CONGRESSIONAL OVERSIGHT AND THE LEGISLATIVE VETO

Richard R. Cambosos*

INTRODUCTION

Recently, *The Washington Post* reported that the Department of Education, acting on the advice of the Attorney General, had decided to ignore a congressional veto of four of its regulations.[1] According to the *Post*, President Carter advised the Congress in June 1978 that such legislative vetos were unconstitutional in that they upset the constitutional balance between the separate branches of Government. The *Post* reported:

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> "The way for Congress to express displeasure with department regulations is to amend the laws, the President argued. In the meantime, pending a court decision, the executive branch will give congressional vetoes serious consideration but will not consider them legally binding."

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This story illustrates a situation which will occur increasingly until the so-called legislative veto issue is finally resolved by the judicial branch.

What is a legislative veto? What is its purpose? Why have past Presidents traditionally opposed them, and on what grounds?

BACKGROUND

Increasingly, the Congress has enacted legislation providing for continued congressional control over the subject matter of legislation after its enactment. The legislative veto is one method on which the Congress relies to achieve this purpose.

Generally, the legislative veto requires the President or other executive branch official to present actions proposed pursuant to a law to either or both Houses of the Congress or to specified committees before the proposed action becomes effective. Depending on the particular law, congressional action may involve approval or disapproval by concurrent resolutions of the Congress, by simple resolution of either House of Congress, or merely by specified committees.

For instance, the legislation providing for annual comparability adjustments in the salary of Federal General Schedule workers states that the President's alternate pay proposal will become effective on October 1 of the applicable year unless either House adopts a resolution disapproving that plan.[2] A mechanism such as this is said to be justified as necessary to permit the Congress to exercise oversight control over the executive at a time when the complexity of the objects of legislation requires that the Congress delegate more and more power to the executive. One group estimates that 200 statutes, most of them enacted in the 1970's, already contain some kind of legislative veto provision.[3]

These provisions have generally been opposed as unconstitutional by most Presidents since Woodrow Wilson, their Attorneys General and by many legal commentators. However, their constitutionality has seldom been tested in court.

This article will look at one form of the legislative veto—the one-House veto. This particular form requires action by either House of the Congress to disapprove a proposed executive action. Although the primary emphasis of this article is on the one-House veto, the discussion also applies to other forms of the legislative veto. The major constitutional issues surrounding the use of the one-House veto are discussed below, followed by a discussion of one Supreme Court Justice's views and a Court of Claims case which addressed these issues.

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[1] Babcock "Executive Branch Decrees Its Disregard of Congressional Veto," *The Washington Post*, June 7, 1980, at A7, col. 1.

[2] 5 U.S.C. §5305(c)(2) (1976).

[3] "Administrative Law," National Law Journal, May 12, 1980, p. 24.

CONSTITUTIONAL ISSUES

The constitutional challenge of the legislative veto is usually based on four provisions of the Constitution. These are usually referred to by the terms separation of powers, presentment, bicameralism, and incompatibility. The arguments are, as is the case with most constitutional matters, quite technical and highly complex. However, the following is an attempt to reduce these arguments to their most basic terms.

Separation of Powers

Perhaps the most often recited but least specific of all the claims of unconstitutionality is that the legislative veto violates the principle of separation of powers embodied in the Constitution. Generally, this argument looks to Article I, section 1, of the Constitution, vesting all legislative powers in the Congress; Article II, section 1, clause 1, and section 3, vesting power in the President to see that the laws are faithfully executed; and Article III of the Constitution, vesting the judicial power in the Supreme Court and in such other courts as the Congress may establish. Together, these are said to prevent the concentration of power in a single branch of Government, thus preventing one branch from exercising a power vested in another.

However, while a strict interpretation of this doctrine once might have entertained judicial favor, it is clearly no longer the case. In *Nixon* v. *Administrator of General Services,*[4] the Supreme Court held that "the separate powers [of the three co-equal branches] were not intended to operate with absolute independence."

