidents proposed about \$75 billion in rescissions under the Impoundment Control Act between fiscal years 1974 and 1996. The Congress agreed to only about one-third of those rescissions (about \$25 billion) but initiated another \$93 billion of rescissions, bringing the total amount rescinded during that period to around \$118 billion.⁴⁴

If the Line Item Veto Act withstands constitutional challenge, one of the basic questions lawmakers will face as they evaluate its performance is similar to what they addressed upon its enactment: do the budgetary gains of the act outweigh the risks of shifting power to the President? If the act continues to have only a limited effect on spending or revenues, policymakers may want to ask whether those small savings justify the transfer of power or other potential problems. The second basic question is whether the Line Item Veto Act will remain relevant if projected budget surpluses materialize and persist. Does the President's cancellation authority have other uses than reducing the deficit, or can it be modified to serve other purposes?

44. General Accounting Office, *Summary of Proposed and Enacted Rescissions: Fiscal Years 1974-1996*, GAO/OGC-97-59 (September 26, 1997).