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THE PRESIDENTIAL VETO POWER

By WILLIAM A. CLINEBURG*

I. INTRODUCTION

The legislative article of the Constitution delegates to the President a limited power of veto.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes 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, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives according, to the Rules and Limitations prescribed in the Case of a Bill.¹

No legislation ever has been enacted giving practical effect to and insuring the fulfillment of these provisions, and they have been construed only fragmentarily by the judiciary.

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1. U.S. CONST. art. I, § 7.

It is not here intended to analyze all the many aspects of the President's veto power nor to probe all the many areas of doubt that are engendered by a phrase-by-phrase dissection of article I, section 7. Rather, it is the limited ambition of this article to point up the very real necessity for the enactment of legislation that will define the operative terms of these veto provisions and prescribe a procedure to be followed by the President and the Congress in the exercise of their respective functions under those provisions.

These two paragraphs of the Constitution represent the effort of the framers to distill from history a veto power best suited to a government structure composed of three separate but coordinate instrumentalities of delegated powers. Fully to understand the intended scope and heft of this veto power requires, therefore, some understanding of the evolution of the executive veto, for it was from this evolutionary history that the framers extracted those features which distinguish the presidential veto power.

The executive veto is not an American invention; the concept dates back to the beginnings of organized government. The scope of the veto power has ranged in history from the absolute power to nullify both legislative and executive acts to the more moderate power to delay, if not nullify, only legislative acts. In essence, the veto is and always has been a governmental device employed either to protect the people governed or to protect the office of the person empowered to employ it, or both.

In ancient Rome, the Tribune most effectively performed the function of his office, which was to protect the plebs from injustice at the hands of the patricians, by uttering the word "Veto," meaning "I forbid."² This tribunician veto, binding upon even consuls and praetors, was strictly negative in effect and has been described as an anarchial act which could bring the whole of the state machinery to a standstill.³

In England, too, the veto power had its genesis early in the history of English government. Long before the Battle of Hastings, as the early English Kings expanded their realms over the island, the assemblies, which were made up of all the freemen of the kingdom, became impracticable and were replaced by a national assembly composed principally of persons chosen by the

2. See BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW § 1 (1925); HUNTER, ROMAN LAW 14, 1045 (3d ed. 1897).

3. JOLOWICZ, HISTORICAL INTRODUCTION TO ROMAN LAW 14 (1939).

king. The voice of the freemen was thus stifled.⁴ During the reign of Edward III, the Parliament usurped the power to enact legislation, but even then the King, in approving legislative acts, would occasionally modify the petitions upon which they were based.⁵ In the reign of Henry V, the House of Commons asserted the right to act upon such amendments, but the King's approval, nevertheless, was necessary for an act to become effective.⁶ This prerogative is said to be the progenitor of the presidential veto power, but it was absolute, being unencumbered by any possibility of being overridden by the Parliament.

Eventually, the king's only direct connection with the legislative process was limited to his acceptance or rejection of a bill as passed by both houses of Parliament.⁷ Because of the final and absolute nature of the king's veto power, no monarch has exercised that power for more than 250 years.⁸ Although this veto power continues to repose in the English monarch, its exercise would constitute such a flagrant breach of tradition that it has been said he would not veto even a bill calling for his own execution.⁹

While the king, after 1707, denied himself the exercise of the veto power with respect to domestic legislation, he frequently asserted his absolute power of veto over colonial acts.¹⁰ His power extended even to colonial acts approved by the colonial governor,¹¹ and in all of the American colonies, save three, the governors had the veto power.¹²

Thus, the veto power was familiar to and understood by the American colonists, and they were so greatly disturbed by what they considered George III's abuse of the power that the Declaration of Independence named that abuse as a reason for their disaffection. "He has refused his Assent to Laws, the most wholesome and necessary for the common good."¹³

4. FREEMAN, *THE GROWTH OF THE ENGLISH CONSTITUTION* 38, 53 (3d ed. 1898).

5. HEARN, *THE GOVERNMENT OF ENGLAND* 57 (1867).

6. KNAPPEN, *CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND* 257 (1942).

7. *Id.* at 385.

8. HEARN, *op. cit.* *supra* note 5, at 60-61; 2 CURTIS, *HISTORY OF THE CONSTITUTION* 266 (1858).

9. BAGEHOT, *THE ENGLISH CONSTITUTION* 122 (2d ed. 1873).

10. 4 ELLIOTT, *DEBATES* 620 (1836).

11. DICEY, *THE LAW OF THE CONSTITUTION* 112 (7th ed. 1908).

12. See POORE, *FEDERAL AND STATE CONSTITUTIONS AND CHARTERS* (1877), for charters. The exceptions were Maryland, Rhode Island and Connecticut.

13. *DECLARATION OF INDEPENDENCE*.

The independent colonies, in composing the Articles of Confederation, evinced their total distrust of an executive branch of government by creating none. In fact, the colonists distrusted all aspects of a central government, and gave to the Congress of the Federation only very limited powers. The American experience under the Articles had served to establish, however, the vital need for a chief executive, and at the Constitutional Convention the delegates came to agree that the chief executive should have a power of veto.

If there were brought together all the treatises that have been written about the birth, and the purpose and meaning of the Constitution, a sizeable edifice would be required to house the collection. The volumes in such a library would include many pages expository of article I, section 7, but nothing ever written about the concept that is given expression in those provisions has added to or in any way discredited what Alexander Hamilton said about it in *The Federalist*.¹⁴ The following excerpts from his paper No. 73 have illuminating pertinence here:

The first thing that offers itself to our observation, is the qualified negative of the President upon the acts or resolutions of the two Houses of the Legislature; or in other words his power of returning all bills with objections; to have the effect of preventing their becoming laws, unless they should afterwards be ratified by two thirds of each of the component members of the legislative body.

The propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be

14. *THE FEDERALIST* Nos. 51, 69, 73 (Hamilton).

blended in the same hands. If even no propensity had ever discovered itself in the legislative body, to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self defence.

But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

* * * The primary inducement to conferring the power in question upon the executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community, against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.

* * * But the Convention have pursued a mean in this business; which will both facilitate the exercise of the power vested in this respect in the executive magistrate, and make its efficacy to depend on the sense of a considerable part of the legislative body. Instead of an absolute negative, it is proposed to give the executive the qualified negative already described. This is a power, which would be much more readily exercised than the other. A man who might be afraid to defeat a law by his single *veto*, might not scruple to return it for reconsideration; subject to being finally rejected only in the event of more than one third of each house concurring in the sufficiency of his objections. He would be encouraged by the reflection, that if his opposition should prevail, it would embark in it a very respectable proportion of the legislative body, whose influence would be united with his in supporting the propriety of his conduct, in the public opinion. A direct and categorical negative has something in the appearance of it more harsh, and more

apt to irritate, than the mere suggestion of argumentative objections to be approved or disapproved, by those to whom they are addressed. In proportion as it would be less apt to offend, it would be more apt to be exercised; and for this very reason it may in practice be found more effectual. It is to be hoped that it will not often happen, that improper views will govern so large a proportion as two-thirds of both branches of the Legislature at the same time; and this too in defiance of the counterposing weight of the executive. It is at any rate far less probable, that this should be the case, than that such views should taint the resolutions and conduct of a bare majority. A power of this nature, in the executive, will often have a silent and unperceived though forcible operation. When men engaged in unjustifiable pursuits are aware that obstructions may come from a quarter which they cannot control, they will often be restrained, by the bare apprehension of opposition, from doing what they would with eagerness rush into, if no such external impediments were to be feared.¹⁵

Hamilton's observations, faithfully reflecting the thinking and aims of the majority of the delegates to the Constitutional Convention, identify clearly those features of the historic veto which the delegates selected for incorporation into the President's veto power. It is patent from Hamilton's reports that the power given the President by the Constitution to approve or disapprove legislation (his disapproval being qualified by the Congressional power to override it) was conceived to serve as a device for maintaining, once the new government was activated and in operation, the same nice balance of powers which the framers had achieved in their "parchment delineation." The power of veto was made available for use by the President to protect the executive branch against the natural "propensity of the legislative" to encroach upon it, and was made available for his use against legislation that would serve provincial interests at the expense of the national interest and against any other legislation considered by him to be improvident.

The importance of the presidential veto power, as a functioning component of the system of checks and balances, is impossible to exaggerate. Woodrow Wilson declared it beyond all comparison the President's most formidable prerogative.¹⁶ Bryce

15. THE FEDERALIST No. 73, at 71 (2 Dunn ed. 1901) (Hamilton).

16. WILSON, CONGRESSIONAL GOVERNMENT 52 (15th ed. 1925).

noted that while the strength of the Congress consists in its power to pass statutes, the strength of the President consists in his right to veto them; he regarded it as a device admirably adapted to thwart tyranny.¹⁷

A distinguishing feature of the President's power to approve or disapprove legislation passed by the Congress, and a feature having important implications, is that it represents a departure from the concept of separated powers and, in the final analysis, is a legislative power, for in approving or disapproving legislation the President is functioning as an integral part of the legislative process. The fact the veto provisions are contained in article I of the Constitution is conclusive that the power was so regarded by the framers. Wilson, in identifying the veto power as the President's most formidable prerogative, observed that the President is thus powerful rather as an arm of the legislative than as the head of the executive branch.¹⁸ The Supreme Court also has observed that "undoubtedly the President when approving Bills may be said to participate in the enactment of laws, which the Constitution requires him to execute."¹⁹

The practical and philosophical purposes intended to be served by the presidential power of veto fail to be served if frustration and circumvention of the power are made possible by uncertainties as to the precise meaning of various words and phrases in article I, section 7. Such uncertainties do exist, as will be shown, and they become apparent when the language of the veto provisions is sought to be applied to factual situations that can and do arise in the legislative enactment process. It is imperative that these ambiguities be eliminated to the end that the presidential veto power may do the job it was designed and intended to do.

II. THE PROPRIETY OF LEGISLATIVE IMPLEMENTATION

It is not surprising that uncertainties in the meaning of key words and phrases in the Constitution's veto provisions become evident when those provisions are sought to be applied to precise situations, although it is more than surprising that these uncertainties have been so long tolerated. Article I, section 7, does not embody the specifics for resolving all the problems that its application can generate, as the authors of the Constitution did not

17. 1 BRYCE, *THE AMERICAN COMMONWEALTH* 224, 225 (3d ed. 1908).

18. WILSON, *op. cit. supra* note 16, at 260.

19. *La Albra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

set out to write a code of laws or procedure but, instead, sought to construct "a frame of government."²⁰

"To have prescribed the means by which the Government should, in all future times, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code."²¹

If perfect harmony and identity of viewpoint as between the Congress and the President were the invariable state of affairs in Washington, the ambiguities of the veto provisions would occasion neither concern nor comment. But our political history volubly testifies that such a state of affairs is inconstant and transient, and to insure that disagreement over the meaning of these provisions does not at some future hour of national crisis create an executive-legislative impasse in relation to critical legislation, the ambiguities in those provisions must be removed. Mr. Justice Stone, dissenting in *Wright v. United States*,²² stressed that the certainty of the veto provisions application "is of supreme importance."²³

These uncertainties should not be permitted to persist pending their resolution by the judiciary, nor is a clarifying constitutional amendment either necessary or desirable. The former of these alternatives offers at best a mere patchwork of interpretation, and, more significantly, an impasse of the sort that ought to be averted could very possibly be the first suitable future occasion for invoking the judiciary's interpretative assistance.²⁴ The latter alternative, a constitutional amendment, involves travelling a route along which the traffic is exceedingly slow, and the fatality rate is exceedingly high.²⁵ Moreover, the respected concept of

20. *United States v. Weil* (1894), 29 Ct. Cl. 523, 546 (1894).

21. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

22. 302 U.S. 583 (1938).

23. *Id.* at 599.

24. To date, the Supreme Court has rendered only five decisions in which it has resolved controversies as to the meaning of certain of the veto provisions. See *Wright v. United States*, 302 U.S. 583 (1938); *Edwards v. United States*, 286 U.S. 482 (1932); *Okanogan v. United States*, 279 U.S. 655 (1929); *Missouri Pac. R.R. v. Kansas*, 248 U.S. 276 (1919); and *La Albra Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

25. There have been several efforts made at amending the Constitution so as specifically to authorize an item veto. The first attempt was initiated by President Grant, who, in his message to the Forty-third Congress, recommended an amendment "to authorize the Executive to approve of so much of any measure passing the two Houses of Congress as his judgment may dictate, without approving the whole, the disapproved portion or portions to be subject to the same procedure as now." 7 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 242 (1898). Presidents Hayes and Arthur made similar

the Constitution as a "frame of government" would be seriously eroded by an amendment of sufficient detail and complexity to eliminate all the existing uncertainties.

The solution lies in the adoption of legislation that will resolve these ambiguities by filling in the details deliberately omitted by those who drafted article I, section 7. It is beyond cavil that Congress has the power to enact legislation which will clarify and implement these constitutional provisions.

Article I, section 8 of the Constitution delegates to the Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²⁶ Although these clauses were the source "of much virulent invective and petulant declamation,"²⁷ Hamilton observed that:

[I]t may be affirmed with perfect confidence that the constitutional operation of this intended government would be precisely the same if these clauses were completely obliterated [or] if they were repeated in every article. They are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government, and, vesting it with certain specified powers.²⁸

There is no express grant of power which does not carry with it others, not expressed but vital in its exercise, which may be the subject of legislative action.²⁹ The only constitutional limitation upon the power thus expressly delegated to the Congress is that the laws enacted in the exercise of the power shall be "necessary and proper." Obviously, the power extends beyond the enactment of laws to carry into execution the legislative powers, and comprehends such laws as are necessary and proper to the carrying into effect of judicial and executive powers as well, for the delegation specifically authorizes the enactment of laws to effectuate all other powers vested by the Constitution in the

recommendations, but only as to appropriation bills. 7 RICHARDSON, *op. cit. supra* at 528; 8 RICHARDSON, *op. cit. supra* at 138. Similar proposals also have originated in the Congress, the earliest having been made in 1876. H.R. Res. 46, 44th Cong., 1st Sess. (1876).

26. U.S. CONST. art. I, § 8.

27. THE FEDERALIST, No. 33 at 211 (1 Dunne 1901) (Hamilton).

28. *Id.* at 4. The validity of this observation has never been seriously doubted. 2 STORY, COMMENTARIES ON THE CONSTITUTION 137-38 (5th ed. 1891).

29. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 255 (1821).

Government of the United States, or in any department or officer thereof. One entire title of the United States Code, Title 5, pertains to the executive departments, officers and employees, and another, Title 28, pertains to the judiciary and judicial procedure.³⁰ The statutes continued in Titles 5 and 28 were adopted by Congress. They effectuate the executive and judicial powers, and are administered and enforced by the executive and judicial departments; thus, they stand as monuments to the proposition that it is the prerogative of the Congress to enact such legislation as may be necessary and proper to carry into effect the presidential veto power.

This congressional prerogative may not, of course, be employed to enlarge or dilute the presidential power.³¹ But neither is its exercise limited to what is absolutely necessary to the carrying into effect of that power, and the Congress may, in its discretion, adopt such legislation as it may deem desirable and appropriate for that purpose, assuming of course the legislation is otherwise consistent with the letter and spirit of the Constitution.³²

III. UNCERTAINTIES OF MEANING: THE NEED FOR LEGISLATIVE IMPLEMENTATION

The veto provisions, on a first reading, create an illusion of clarity and incisiveness, attributes for which the Constitution as a whole is renowned. In fact, the first paragraph of these provisions is the second longest paragraph in the document, and the second paragraph readily could have been incorporated in the first at a considerable economy of language. When contrasted with other, equally vital sections of the Constitution, article I, section 7 is rather tumid. Yet despite, or perhaps because of, its comparative prolixity, it contains ambiguities that have generated and will continue to generate uncertainty and confusion. Attention herein will be addressed only to certain of the more disquieting and unresolved ambiguities in the meaning of the veto provisions.³³

30. The Supreme Court has even said that it is the *duty* of the Congress to pass such laws as are necessary and proper to carry into effect the powers vested in the judicial department. *Ableman v. Booth*, 62 U.S. 506, 521 (1859).

31. See *Union Bridge Co. v. United States*, 204 U.S. 364, 381 (1907).

32. *Everard's Breweries v. Day*, 265 U.S. 545, 558 (1924).

