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SEPARATION OF POWERS: CONGRESSIONAL RIDERS AND THE VETO POWER

Conflicts between the executive and legislative branches of the federal government are a common and perhaps inevitable feature of the American constitutional system.¹ Although it is the proper scope of their respective roles in the conduct of foreign affairs that has recently occupied the center of attention,² other areas of competition between presidential and congressional authority have been the subject of increasing concern on the part of both officials and commentators.³ One problem which has received somewhat less attention, but which involves a potentially serious conflict between the branches, is the degree to which the widespread use by Congress of nongermane amendments to bills, or riders,⁴ may improperly limit the President's power to veto legislation of which he disapproves.⁵

¹ The "rivalry for political supremacy between Congress and the President . . . was built into the Constitution." J. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* 4 (1964).

² See, e.g., Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 *YALE L.J.* 672 (1972); Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 *TEX. L. REV.* 833 (1972); Wallace, *War-Making Powers: A Constitutional Flaw?*, 57 *CORNELL L. REV.* 719 (1972); Rogers, *Congress, the President, and the War Powers*, 59 *CALIF. L. REV.* 1194 (1971); Wallace, *The President's Exclusive Foreign Affairs Powers over Foreign Aid* (pts. 1-2), 1970 *DUKE L.J.* 293, 453; Henkin, *Constitutional Issues in Foreign Policy*, 23 *INT'L AFF.* 222 (1969).

³ The doctrine of executive privilege, invoked to justify the withholding of testimony or written information from Congress, has provoked considerable controversy. See, e.g., *Hearings on S. 1125 Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971); Berger, *Executive Privilege v. Congressional Inquiry*, 12 *U.C.L.A.L. REV.* 1044 (1965); Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 *U. PITT. L. REV.* 755 (1959); Comment, *Policing the Executive Privilege*, 5 *U. MICH. J.L. REF.* 568 (1972).

The authority of the executive branch to impound funds appropriated by Congress has been a subject of much debate. See, e.g., Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Executive Discretion*, 22 *STAN. L. REV.* 1240 (1970); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 *N.C.L. REV.* 502 (1965); Goostree, *The Power of the President to Impound Appropriated Funds: With Special Emphasis to Grants-In-Aid to Segregated Activities*, 11 *AM. U.L. REV.* 32 (1962).

Executive orders have also been subjected to critical scrutiny. See, e.g., Comment, *Executive Orders and the Development of Presidential Power*, 17 *VILL. L. REV.* 688 (1972); Comment, *Presidential Legislation by Executive Order*, 37 *U. COL. L. REV.* 105 (1964).

⁴ See part I A *infra*.

⁵ U.S. CONST. art. I, § 7, cl. 2. See part I B *infra*.

The recent efforts of some members of Congress to attach to various pieces of legislation an "end-the-war" amendment, designed to restrict funding for continued American involvement in Vietnam, underscore the immediacy of this problem.⁶ If a nongermane amendment which the President strongly opposes were to reach his desk attached to a bill which he feels is otherwise vital to the nation's well-being, he would face a difficult choice. The assumption to date has been that the President must either sign a bill as it is presented to him or veto it in its entirety.⁷ Under this interpretation, the President would be forced to accept any amendment which he opposes, along with the remainder of the bill, or reject the main provisions of the legislation in order to avoid enactment of the amendment. There are indications, however, that in such a case the President might refuse to follow the traditional practice.⁸ It is not inconceivable that he might attempt to veto separately an amendment to which he is totally opposed in an effort to salvage essential legislation, while asserting the further purpose and justification of recapturing his constitutional prerogatives from longstanding congressional encroachment.⁹

⁶ Several proposals fit under the general title of "end-the-war" amendments. The McGovern-Hatfield amendment to the Military Procurement Bill of 1971 would have allowed expenditures of funds in Vietnam after April 30, 1971, only for the orderly withdrawal of American troops, in efforts to secure the release of prisoners of war, for provisions of asylum for endangered Vietnamese, and for other purposes "consistent with the foregoing objective" of total withdrawal. Amend. No. 862 to H.R. 17123, 91st Cong., 2d Sess., 116 CONG. REC. 30,080 (1970). The Cooper-Church amendment to the Special Foreign Assistance Act of 1971 prohibited the expenditure of funds for the reintroduction of American troops into Cambodia. Act of Jan. 5, 1971, Pub. L. No. 91-652, § 7, 84 Stat. 1943, codified as 22 U.S.C. § 2411 note (1970). The Mansfield amendment to the Military Procurement Authorization Act of 1972 merely requests the President to take "immediate steps" to terminate United States involvement in Vietnam. Act of November 17, 1971, Pub. L. 92-156, § 601(a), 85 Stat. 430. The McGovern-Hatfield amendment, unlike the Cooper-Church and Mansfield amendments, was rejected by Congress. To the extent that these proposals attempted to end a particular activity of the armed forces, they were not totally germane to the subject matter of the bills to which they were introduced as amendments. The bills were, however, concerned generally with military appropriations.