The Court's rationale was that the Constitution did not require "three air tight departments of government." Rather, the Court said that in determining whether an act disrupts the proper balance between the coordinate branches, one should look to the extent to which the disruption "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Then, if disruption is found, a determination must be made as to whether the impact is justified by an overriding need to promote objectives within the constitutional authority of the Congress.

Admittedly, legislative veto provisions further the purpose of congressional oversight—a cooperative executive and legislative enterprise—and are a natural result of the Congress' having to delegate more complex functions to the executive. Thus, it appears that under the court's decision, unless legislative veto provisions prevent the executive from accomplishing a constitutionally assigned function, separation of powers alone will not bar their use.

Presentment Clause

> Article I, section 7, of the Constitution provides that:
>
> "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."

It has been argued that this provision was added for the express purpose of preventing congressional evasion of the President's veto, and thusrequires the President's participation in the exercise of legislative power by the Congress. Thus, a matter which is properly regarded as legislative must be presented to the President for his consideration and possible veto. It is argued by the opponents of the legislative veto that since the policy decisions and legal consequences of many of the forms of legislative veto are indistinguishable from the policy decisions and legal consequences of legislation, they may only be exercised as set forth in the Constitution; that is, the President must have the opportunity to exercise his veto authority.

However, these arguments are countered by the proponents of the legislative veto who contend that since the Supreme Court ruled that the exercise of statutory authority can be made contingent upon the findings of fact by an executive officer[5] or a favorable vote of the persons to be affected by proposed government action[6] then why can't the effectiveness be made contingent on a vote of either or both Houses of Congress? Furthermore, the Congress is not acting without authority, but pursuant to statute enacted under the Constitution. Finally, allowing a

[4] 433 U.S. 425 (1977).

[5] *Marshall Fields and Co.*, v. *Clark,* 143 U.S. 649 (1892).

[6] *Currin* v. *Wallace,* 306 U.S. 1 (1939).

proposed action, rule, or regulation to take effect if approved by both Houses of Congress or if not disapproved by either House merely constitutes a reversal of the normal legislative process and as such is not violative of this provision.

Bicameralism

Under Article I, section I of the Constitution, *both* Houses of Congress must approve a bill before it can become a law. Opponents of the legislative veto maintain that while one can argue that both Houses agree when a proposal is approved by concurrent resolution of the Congress or disapproved by simple resolution of one House, where the mechanism is the one House or committee approval or disapproval by concurrent resolution, a change in law can take place without both Houses agreeing to the change. Thus, it is argued that the compromises and refinements in lawmaking which result from the two Houses representing differing constituencies is sacrificed.

Proponents of the legislative veto argue that the powers of the Congress which are not expressly granted in the Constitution, but which follow incidently from the power to legislate, can be delegated to one House or its committees.

The Incompatibility Clause

Article I, section 6, clause 2 of the Constitution provides that:

> "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."

It has been argued that attempts to delegate administrative tasks to one House or a committee of either or both Houses of Congress violates this clause as such functions are executive in nature and must be performed by officers of the United States. This being the case, by naming a committee to approve or disapprove a particular action in effect makes the members of the committee officers of the United States, which the clause precludes. The same argument has been said to preclude the one-House veto.

Proponents of the legislative veto argue that the Congress is not performing any constitutionally protected executive power by approving or disapproving regulations. Rather, it is argued that these mechanisms are merely an aid to legislation.

JUDICIAL COMMENTS AND DECISIONS

Although the constitutionality of the legislative veto has often been questioned, few of the mechanisms have actually been challenged in court. However, some of the legislative veto mechanisms have received support from the judicial branch.

At least one member of the Supreme Court feels that procedures allowing either House of Congress to disapprove proposed regulations are not an impermissible change in the relationship between the President and the Congress under the Constitution. In a concurring opinion, Justice White stated:

> "I am also of the view that the otherwise valid regulatory power of a properly created independent agency is not rendered constitutionally infirm, as violative of the President's veto power, by a statutory provision subjecting agency regulations to disapproval by either House of Congress."[7]

He equates regulations that become effective by *nonaction* with regulations not required to be laid before the Congress. In his view, the power to disapprove is *not* equivalent to legislation under the presentment clause.