33. Some of the more obvious ambiguities have been resolved by the Supreme Court. The problem of whether, when the provisions specify that a veto may be overridden by a two-thirds vote of each "House," a two-thirds vote of the *members* of each House is required, or merely two-thirds of a *quorum*, was unsettled and much debated until, in 1919, the Supreme Court

A. The meaning of "presented to the President."

Article I, section 7 specifies no fewer than three times that every bill shall be "presented to the President," and it provides that if a bill thus presented is not returned by him "within ten Days (Sundays excepted)," it shall be a law as if he had signed it, "unless the Congress by their Adjournment prevent its Return." If, on the other hand, the President, within ten days after the bill has been presented to him, returns it with his objections to the House of its origin, the bill stands as vetoed and can become law thereafter only if it is passed by a two-thirds vote of each House.

The precise meaning of "presented" is first of all significant because it marks the commencement of the ten-day constitutional period. If a veto is timely, *i.e.*, within ten days, the bill does not become law; if, on the other hand, the bill is not returned within that period of time, and the Congress remains in session, the bill becomes law. But if the Congress should adjourn on the tenth day without the bill having been returned, the question arises whether such a bill becomes a law without the President's approval or is to be considered the victim of a pocket veto. In other words, does a congressional adjournment on the morning of the tenth day deprive the President of most of the working hours of that tenth day within which to decide if he should approve or veto the bill? This question is unresolved.

The traditional procedure by which bills are presented to the President serves to gloss over some of the uncertainties in the meaning of the term "presented." In practice, the original enrolled bill is delivered to a White House employee who issues a dated receipt therefor and impresses a stamp on the bill bearing the legend "The White House" and showing the date. The date of the receipt, which coincides with the date stamped on the bill, is in practice accepted as the first day of the ten-day constitutional period. This, it bears repeating, is merely a matter of practice and custom, neither dictated nor sanctioned by constitutional provision, legislation or judicial decision.

held that the fractional requirement refers to a quorum of the membership. *Missouri Pac. R.R. v. United States*, 248 U.S. 276 (1919). The question was argued for almost 150 years before the Supreme Court decided that a President may sign a bill *after* a congressional adjournment, notwithstanding a long-established practice and custom to the contrary. *Edwards v. United States*, 286 U.S. 482 (1932). In *Okanogan v. United States*, 279 U.S. 655 (1929), the Supreme Court finally resolved in the affirmative the question of whether there is such a thing as a "pocket veto."

This practice originated early in our government's history and before Presidents began frequently to absent themselves from the continental limits of the United States during sessions of Congress. In instances of the President's unavailability by reason of his absence from the United States, if the Congress is dominated by the political party of the President, a bill simply is not "presented" until the President returns to Washington³⁴ or, in the alternative, the bill is flown to him abroad. Should the Congress, or at least the House of origin, be dominated by the opposing political party, however, problems can arise. If a majority of such a Congress or House of origin desire strongly that a bill become law, whereas the absent President is known to oppose it, the delivery of the bill in accordance with the standard custom and practice to a White House employee could be contended as marking the commencement of the ten-day period and the bill deemed as having become law if the President's return should be delayed beyond the ten days following such presentation. But the President's partisans could take the position that, custom and practice to the contrary notwithstanding, the bill had not been "presented to the President" as required by article I, section 7 and did not become law.³⁵ The Supreme Court's decision in *Edwards v. United States*³⁶ would appear to support the latter position.

There is also the possibility that a President, on departing the United States for an extended stay abroad during a session of an uncooperative Congress, could instruct his White House staff not to accept delivery of bills during his absence. Not only does the

34. Professor Corwin tells of an instance of this kind during the Seventy-fourth Congress when a bill was delivered to and approved by the President twenty-three days after the final adjournment of the Congress. CORWIN, *THE PRESIDENT, OFFICERS AND POWERS* 341, 503 (3d ed. 1948). This averted a pocket veto as the bill was not signed until July 13, 1936, after the second session of the Congress had adjourned *sine die* on June 20, 1936. See 49 Stat. 2041 (1936), 20 U.S.C. § 194 (1964).

35. In the first session of the Seventy-eighth Congress, while President Roosevelt was abroad, a joint resolution was delivered to a White House employee on November 18, 1943. [S.J. Res. 59, S. Jour., 78th Cong., 1st Sess., at 493 (1943)]. In his veto message thereon, S. Doc. No. 135, 78th Cong., 1st Sess. (1943), the President stated: "This joint resolution was presented to me on November 25, 1943". And during the same session, President Roosevelt approved S. 630 (57 Stat. 595, Ch. 332) on December 3, 1943, noting on the margin of the original enrolled bill "presented to me December 3, 1943," although the official Senate record states that the joint resolution was "presented to the President of the United States" on November 27, 1943, S. Jour., 78th Cong., 1st Sess., 501 (1943).

36. 286 U.S. 482 (1932). See also *Wright v. United States*, 302 U.S. 583 (1938); *Okanogan v. United States*, 279 U.S. 655 (1929); *La Alba Silver Mining Co. v. United States*, 175 U.S. 423 (1899).

Edwards decision appear to indicate that the described custom and practice is not binding as to the constitutional meaning of the term "presented", but to regard delivery to a White House employee as satisfying the requirement that bills be "presented to the President," would be inconsistent with the Supreme Court's reasoning in the so-called "Pocket Veto" case.³⁷ In that case the Supreme Court held that there is "no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned, consistently with the constitutional mandate, by delivering it, with the President's objections, to an officer or agent of the House, for subsequent delivery to the House. . . ."³⁸ If return to a House employee is not a "return to the House" within the meaning of article I, section 7, by the same token a delivery to a presidential employee would not satisfy the requirement that a bill be "presented to the President."