⁷ Clineburg, *The Presidential Veto Power*, 18 S.C.L. REV. 732, 751 (1966).

⁸ A growing impatience with congressional riders may have been reflected by President Nixon's statement upon signing the Military Procurement Authorization Act of 1972: "I wish to emphasize that § 601 of this act—the so-called 'Mansfield amendment'—does not represent the policies of this administration. . . . [I]t is without binding force or effect." 7 WEEKLY COMP. PRES. DOCS. 1531 (Nov. 22, 1971). See also *Item Veto Hearings Before a Subcomm. of the House Comm. on the Judiciary*, 85th Cong., 1st Sess., at 51 (1957) (remarks of Representative S. Udall) [hereinafter cited as *Item Veto Hearings*].

⁹ See Givens, *The Validity of a Separate Veto of Nongermane Riders to Legislation*, 39 TEMPLE L.Q. 60 (1965). Of course, a second option open to the President would be to sign the entire bill into law and simply refuse to comply with the objectionable rider. See note 8 *supra*. If the current dispute over presidential impoundment of funds is resolved in favor of the President, such a refusal would appear to be even more likely. See note 43 *infra*. Previous Presidents have, on occasion, successfully ignored restrictive legislation. For example, a 1913 law (22 U.S.C. § 262 (1970)) providing that the President shall attend no international conference without congressional authorization has been frequently

It has been suggested that in order to avoid this potential crisis statutory authority to veto nongermane riders be granted to the President.¹⁰ One author has contended that no such statute is needed, that the President presently has such power under Article I, Section 7 of the Constitution.¹¹ On the other hand, bills have been introduced in both houses of Congress which might have specifically denied that power to the President.¹² This article examines whether there is any constitutional ground on which the President could take the unprecedented action of separately vetoing congressional riders.¹³

I. HISTORICAL BACKGROUND

A. *The Legislative Rider*

A rider, broadly defined, is any clause which is added to a bill after the bill has emerged from committee.¹⁴ The term may be used somewhat more narrowly to refer only to clauses added to appropriations bills.¹⁵ Finally, the word may embrace only amendments which are not germane to the subject matter of the original bill.¹⁶ Although the term will be used herein specifically with reference to the third definition, its practical character and connotations overlap the other two. For instance, riders, as used in the third sense, are most often attached to appropriations bills. The enormous pressures upon the executive to approve essential appropriations rather than imperil agencies or programs makes the rider a potent weapon in any effort to gain presidential approval of

ignored. The President could, of course, argue that such restrictions on the conduct of foreign affairs constitute an impermissible intrusion into his powers as Commander in Chief. *See* U.S. CONST. art. II, § 2, cl. 1. In any event, there may be tactical advantages in using the veto rather than failing to follow the distasteful part of what is nevertheless a facially valid law which he has himself approved in its entirety.

¹⁰ *See* Clineburg, *supra* note 7, at 754.

¹¹ Givens, *supra* note 9, at 62.

¹² H.R. 6225, 92d Cong., 1st Sess. (1971); S. 1642, 92d Cong., 1st Sess. (1971). Section 302(b) of each bill provides that "The President shall not make any notation on a bill, so presented, other than his signature and, if he desires, the word 'approved' and the date." The Committee on Federal Legislation of the New York City Bar Association has interpreted this section to preclude any exercise of a partial veto. *See* 167 N.Y.L.J. (Jan. 12, 1972) at 1, col. 5.

¹³ Largely outside the scope of this article are certain considerations relating to the broader subject of item vetoes as applied to the clearly germane provisions of a bill; the considerations peculiar to item vetoes of appropriations bills (*see* notes 15, 16, 134, and 135 and accompanying text *infra*); and the problems raised by administrative noncompliance with enacted legislation (*see* note 9 *supra*).

¹⁴ BLACK'S LAW DICTIONARY 1486 (4th ed. rev. 1968).

¹⁵ *E.g.*, *Commonwealth v. Barnett*, 199 Pa. 161, 172, 48 A. 976, 977 (1901).