In a recent case, *Atkins* v. *United States,*[8] the Court of Claims held constitutional the one-House veto provision in the Federal Salary Act of 1967.[9] The court made it clear that it was examining only the constitutionality of the specific one-House veto clause contained in that act and not the constitutionality of the one-House veto in general. It ruled that the device neither conflicted with the constitutional powers and obligations of the Congress as a whole acting through both Houses, nor invalidly intruded on the constitutional sphere of the President.

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[7] *Buckley* v. *Valeo,* 424 U.S. 1, 284 (1975) (White, J., concurring).

[8] 556 F.2d 1028 (Ct. Cl., 1977), *cert. denied,* 434 U.S. 1009 (1978).

[9] Pub. L. No. 90-206, Title II, §225(i) (Dec. 16, 1967) 81 stat. 644, *as amended* 2 U.S.C. 359(1) (1970).

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COMMENT

"WE'RE YOUR LAWYERS"

Charles F. Roney*

When I was chosen as an editor of the *Adviser* almost two years ago, one of the first things I did was to look over the back issues of the *Adviser* to see exactly what it was about.

After studying the subject matter of the articles, comments and notes of all the previous issues, I was as much in the dark as when I was chosen to become an editor. The material covered almost every conceivable topic, from "The GAO Auditor in Court"[1] to "Doing Legal Research."[2] Even one of Aesop's Fables was reprinted.[3]

It wasn't until I read the first "From the Editors" that I discovered what I believe to be the "mandate" of the *Adviser*. In that first issue over four years ago, Ralph Lotkin and Donald Mirisch wrote:

> **"We're Your Lawyers"**
> * * * * *
>
> "Let us state at the outset that this publication, 'The OGC Adviser,' is unique. It is a legal journal for the GAO community, lawyer and non-lawyer, with the goal of providing legal viewpoints on matters of interest and use of GAO's professional staff. Many of the questions we are asked require individual attention, and the answers are relevant only to the work of the division or office making the request. However, a significant number of legal problems are common to GAO, and their solutions can be helpful to us all.
>
> "It is our hope in this and future issues of the 'Adviser' to present legal issues in a lively, non-technical, and readable format; to answer frequently-asked questions; to anticipate questions; and generally to advise on matters that we consider of importance and interest to GAO. In return, your comments, suggestions, and advice will be appreciated."

However, it is difficult to determine how well the *Adviser* is fulfilling its mandate without feedback from the GAO community. In order to perform its function, the *Adviser* needs your comments, suggestions and advice, and not just on material appearing in past issues. We want to know what you would like to read in future issues of the *Adviser*.

As we said in the first issue, "we're your lawyers" and it's your journal. We would certainly appreciate comments on how well the *Adviser* is serving its purpose and any suggestions on where it should go from here.

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[1] Vol. 1 No. 1, October 1976.

[2] Vol. 2 No. 2, January 1978.

[3] *Id.*

NOTE

HUMAN RIGHTS TREATIES: WHY DON'T WE SIGN?

Suzanne M. Fishell*

The Constitution specifically provides in Article II, section 2 for treaty-making. Essentially, the process is that the President negotiates the treaty and sends it to the Senate for its advice and consent. If two-thirds of the Senators present consent, the President can ratify, that is "make," the treaty. The following illustrates what options the Senate has when the treaty presented to it may conflict with existing United States law or policy.

On February 23, 1978, four multilateral treaties concerning basic human rights were sent to the Senate for its necessary advice and consent to ratification by the President. All four previously had been signed on behalf of the United States, one more than a decade ago. Three were negotiated at the United Nations. None of them, however, has been ratified by the United States. The treaties are:

- —The International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States on September 28, 1966.
- —The International Covenant on Economic, Special and Cultural Rights, signed on behalf of the United States on October 5, 1977.
- —The International Covenant on Civil and Political Rights, signed on behalf of the United States on October 5, 1977.
- —The American Convention on Human Rights signed on behalf of the United States on June 1, 1977. (This treaty is open for adoption only by members of the Organization of American States.)