A further problem, and one of some gravity, arises when there is a presidential succession either by reason of the election of a new President or by reason of the death of the incumbent. The President's term, since the adoption of the twentieth amendment, expires seventeen days after the opening of the first session of a new Congress. If a new Congress should present a bill to an outgoing President fewer than ten days before his term expires, may the incoming, newly elected President approve or veto the bill before the expiration of the ten days? Or, if a President should die during a session of Congress, may his successor approve or veto bills within ten days from the date on which they were presented to his deceased predecessor?

The Supreme Court has indicated its belief that the incoming President, to whom such a bill has not been presented, may not act upon it.³⁹ President Truman, however, signed certain bills that had been presented to President Roosevelt prior to the latter's death,⁴⁰ and while Mr. Truman's power to do so was not

37. *Okanogan v. United States*, *supra* note 36.

38. 279 U.S. at 683.

39. In *Edwards v. United States*, 286 U.S. 482, 493 (1932), the Supreme Court made the following prefatory remark:

But it does not follow that because an incoming President, to whom a bill has not been presented by the Congress, cannot approve it . . . that a continuing President, to whom a bill has been presented by the Congress, must be debarred of his opportunity to give his approval within the time which the Constitution has prescribed.

40. H.R. 2013, H.R. 510 and H.R. 685 were "presented" on April 12, 1945. See H.R. Jour., 79th Cong., 1st Sess. (1945) at 258. President Roosevelt died late that same afternoon and Mr. Truman took the oath of office as President

contested, the fact is the bills had not been "presented" to President Truman. This void, this lack of certainty as to what is meant by "presented,"⁴¹ should be eliminated.

B. The Ordinary Veto

An "ordinary veto" refers to the President's exercise of his option to return a bill of which he does not approve, along with his objections, to the House where it originated, and serves to distinguish this procedure from the so-called "pocket veto." Problems have already arisen with respect to the ordinary veto, and others lurk in the constitutional language pertaining to it.

One such problem emerges when an attempt is made to determine precisely what actions taken by the Congress are subject to the veto. This problem presently is quiescent, but it will not always remain so and needs to be settled once and for all.

The first paragraph of article I, section 7 requires that "Every Bill" passed by both Houses shall be presented to the President, who may approve it or reject it. However, as will be more fully discussed hereafter, the Constitution does not define a "Bill" and the judiciary has not had occasion to clarify the meaning of the term. It is fortuitous that no controversy has developed over what is a bill and that, at the present time, *any* legislative instrument entitled "A Bill" is regarded as subject to veto. This absence of definition may one day precipitate a stultifying deadlock between the President and the Congress.

The second paragraph of article I, section 7 was intended merely to elaborate and buttress the first, but it requires that "Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary" shall be presented to the President for his approval or disapproval. This paragraph was added for the specific purpose of preventing the Congress from circumventing the presidential

of the United States later that evening. The bills had been delivered at the White House prior to President Roosevelt's death, while Mr. Truman was Vice President. Thereafter, on April 16, President Truman approved H.R. 2013 [59 Stat. 52, ch. 61 (1945), 22 U.S.C. § 412 (1954)], and on April 17 he signed H.R. 510 [59 Stat. 52, ch. 62 (1945), 22 U.S.C. § 413 (1954)] and H.R. 685 [59 Stat. 53, ch. 78 (1945), 22 U.S.C. § 300 (1954)].

41. "Adjournment" is also a troublesome word in need of definition. The decisions in the *Okanogan* ("Pocket Veto") and *Wright* cases, do not resolve these questions: If a bill is passed by both Houses of a second session of a Congress, which thereupon adjourns *sine die*, and the new Congress is convened within ten days, may the President sign the bill into law? May he subject it to an ordinary veto? If he does neither, is it the victim of his pocket veto? Or does it become law without his signature?

veto by taking action in the form of "Orders, Resolutions, or Votes,"⁴² yet in current legislative practice the injunctions of this paragraph largely are ignored. Joint resolutions are submitted to the President, but concurrent resolutions are not. As long ago as the first session of the Fifty-eighth Congress, the President Pro Tempore of the Senate stated that within his experience no concurrent resolution had ever been sent to the President, and he added that "the Chair has endeavored faithfully to find out how concurrent resolutions escape the provisions of the Constitution. He has not succeeded."⁴³

This legislative practice of not referring concurrent resolutions to the President for his approval or disapproval thus far has gone unchallenged,⁴⁴ but in recent years it has come to be employed in a manner that can seriously impair the presidential veto power and create an imbalance of power as between the legislative and executive branches.

Since the early 1930's, many observers have descried the usurpation of congressional functions by Presidents, but little has been said regarding congressional encroachment on the presidential veto power.⁴⁵ This encroachment is effected through the adoption by the Congress of concurrent and other resolutions which, apparently only because of long-standing practice, are not submitted to the President.

"Legislation" includes not only the enactment of statutes but also bills to repeal them, and certainly bills intended to repeal

42. During the Constitutional Convention, when the first paragraph of article 1, section 7, was being debated, Madison pointed out that its provisions could be by-passed if the Congress should take action in forms other than by "Bill." His motion to insert the words "or Resolve" after "Bill" was rejected, but Randolph succeeded in having the second paragraph added. 1 WATSON, CONSTITUTION OF THE UNITED STATES 377, 378 (1910).

Expressly excluded from the requirement that "Orders, Resolutions or Votes" be submitted to the President is congressional action as to adjournment, and in *Hollingsworth v. Virginia*, 3 Dall. 378 (U.S. 1798) Justice Chase said that "the negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the Constitution." *Hollingsworth v. Virginia*, *supra* at 381.

43. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

44. George B. Galloway, a respected observer and authority in this field, has said that "a joint resolution is a bill" and for that reason must be approved by the President. He distinguishes a concurrent resolution as being merely expressive of "facts, principles, opinions, and purposes of the two houses" and not, therefore, requiring presidential approval. "A simple resolution deals with the affairs of one house only," and "an order embodies the commands and requests of one house"; accordingly, neither is submitted to the President. GALLOWAY, THE LEGISLATIVE PROCESS 50, 51 (1953).

45. No "side" is taken in the debate whether either the presidential or congressional power is too strong, vis-à-vis that of the other, by expression of concern over the use of concurrent resolutions to by-pass the veto power.

existing laws are required by the Constitution to be submitted to the President for his approval or disapproval. But in the last two decades the Congress has on several occasions employed the resolution device for circumventing the presidential veto power with respect to the repeal or termination of existing laws. This is the very sort of tactic the second paragraph of article I, section 7 was intended to checkmate.

The Lend-Lease Act authorized the President to extend "lend-lease" aid, and then provided:

After June 30, 1943, or after the passage of a concurrent resolution by the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a); except that until July 1, 1946, any of such powers may be exercised to the extent necessary to carry out a contract or agreement with such a foreign government made before July 1, 1943, or before the passage of such concurrent resolution, whichever is the earlier.⁴⁶

This represents a bold circumvention of a possible veto of repealing legislation.

In the Reorganization Act of 1949⁴⁷ the President was authorized to promulgate reorganization plans shuffling functions and powers within the executive department, but a reorganization plan could be rejected by resolution adopted by *either* house within sixty days after transmittal of the plan to it. If the basic delegation of power to the President was valid, that delegation should not have been subject to repeal, termination or negation by a one- or two-house resolution.

The Trade Agreements Extension Act of 1958⁴⁸ contained a comparable use of the resolution technique for by-passing the President. Section 7 of the Trade Agreements Extension Act of 1951⁴⁹ provided for presidential adjustment of tariffs and imposition of quotas—either or both—to protect domestic industry

46. Act of Mar. 11, 1941, ch. 11 § 2, 55 Stat. 31 (1941).

47. 63 Stat. 203 (1949), 5 U.S.C. § 133(2) (1964).

48. 72 Stat. 673 (1958), 19 U.S.C. § 1351 (1964).

49. 19 U.S.C. § 1364 (a) (1964).

from serious injury, upon findings and report of the Tariff Commission. The 1958 law added a provision which reads in part:

(2) The action so found and reported by the Commission to be necessary shall take effect . . .

(A) if approved by the President, or

(B) if disapproved by the President in whole or in part, upon the adoption by both Houses of the Congress (within the 60-day period following the date on which the report . . . is submitted to such committees), by the yeas and nays by a two-thirds vote of each House, of a concurrent resolution stating in effect that the Senate and House of Representatives approve the action so found and reported by the Commission to be necessary.

For the purpose of subparagraph (B), in the computation of the 60-day period there shall be excluded the days on which either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die.

(3) In any case in which the contingency set forth in paragraph (2) (B) occurs, the President shall (within 15 days after the adoption of such resolution) take such action as may be necessary to make the adjustments, impose the quotas, or make such other modifications, as were found and reported by the Commission to be necessary.⁵⁰

This represents legislation by the Congress of tariff policy in a manner that circumvents the President's power to approve or disapprove such legislation.

There are many other similar instances of congressional encroachment on the veto power.⁵¹ It is inevitable that "legislation" of this character will one day be challenged, and such a challenge could very possibly lead to the invalidation of important and critical legislation which, had it been enacted in the proper form and submitted to the President as required, would have been approved by the President and been impervious to attack. This indicates a strong need for legislation to clarify and implement article I, section 7.

50. 72 Stat. 673 (1958), 19 U.S.C. § 1351 (a) (1964).

51. This problem is the subject of an opinion given President Eisenhower by the United States Attorney General on July 13, 1955. 41 Ops. ATT. GEN. 230 (1955).

Another problem,⁵² not dangerous but puzzling, involved in the ordinary veto is the effect of the written memoranda with which various Presidents have announced their approval of legislation presented to them and in which they have expounded their interpretations of such legislation. The Constitution requires a President to return a bill of which he disapproves along with a statement of his objections to it, but if he approves it he is merely to "sign it." The President has no authority to modify legislation. President Jackson, however, on signing an original enrolled bill in 1830, added "I approve this bill, and ask a reference to my communication to Congress of this date, in relation thereto."⁵³ In his referenced communication, he announced that he approved the bill with the understanding that a road authorized to be constructed by it was not to be extended beyond the boundaries of the Territory of Michigan.⁵⁴ A select committee of the House of Representatives later submitted a report severely critical of President Jackson's action. They deemed his course an objection to and negation of one section of the bill and an approval of its other sections.⁵⁵

When President Truman approved the Hobbs Anti-Racketeering Act⁵⁶ and the Portal-to-Portal Act,⁵⁷ he sent messages to the Congress in which he construed certain provisions of those measures. Arthur Krock declared that those messages constituted an essential part to the legislative history of the acts to which the courts would be obliged to refer if called upon to interpret them.⁵⁸ A contrary view was based on the reasoning that the

52. There are numerous other less serious problems, as, for instance, the problem of the basis upon which a President may veto legislation. President Washington, knowledgeable of the origins of the veto provisions, considered that he could veto a bill only if he believed it unconstitutional. 33 WRITINGS OF GEORGE WASHINGTON 96 (1940). President Jefferson held to the same opinion. See 1 WATSON, CONSTITUTION OF THE UNITED STATES 373 (1910). Willoughby, however, argued that the President does not have the authority to veto a bill on the ground it is unconstitutional, as this would be a usurpation of the exclusive power of the judiciary. See 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 658 (1929). President Taft disagreed with this view, saying that as President he would have much less hesitation in vetoing a bill for reasons of unconstitutionality than the Supreme Court should have in declaring it unconstitutional. TAFT, THE PRESIDENCY 18 (1916). This divergence of views could be resolved by congressional legislation not inconsistent, of course, with the letter and spirit of the Constitution.