¹⁶ B. GROSS, *THE LEGISLATIVE STRUGGLE* 221 (1953).

legislation which, if passed separately, would surely be vetoed.¹⁷ Another factor producing definitional spillover is the difficulty inherent in assessing what is or is not germane to a bill. For example, a favorite type of floor amendment is the pork-barrel public works project, designed primarily to benefit the sponsor's constituency.¹⁸ Although certainly relevant to the subject of appropriations, such amendments are sufficiently distinguishable from the original purposes of the bill to be widely characterized as riders. Under a very liberal interpretation almost any amendment added to a bill after it leaves the committee could be considered nongermane. Under this interpretation, the first and third definitions would be equated.¹⁹ For these reasons, the use of the term "rider" must remain somewhat inexact.

It is important to note that riders were not discussed²⁰ and apparently not foreseen by the framers of the Constitution.²¹ They did not appear in Congress until 1820²² and did not become common until after the Civil War.²³ Originally used by one house of Congress to coerce the other house into accepting a provision that otherwise would have been rejected, not until Reconstruction did riders become instruments for the coercion of the President by a hostile Congress.²⁴ Since that time they have been frequently employed to circumvent the executive veto.

Not surprisingly, Presidents have been highly critical of the use of riders.²⁵ Criticism has not been confined to the executive branch, however. The Supreme Court has described the practice of logrolling, by which riders are often attached to appropriations

¹⁷ W. KEEFE & M. OGUL, *THE AMERICAN LEGISLATIVE PROCESS: CONGRESS AND THE STATES* 255 (2d ed. 1968).

¹⁸ See Harris, *supra* note 1, at 53-55, 114.

¹⁹ See W. KEEFE & M. OGUL, *supra* note 17, at 255.

²⁰ See generally J. ELLIOT, *DEBATES* (1836); *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (M. Farrand ed. 1937).

²¹ Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 240 (1952).

²² In that year the bill admitting Missouri to statehood was attached to the bill admitting Maine. E. MASON, *THE VETO POWER* 48 n.1 (1890).

²³ *Id.* n.4. According to one author there were 387 riders attached to appropriations bills between 1862 and 1875. H. DAVIS, *AMERICAN CONSTITUTIONS* 30 (1885).

²⁴ E. MASON, *supra* note 22, at 48 n.1. The value of the rider in the struggle between the Congress and President Andrew Johnson insured its survival beyond the early years of Reconstruction. By 1879, for example, the Democrats had gained control of Congress, and they attached to an appropriations bill a rider which would have eliminated the practice of using federal troops to guard ballot boxes in the South during elections. The amended bill passed Congress five times, only to be met on each occasion by President Hayes' veto. Finally, the Democrats conceded the issue and passed an unamended appropriations bill. H. DAVIS, *supra* note 23, at 30-32.

²⁵ 7 J. RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 242 (1898) (President Grant's proposal to vest the President with a full item-veto power); *id.* at 531 (President Hayes' message accompanying the veto of a bill with objectionable riders); 5 *id.* at 462 (President Buchanan's state of the union address, in which he objects to the limitations placed on presidential review of legislation by the use of riders).

bills, as "pernicious."²⁶ Several states have constitutional provisions prohibiting nongermane amendments to legislation,²⁷ designed to eliminate those abusive devices which so often "embraced ill digested and pernicious legislation, relief bills, private appropriations measures, and the like."²⁸ Even in Congress, each house has a rule prohibiting the introduction of nongermane amendments,²⁹ and members have voiced their concern over the use of riders.³⁰

Despite the distinctly pejorative connotations attached to the term "rider," the device remains a common feature of the nation's legislative process.³¹ The tenacity with which the practice of attaching riders has resisted critics and reformers³² has not been solely a function of legislators' desires to protect their special interests, however. The practice of enacting legislation through riders serves other, more respectable purposes. First, it can significantly expedite the legislative process. By introducing what would be a separate bill as an amendment to one that has already reached the floor for consideration, the lengthy and often obstructive committee process³³ is avoided. In view of Congress' heavy workload,³⁴ the use of bills embracing a variety of measures may be an essential part of its procedure.³⁵ Second, bills

²⁶ *Bengzon v. Secretary of Justice*, 299 U.S. 410, 415 (1937). See also *Commonwealth v. Barnett*, 199 Pa. 161, 172, 48 A. 976, 977 (1901).

²⁷ *E.g.*, PA. CONST. art. III, § 3; VA. CONST. art. IV, § 12; OHIO CONST. art. II, § 16; MO. CONST. art. III, § 23; TEX. CONST. art. III, § 35.

²⁸ *Ex parte Hallawell*, 155 Cal. 112, 114, 99 P. 490, 491 (1909).

²⁹ H.R. Res. 46, 44th Cong., 1st Sess., R. 16, No. 7 (1876); S. Res. 18, 48th Cong., 1st Sess., R. 16 (1884).