Although the United States is a leader in protecting human rights and has played a central role in the formulation of these treaties, it is one of the few major nations that has not formally become a party to them. Since the great majority of the treaties' substantive provisions are consistent with the letter and spirit of the United States Constitution and laws, one may ask why the Senate has not consented to ratification by the President.

One answer is that certain provisions of the treaties appear to conflict with United States domestic law. For example, the right of free speech as protected by our Constitution seems to conflict with the following provisions of the treaties:

> "State Parties * * *
>
> [S]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred * * *" (Article 4(a), Convention on Racial Discrimination.)
>
> "State Parties * * *
>
> [S]hall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law." (Article 4(b), Convention on Racial Discrimination.)
>
> "Any propaganda for war shall be prohibited by law." (Article 20 of the Covenant on Civil and Political Rights.)

While these concepts may be commendable, the criminal penalties proposed by these treaties could conflict with the freedom of speech guaranteed by the 1st amendment to the United States Constitution. Thus, to harmonize these treaties' provisions with the rights granted under the 1st amendment, the Senate may consent to the treaties with a reservation, *i.e.*, a new condition or term which limits or varies the application of certain treaty provisions.

A reservation may simply be a statement that nothing in the treaty shall be deemed to require or to authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States. A reservation, however, is really a proposal for a treaty different from that agreed on. If the reservation is not accepted by the other nations concerned, it amounts to a rejection of the revised treaty. At the

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very least, the treaty will not come into force between the reserving state and those which do not accept the reservation since any condition imposed by the United States upon its consent to a treaty gives rise to a right of rejection by other signatories who have agreed only to the version they signed.

Another way to harmonize the treaties with United States domestic law would be for the Senate to declare that the treaties are not self-executing. With such declarations, the treaties' substantive provisions would not, of themselves, become effective as United States domestic law until a law was passed adopting them. Without such statements, the terms of the treaties might be considered as directly enforceable law on a par with congressional statutes.

A final example of a provision in one of the human rights treaties that may not be not in accord with the United States law and policy occurs in Article 4 of the American Convention of Human Rights, concerning the matter of the right to life. Article 4 deals with the right of life generally and protects life from the moment of conception:

> "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception * * *."
> (Article 4, American Convention on Human Rights.)

In other words, Article 4 of this treaty raises the abortion issue. Since any treaty ratified by the United States supersedes all prior inconsistent domestic laws, ratification of the treaty with this provision without a reservation would be controversial because United States law and policy on this issue is, at the least, unsettled. In this instance, the Senate may wish to enter the following reservation recommended by the State Department:

> "United States adherence to Article 4 is subject to the Constitution and other laws of the United States." (Department of State letter of submittal to the President, December 17, 1977, in Four Treaties Pertaining to Human Rights, S. Exec. Doc. No. 29-118, 95th Cong., 2 Sess. XVIII (1978)).

This year may well be the year that the Senate consents to the President's ratification of the human rights treaties, thus giving a legal and international expression to human rights that are, for the most part, already accepted in United States law and practice. It will be interesting to see how and to what extent the Senate will accommodate those provisions of the treaties that conflict with existing domestic laws.

YOURS OF THE 10TH RECEIVED. First of all, he has a wife and a baby; together they ought to be worth $500,000 to any man. Secondly, he has an office in which there is a table worth $1.50 and three chairs worth, say, $1. Last of all, there is in one corner a large rat-hole, which will bear looking into.

Respectfully,
A. LINCOLN

—**LINCOLN, Abraham,** Letter to a New York firm inquiring for recommendations, in Lang, H. Jack, *The Wit and Wisdom of Abraham Lincoln* (Cleveland: The World Publishing Company, 1943), p. 65.