53. 4 Stat. 428, ch. CCXXXII (1830).

54. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 337 (1907).

55. H.R. REP. No. 909, 27th Cong., 2d Sess. (1830).

56. 60 Stat. 420, ch. 537 (1946), 15 U.S.C. § 17 (1964).

57. 61 Stat. 84, ch. 52 (1947), 9 U.S.C. § 251 (1964).

58. N.Y. Times, May 16, 1947, p. 3.

presidential message was not before Congress when it was considering the bills and therefore would shed no light on congressional purpose in passing the bills.⁵⁹ The latter view conforms to what the select committee had said many years earlier regarding Mr. Jackson's memorandum, namely, that it was merely "a defacement of the public records and archives."⁶⁰ This view loses credence if it is remembered that the President, when acting on bills passed by both Houses of the Congress, is a part of the legislative process and acting in a legislative capacity, which leads to the conclusion that the intent of the Senate and the House of Representatives should not be considered apart from the intent of the President.⁶¹

It cannot be predicted whether the judiciary would subscribe to Mr. Krock's reasoning or to the opposing view. Legislation to clarify the presidential veto power could resolve this problem.

C. The Separate Veto of Non-germane Riders

If a rider concerning one subject has been attached to a piece of legislation dealing with an entirely different subject, must the President approve or reject this omnibus instrument in its entirety, or may he veto the rider and approve the balance? This is yet another problem that surfaces when one attempts to apply the veto provisions of the Constitution to concrete factual situations, and it urgently needs to be settled.⁶²

As America's world responsibilities enlarge and the enactment by Congress of legislation having international impact becomes the more common, the seriousness of this particular problem intensifies. The Foreign Aid Bill of 1964, for example, was jeopardized for a time by efforts to encumber it with riders dealing with the reapportionment of state legislatures. In that instance, but for the close, compatible working relationship between President Johnson and the majority of the Eighty-ninth Congress, a

59. CORWIN, *THE PRESIDENT, OFFICERS AND POWERS*, 344 (3d ed. 1948).

60. H.R. REP. No. 909, 27th Cong., 2d Sess. (1830).

61. *Cf. Shelton Hotel Co. v. Pates*, 104 P.2d 478, 481 (Wash. 1940).

62. The separate veto of non-germane riders is not to be confused with its kin, the "item veto," the latter being a power expressly given by state constitutions to most governors with respect to appropriation bills. At the federal level, the President in fact may not need to be endowed with the power to veto specific items in appropriation bills, as he has another remedy, namely, not to spend the money appropriated in items objectionable to him. See *Item Veto*, *Hearings on H.R.J. Res. 47, Before the Subcommittee No. 3 of the House Committee on the Judiciary*, H.R.J. Res. No. 47, 85th Cong., 1st Sess., at 50 (1957).

disagreement between the two branches as to whether the veto is applicable separately to non-germane riders could have erupted into an executive-legislative stalemate of considerable gravity.⁶³ It is manifest that our involvements abroad, and in Viet Nam particularly, will require the Ninetieth Congress to enact legislation of great national and international significance. It is manifest also that the relationship between the President and the Ninetieth Congress may be less congenial than was the relationship between Mr. Johnson and the Eighty-ninth, and it is within the realm of reason to conjecture that coalitions of anti-administration members of the Ninetieth Congress may seek to use legislative measures strongly desired by the President as vehicles for non-germane riders strongly opposed by him. If, let us suppose, a coalition of dissidents in the Ninetieth Congress should succeed in attaching to a defense appropriation bill a rider calling for the repeal of existing civil-rights legislation, the problem whether the President would have the power to veto the non-germane rider and approve the balance of the legislation could become so acute as to bring the legislative process to a standstill.

This problem stems from the ambiguity of the dictum in article I, section 7 that "every Bill . . . shall . . . be presented to the President . . . ; If he approves he shall sign it, but if not he shall return it"⁶⁴ The long-unchallenged view has been that this proviso affords the President with but two alternatives: either to approve the "Bill" or to return it. But this view rests on the assumed premise that any legislative instrument passed by the Congress is a "Bill" *if so entitled*—whether it treats of one subject or of many, unrelated subjects. This assumption is, at best, a tenuous one, and such validity as can be ascribed to it must derive from the notion that a baseless assumption achieves a degree of invulnerability with age and repetition. But no de-

63. On November 13, 1966, following the adjournment of the 89th Congress, the President approved H.R. 13103 (Public Law 89-809, 80 Stat. 1539 [1966]), which had been labelled the "Christmas Tree Bill" by the various news media. This apt appellation was inspired by the non-germane riders attached to a bill originally introduced for the single purpose of amending certain provisions of the Internal Revenue Code of 1954 pertaining to income derived from United States sources by foreign investors. The bill in its original form had been introduced at the President's request, and he approved the hodge-podge legislative instrument ultimately submitted to him only because he found the non-germane riders unobjectionable. (Indeed, one of the riders, having to do with contributions to political parties, had been recommended by him.)

64. U.S. CONST. art. I, § 7.

ference is required to be given the fact that the rote of practice, custom and belief has it that the President is without the power to veto non-germane riders, for in *Edwards v. United States*⁶⁵ the Supreme Court held that the President has the power to sign bills subsequent to the adjournment of the Congress, *long-established practice, custom and belief to the contrary notwithstanding*.