³⁰ James A. Garfield, while in Congress, described the use of riders as being "revolutionary to the core, . . . destructive of the fundamental element of American liberty, the free consent of all the powers that unite to make laws." 9 CONG. REC. 117 (1879) (remarks of Representative Garfield). During the same debate, one congressman described the practice of attaching riders to appropriations bills as the action of "a merciless jailor" who "place[s] before a famishing prisoner food mixed with poison and then say[s] to him: eat or refuse; the responsibility of your life rests entirely with you." 9 CONG. REC. 560 (1879) (remarks of Representative Burrows).

³¹ "The familiar interpretation of riders characterizes them as evasive, underhanded, and, in degree, even dangerous; however that may be, Congress has given its tacit consent to their use, a point readily verified in roll-call votes." W. KEEFE & M. OGUL, *supra* note 17, at 256.

³² Inasmuch as the congressional rules prohibiting nongermane amendments have not prevented their continual use, the primary tactic of those opposed to the use of riders has been an effort to attain congressional approval of a power to veto items of appropriations bills. Since the first such proposal was introduced nearly one hundred years ago (H.R. 46, 44th Cong., 1st Sess. (1876)), over 150 bills have been offered providing for such a power. In spite of support from various Presidents and influential congressmen, only a few of these have even reached the floor, and none have been voted upon. J. HARRIS, *supra* note 1, at 111.

³³ See generally W. KEEFE & M. OGUL, *supra* note 17, at 161-237; G. GALLOWAY, *THE LEGISLATIVE PROCESS IN CONGRESS* 273-326 (1953).

³⁴ It has been estimated that twenty thousand bills are introduced during both sessions of Congress. W. KEEFE & M. OGUL, *supra* note 17, at 162.

³⁵ *Item Veto Hearings*, *supra* note 8, at 51 (remarks of Representative S. Udall).

with topically diverse provisions are often the result of complex interaction between members of Congress. Making a measure more acceptable by the attachment of riders favored by a small group of legislators, or even by one influential member, is often essential in securing its passage.³⁶ Furthermore, bills that otherwise may never receive serious consideration if referred to a hostile committee may be introduced as riders. By far the most important function of riders, however, is the enhancement of Congress' bargaining position vis-à-vis the President, for the rider necessarily circumvents to some degree the President's veto power.³⁷

B. *The Presidential Veto Power*

Two types of presidential vetoes are clearly recognized by the Federal Constitution.³⁸ First, the President may return a bill with which he disagrees to the house in which it originated.³⁹ Secondly, if the President does not sign a bill within ten days after it is presented to him but is prevented from returning the bill because of congressional adjournment, the bill will not become law.⁴⁰ In the latter case, of course, there is no possibility that Congress may override the veto.⁴¹ A third category of the general power to reject legislation is the item veto, which allows the executive to reject specific sections of a bill while giving approval to the remainder. Although state constitutions often grant some form of

³⁶ H. WALKER, *LAW MAKING IN THE UNITED STATES* 346 (1934).

³⁷ See notes 7-8 and accompanying text *supra*.

³⁸ U.S. CONST. art. I, § 7, cl. 2 reads in part:

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 the House in which it shall have originated, who shall . . . 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. . . . If any Bill shall not be returned by the President within ten Days . . . 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.

³⁹ This type is sometimes referred to as a "return" veto. See Note, *The Presidential Veto Power: A Shallow Pocket*, 70 MICH. L. REV. 148, 149 (1971).

⁴⁰ This device is commonly called the "pocket" veto. See generally Bellamy, *The Growing Potential of the Pocket Veto: Another Area of Increasing Presidential Power*, 61 ILL. B.J. 85 (1972).

⁴¹ A related issue concerns the meaning of the term "adjournment" in Article I, Section 7: whether that term refers to any congressional recess or only to *sine die* adjournment. Under the former interpretation the President could pocket veto a bill during any recess. See generally Note, *supra* note 39. Bills have been introduced in both houses of Congress which would limit the term's meaning to *sine die* adjournment. H.R. 6225, 92d Cong., 1st Sess. (1971); S. 1642, 92d Cong., 1st Sess. (1971).

the item veto to the state's chief executive,⁴² the Federal Constitution provides no similar power to the President.⁴³ The power to veto nongermane riders might be regarded as a form of the item veto, for it would allow the President to reject specific sections of bills while giving approval to the remainder of the legislation.

Even the limited veto power enunciated in the Constitution was not given to the President without much debate by the framers.⁴⁴ The experience of the colonial period was fresh on the minds of the authors of the Constitution. The governors of all thirteen of the original colonies had possessed an absolute veto power; furthermore, the King of England could prevent any bill from becoming law in all of the colonies except Maryland, Rhode Island, and Connecticut.⁴⁵ The King did not hesitate to exercise this power, and the resulting resentment was a major factor leading to the Revolution. The first grievance cited in the Declaration of Independence was that the King "has refused his assent to laws most wholesome and necessary to the public good." It is therefore not surprising that the new nation, under the Articles of Confederation, had no executive branch whatsoever. In several of the new states there was no governor, and in all the others except Massachusetts the governor had no veto power.⁴⁶

Although some proposed that a council be established under the Constitution to review legislative acts,⁴⁷ and others, including Alexander Hamilton, favored vesting the President with an absolute veto,⁴⁸ the constitutional convention finally settled on the more limited "qualified" veto.⁴⁹ In light of the colonial experi-

⁴² See notes 133-35 *infra*.

⁴³ The impoundment of appropriated funds (see note 3 *supra*) may be considered a form of the item veto, for the President may, through impoundment, refuse to spend funds appropriated by one section of an appropriations bill while giving full effect to the remainder of the legislation by authorizing expenditures in accordance with congressional desires. There has been an increasingly vigorous challenge mounted against the practice of impoundment, both in Congress and in the courts. See *Impoundment of Funds: Constitutional Crisis Ahead*, 31 CONG. Q., 213 (1973). A federal district court has recently ruled that the withholding of highway funds by the Secretary of Transportation, under the terms of the Federal-Aid Highway Act specifically barring impoundment, was unlawful. *State Highway Comm'n v. Volpe*, 347 F. Supp. 951 (W.D. Mo. 1972), *aff'd*, 41 U.S. L.W. 2539 (8th Cir. April 2, 1973). A decision in favor of the President's power to impound funds would lend support to the validity of the corresponding item veto analyzed herein. Likewise, a decision against the President on the impoundment issue may be based on the absence of any item veto power under the Constitution. *Cf.* Church, *supra* note 3, at 1249. Such a decision would seem to invalidate an attempt to veto nongermane riders.

⁴⁴ See generally E. MASON, *supra* note 22, at 17-23.

⁴⁵ *Id.* at 17.

⁴⁶ In Massachusetts the governor's veto could be overridden by the legislature. *Id.* at 18-19.

⁴⁷ 4 J. ELLIOT, *supra* note 20, at 622.

⁴⁸ *Id.* at 623.

⁴⁹ Alexander Hamilton, fearing the popular reaction to any mention of the term "veto," used the phrase "qualified negative" to describe the President's power under the new Constitution. See THE FEDERALIST No. 49, at 514-15 (J. Hamilton ed. 1864) (A. Hamilton). Similarly, the word "veto" does not appear in the Constitution.

ence, it is perhaps remarkable that the executive was given any veto power at all.⁵⁰

Since the constitutional convention, many proposals have been made for the reform of the veto provision of the Constitution. In 1818 a resolution was introduced in Congress calling for the abolition of the veto power.⁵¹ One objection to the veto was that it was highly undemocratic, for the objections of one man could stand in the way of the will of a majority of the people's representatives. Furthermore, since a presidential veto was rarely overridden, the veto power was viewed as being, for all practical purposes, absolute, and thus contrary to the intentions of the framers.⁵² On the other hand, many proposals have been made for expanding the veto power. The most frequent suggestion is the institution of the power to veto items of appropriations bills separately.⁵³ President Grant went even further, asking for the power to veto sections of any bill.⁵⁴

Several purposes have been ascribed to the presidential veto power. Its general purpose, of course, is to serve as a check on unwise policy trends in legislation.⁵⁵ More specifically, some have argued that it provides for a review of legislation by one representing a national, as opposed to a local or regional, interest.⁵⁶ Others argue that it serves to provide a check on potential legislative encroachment on executive power.⁵⁷ The unrestricted use by Congress of nongermane amendments, by inhibiting the President's use of his veto power, could surely thwart all three objectives.

Thus the enactment of riders by Congress, although serving several purposes within the legislative process, may constitute an unreasonable encroachment on the presidential power, provided in Article I, Section 7, to oversee legislative policy. Under the traditional notion that the President has no item veto power, the use of riders significantly limits the exercise of the power to veto objectionable legislation.

⁵⁰ Comment, *Federal Legislation: The Item Veto in the American Constitutional System*, 25 GEO. L.J. 106, 109 (1936).

⁵¹ E. MASON, *supra* note 22, at 136.

⁵² *Id.* at 135.

⁵³ See note 32 *supra*; *Item Veto Hearings*, *supra* note 8, at 5, 8 (remarks of Representative Keating).

⁵⁴ J. RICHARDSON, *supra* note 25, at 242.

⁵⁵ E. MASON, *supra* note 22, at 132-33. In the early years of the nation it was widely believed that the President could exercise the veto power only if his objection to the legislation were based on an alleged constitutional defect in the bill. Zinn, *supra* note 21, at 230. In recent years, of course, vetoes on grounds of policy have become universally accepted.