The Constitution itself does not define the word "Bill" and imposes no limitations upon the contents of a bill. Further, the Constitutional Convention debates and The Federalist papers are barren of any discussion of the subject. There is no evidence that the invention of non-germane riders and omnibus bills was foreseen at the time the Constitution was being written and debated.⁶⁶ The judiciary never has delineated the meaning of the term "Bill". Accordingly, there is nothing, save for an insupportable but hoary assumption, to bar fresh consideration of what is a "Bill" within the purview of article I, section 7.

Bearing in mind that "it is a *Constitution* we are construing,"⁶⁷ there is persuasive support for the view that a bill, within the letter and intent of the Constitution, is a legislative instrument setting forth one or more propositions of law all related to a single subject matter. Quite apart from substantive considerations, this concept of a bill more strongly appeals to logic and common sense than does the concept which requires merely that there be a single instrument but permits that instrument to embrace any number of unrelated and unconnected subject matters. The mere fact that a legislative measure is entitled "A Bill" doesn't make it so within the purview of the Constitution. Justice Stone observed that the Constitution "is concerned with substance and not with form,"⁶⁸ and this principle permeates federal law.⁶⁹

65. 286 U.S. 482 (1932).

66. The delegates to the Convention, and the authors of The Federalist, were preoccupied with the more basic issues respecting the veto power, *viz.*, whether the power should be absolute or limited, whether it should be reposed in the President alone, and what proportion of Congress should be required to override a veto.

67. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819). (Emphasis *not* supplied.)

68. *Dimick v. Schiedt*, 293 U.S. 474, 490 (1935).

69. The principle is commonly applied in Federal tax cases [see, *e.g.*, *Simpson v. Union Oil Co.*, 377 U.S. 13, 22 (1964); *Commissioner v. Hansen*, 360 U.S. 446, 461 (1959); *Bagley v. Commissioner*, 331 U.S. 737, 739, 744 (1947); *Commissioner v. Court Holding Co.*, 324 U.S. 331, 334 (1945)]; in criminal prosecutions (see, *e.g.*, *Lutwak v. United States*, 344 U.S. 604, 607 (1953); *Travis v. United States*, 269 F.2d 928 (10th Cir. 1959), *rev'd on other*

More importantly, an analysis of the nature and purpose of the President's veto power points to the conclusion that a single subject, rather than a single instrument, is the true hallmark of a "Bill." For if that word encompasses any single instrument of legislation, the preservation or destruction of the veto power rests entirely within the domain of congressional discretion. The President's veto power is preserved intact only if bills are limited to one subject; it is destroyed completely if a session of Congress incorporates all of its legislative program in a single instrument. In *every* instance where a legislative document embracing congressional treatment of more than one subject is submitted to the President, his veto power is frustrated if he agrees with the congressional treatment of one such subject and disagrees with its treatment of another subject, but is required to approve or reject the document in its entirety. To concede that, at its discretion, Congress thus may preserve or destroy the veto power by varying the number and variety of the subjects it includes for treatment in a bill, is to concede to Congress the authority to negate a power expressly awarded to the President by the Constitution. The fallacy of the view that the President may not veto non-germane riders thus is laid bare.

Further, the rules of both the House of Representatives⁷⁰ and the Senate⁷¹ provide that matters not germane to a bill are subject to a point of order. Ordinarily, and in general practice, the Congress enacts separate bills respecting separate subjects, doing so in consistence with the concept given expression in its rules that a bill is a measure addressed to a single subject. If, however, a point of order is not successfully maintained respecting non-germane riders, the President ultimately is faced with a bill containing extraneous matter that may be objectionable to him. Something more is needed, therefore, than legislative rules of procedure if the veto power is to be preserved, and a statutory definition of the term "Bill" would restore to the President the veto power which the founding fathers contemplated and of which he is deprived by the practice of incorporating extraneous and distasteful provisions in a bill which is otherwise necessary and desirable. The President should have the same right as the

grounds, 364 U.S. 631 (1961)]; and other cases [see, *e.g.*, *Stoeck v. Wallace*, 255 U.S. 239, 251 (1921); *Uebersee Finanz-Korporation, A.G. v. McGrath*, 196 F.2d 557 (D.C. Cir. 1951); *Kaname Fugino v. Clark*, 172 F.2d 384, 385 (9th Cir. 1949); *Favini v. Van Dyke*, 111 F.2d 981, 982-83 (3d Cir. 1940)].

70. H.R. Res. 46, 44th Cong., 1st Sess., R. 16 No. 7 (1876).

71. S. Res. 18, 48th Cong., 1st Sess., R. 16 (1884).

members of the Congress to object to matters which are not germane to a bill. And if, by its legislative action in incorporating several subject matters in one instrument designated "A Bill", the Congress may defeat or curtail the constitutional veto power, surely by legislative action defining the term it may preserve that power.

IV. CONCLUSION

The presidential veto is unlike its historical predecessors, being a qualified rather than an absolute negative. It is unique in that, in a government of separated powers, the veto provisions constitute the Chief Executive a part of the Legislature and make the veto an instrument for effectuating the system of checks and balances. Manifestly, the veto power is a vital component in the machinery of the federal government.

The Congress should exercise its authority to enact legislation which will extirpate the ambiguities from the provisions of article I, section 7. Without such legislation, the meaning and application of those provisions will continue to be matters of uncertainty. Such uncertainties inevitably foster conflicting interpretations that can lead to a disastrous breakdown of the legislative process. Legislation is a simple remedy for this dangerous, volatile problem.