⁵⁶ *Item Veto Hearings*, *supra* note 8, at 50-51 (remarks of Representative S. Udall).

⁵⁷ Clineburg, *supra* note 7, at 737.

II. CONSTITUTIONAL INTERPRETATION

It is possible that the constitutional language itself⁵⁸ may hold the solution to the conflict between riders and the veto power. As used in that provision, the word "bill" may be held to refer only to a discrete, topically differentiated piece of legislation. One which had been adulterated by the addition of a nongermane amendment would, under this interpretation, be the constitutional equivalent of two separate bills.⁵⁹ The President would then be free to act upon them individually, vetoing one (the rider), while approving the other (the original bill). If such a definition of "bill" is inherent in the language of Article I, Section 7, then no statutory authorization is needed to enable the President to veto nongermane riders.

There are several arguments in favor of such a construction. Because the rules of both houses of Congress prohibit nongermane amendments,⁶⁰ it has been argued that Congress has defined the word "bill" to mean a piece of legislation dealing with related subjects.⁶¹ The difficulty with this approach, however, is that the rules do not provide that a bill loses its quality as a single bill when a nongermane provision is added; they merely provide that such amendments should not be introduced. Even if the rules did contain a limited definition of the word "bill," they would not dispose of the issue of that term's constitutional meaning, for a procedural rule of Congress cannot alter the meaning of constitutional language.⁶² If the constitutional definition of a bill embraces legislation with topically diverse provisions, no self-imposed rule of Congress could limit that meaning.

An attempt has also been made to find a congressional definition in that body's "general practice" of separating proposals into "bills" according to their dominant subject.⁶³ Actual congressional practice does not seem to support this argument. In fact, to the extent that legislative custom furnishes any guidance in this matter, the practices of ignoring rules prohibiting nongermane amendments⁶⁴ and frequently presenting omnibus legislation to the President⁶⁵ indicates a broader definition. Even if the use of

⁵⁸ See note 38 *supra*.

⁵⁹ See Givens, *supra* note 9, at 60; Zinn, *supra* note 21, at 240.

⁶⁰ See note 29 *supra*.

⁶¹ Givens, *supra* note 9, at 63; Clineburg, *supra* note 7, at 753.

⁶² "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints . . ." *United States v. Ballin*, 144 U.S. 1, 5 (1891).

⁶³ Givens, *supra* note 9, at 63.

⁶⁴ See note 31 and accompanying text *supra*.

⁶⁵ *Item Veto Hearings*, *supra* note 8, at 51 (remarks of Representative S. Udall).

riders were merely an aberration in the normal legislative process, the definitional issue must remain open. As was the case with procedural rules, congressional practice cannot be considered determinative of constitutional interpretation.⁶⁶

Longstanding practice and belief are not, however, without importance in construing constitutional language. Particularly in uncertain areas, such as the relations between the three branches of government, acquiescence by one branch in a particular practice of another branch will lend support to the constitutionality of that practice.⁶⁷ The continual acquiescence by Presidents in the congressional use of nongermane amendments may thus indicate the constitutional validity of a broad interpretation of the word "bill."⁶⁸ The relative frequency with which traditional assumptions are overthrown in the constitutional arena⁶⁹ nevertheless dictates caution in drawing inferences from patterns of acquiescence. Perhaps the most that can be said of the veto power in this context is that there exists a presumption, founded upon longstanding custom, against a narrow definition of the word "bill."⁷⁰

More support for a limited definition of the word "bill" is derived from the observation of Justice Stone that the Constitution is "concerned with substance and not with form."⁷¹

⁶⁶ In *Edwards v. United States*, 286 U.S. 482, 485, 487-90 (1932), the Supreme Court held that under Article I, Section 7 of the Constitution, the President could sign a bill after the adjournment of Congress despite "opposing views strongly held in the past" and a history of presidential avoidance of post-adjournment signings.

⁶⁷ "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952); *Meyers v. United States*, 272 U.S. 52, 119, 136 (1926).

⁶⁸ *The Pocket Veto Case*, 279 U.S. 655, 688-89 (1929). The Court stated:

The views which we have expressed as to the construction and effect of the constitutional provision here in question are confirmed by the practical construction that has been given to it by the Presidents through a long course of years, in which Congress has acquiesced.

⁶⁹ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin laws authorizing prehearing seizure of goods violate due process clause of fourteenth amendment); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty as presently administered constitutes cruel and unusual punishment). Between 1810 and 1956 the Supreme Court overruled at least ninety of its prior decisions, of which fully two-thirds were in the area of constitutional law. Blaustein & Field, "Overruling" *Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 167 (1958).

⁷⁰ See *The Pocket Veto Case*, 279 U.S. 655, 690 (1929), quoting with approval from *State ex rel. Corbett v. South Norwalk*, 77 Conn. 257, 264, 58 A. 759, 761 (1904):

[A] practice of at least twenty years duration "on the part of the executive department, acquiesced in by the legislative department, while not absolutely binding on the judicial department, is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning."

Most who have argued that the President should have the power to veto nongermane amendments separately have conceded that special legislation would be necessary to confer such a power. See Zinn, *supra* note 21, at 241; Clineburg, *supra* note 7, at 754.

⁷¹ *Dimick v. Scheidt*, 293 U.S. 474, 490 (1935) (Stone, J., dissenting).

Under this view, the meaning of the word is to be derived from a consideration of what substantively comprises a bill, not what is formally called such by Congress. The label which Congress attaches to a piece of legislation should not be allowed to foreclose consideration of its true character, which would be determined by its range of subject matter.⁷² The proponents of this view, however, have failed to provide criteria of germaneness adequate to implement the definition which they propose. The problems raised by attempting to define a rider by its topical germaneness⁷³ are likewise encountered in defining a bill as "a legislative instrument setting forth one or more propositions of law all related to a single subject matter."⁷⁴ Neither the language of the Constitution, nor its history, nor its logic furnishes any assistance in setting a standard of relevance. Were the single-subject test explicitly authorized in the Constitution, the specifics could probably be developed through the gradual accretion of practical and litigational precedents. That the formula itself is an extrapolation from inconclusive language and contrary practice may well combine with its initial pliability to create too great a factor of uncertainty.

A final argument in favor of a limited definition of the word "bill" is the proposition that this meaning was intended by the framers of the Constitution.⁷⁵ There were no debates over the meaning of the word at the constitutional convention,⁷⁶ and no other contemporaneous recognition that its interpretation would present any difficulties has been found. This silence may be related to the fact that nongermane amendments were alien to the legislative process in the early years of the nation.⁷⁷ One possible inference is that the founding fathers were familiar only with topically separated legislative acts and that they assumed without question that the word "bill" would refer to such acts. The framers' silence is equally consistent, however, with other, contradictory interpretations. They may have been primarily concerned with the phenomenon of congressional action upon a proposal, in which case "bill" was intended as merely a procedural term, used to refer to anything which Congress wishes to pass under a single title. Whatever may have been the framers unarticulated and perhaps unexamined assumptions, they can be re-

⁷² See Clineburg, *supra* note 7, at 752; Givens, *supra* note 9, at 62.

⁷³ See notes 14-19 and accompanying text *supra*.

⁷⁴ Clineburg, *supra* note 7, at 752.

⁷⁵ See Givens, *supra* note 9, at 62; Zinn, *supra* note 21, at 240.

⁷⁶ See notes 20-21 and accompanying text *supra*.

⁷⁷ See note 22 and accompanying text *supra*.

constructed at present only by speculation. In the absence of any clear intent to convey a more limited meaning by the use of the word "bill," the issue of its original content must remain open.

Thus it appears that the attempt to find the meaning of Article I, Section 7 through the traditional techniques and sources of constitutional construction is inconclusive. The argument in favor of a restricted definition of the word "bill" has a great deal of intuitive appeal, for it is possibly the only logical midpoint between allowing Congress to restrict the veto power at will merely by collecting various measures under a single heading and permitting the President the full power to pick and choose as he wishes among the provisions of a legislative proposal. The argument is not totally convincing, however, and a case can be made in favor of a procedural definition of the term. It therefore seems appropriate to move beyond the constitutional language itself and view the problem as one involving the constitutional separation of powers.

III. SEPARATION OF POWERS.

The separation of powers and related concepts have a rich background in political theory and practice, much of which is directly relevant to the creation of our constitutional system.⁷⁸ Although the doctrine is not explicitly stated in the Federal Constitution,⁷⁹ it was of fundamental importance to the framers and

⁷⁸ See generally W. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* (1965); P. SPURLIN, *MONTESQUIEU IN AMERICA, 1760-1801* (1940); M. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* (1967); Brand, *Montesquieu and the Separation of Powers*, 12 OREGON L. REV. 175 (1933); Farlie, *The Separation of Powers*, 21 MICH. L. REV. 393 (1923); Parker, *Separation of Powers Revisited*, 49 MICH. L. REV. 1009, 1011-20 (1951); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935); Wright, *The Origins of the Separation of Powers in America*, 13 ECONOMICA 169 (1933), reprinted in SUBCOMM. ON SEPARATION OF POWERS OF THE COMMITTEE ON THE JUDICIARY, *SEPARATION OF POWERS AND THE INDEPENDENT AGENCIES: CASES AND SELECTED READINGS*, S. DOC. NO. 91-49, 91st Cong., 1st Sess. 240 (1969) (prepared by the Legislative Reference Service of the Library of Congress).

⁷⁹ Several states urged the explicit inclusion of the separation doctrine in the Bill of Rights, but Congress rejected the recommendations. 1 ANNALS OF CONG. 760-61 (1834); 1 S. JOUR. 64, 73-74 (1820). Most state constitutions contain provisions expressly recognizing the separation of powers. AMERICAN BAR FOUNDATION PROJECT ON THE UNAUTHORIZED PRACTICE OF LAW, UNAUTHORIZED PRACTICE STATUTE BOOK 2-3 (1961). The language of the Michigan constitution is typical:

The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this Constitution.

MICH. CONST. art. III, § 2.

permeated their work.⁸⁰ It has been uniformly acknowledged⁸¹ that the principle is implicit in the structure of the first three articles of the Constitution, in which the legislative, executive, and judicial powers are assigned to the three branches of government.⁸² As a constitutional principle, it serves to "limit and control" the interpretation of that document.⁸³ The tension between riders and the veto power quite obviously is a problem affecting the distribution of legislative capabilities within the federal government. Given the uncertainty of its resolution through the application of other interpretative devices,⁸⁴ it becomes important to consider the bearing of the separation of powers doctrine upon this area of potential conflict.

There is far less agreement upon just what the separation of powers doctrine represents in theory or requires in practice than upon its existence as an organizing principle. In the United States it constitutes a fusion of two concepts. The first is what might be called the pure, or strict, separation of powers. This concept contemplates a relatively rigid partitioning of both the functions and the departments of government into, at least in its modern form, three divisions: legislative, executive, and judicial.⁸⁵ The

⁸⁰ "No concept of government was so unanimously accepted by all the statesmen whose genius brought into being the American nation as was the doctrine of the separation of governmental powers." A. VANDERBILT, *THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE* 4 (1953).

It is not surprising, therefore, that the principle of the separation of powers was accepted without any debate whatever by the members of the convention. It had become an axiom; and the only question was of applying it.

.....
All the plans presented to the convention provided, in some form, for the separation of powers.

Sharp, *supra* note 78, at 419-20 (footnote omitted). For a discussion of the constitutional convention's struggle to apply this axiom to specific problems, *see id.* at 419-25.

⁸¹ *See, e.g.*, Springer v. Philippine Islands, 277 U.S. 189, 201 (1928); Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1881); 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 518, at 2 (1st ed. 1833); A. MASON & W. BEANEY, *AMERICAN CONSTITUTIONAL LAW* 59-60 (5th ed. 1972).

⁸² "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." U.S. CONST. art. I, § 1. "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

⁸³ National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 590-91 (1949). Justice Jackson wrote:

The doctrine of separation of powers is fundamental in our system. It arises, however, not from Art. 3 nor any other single provision of the Constitution, but because "behind the words of the constitutional provisions are postulates which limit and control." Chief Justice Hughes in *Monaco v. Mississippi*, 292 U.S. 313, 323.

⁸⁴ *See* part II *supra*.

⁸⁵ *See* M. VILE, *supra* note 78, at 13.

There is of course no talismanic quality about the familiar tripartite division, which did not become the dominant mode of analysis until the mid-1700s. Prior to that time it was common to distinguish only the executive and legislative functions, subsuming the judicial function under the former heading. *See generally* W. GWYN, *supra* note 78 (focusing

nature of any particular power should, under this view, determine which agency is to be assigned, as nearly as possible, the exclusive right to exercise that power. Thus, in its ideal form, specialization and compartmentalization of governmental activities would be complete.⁸⁶

This position is modified by the second concept inherent in the separation doctrine, the inclusion within our constitutional structure of provisions for checks and balances, powers given to each branch to control directly the activities of the others through a limited exercise of the other branches' distinctive functions.⁸⁷ Whereas the theory of strict separation is intended to operate as a negative check on the accumulation and exercise of concentrated power, the theory of checks and balances supplements the strict doctrine with more positive means of control.⁸⁸

As it represents an amalgam of two opposed ideas—the segregation and the sharing of powers—there is a certain tension inherent in the doctrine. Furthermore, there are serious practical difficulties raised by the ambiguity of the tripartite categorization of functions; even if analytically sound, this categorization implies a far more clear-cut distinction than is evident in reality.⁸⁹ These observations suggest two corollaries. First, the separation of powers doctrine may be interpreted in a way which emphasizes either the segregation of power, or its sharing through checks and balances. Second, however conceived, its actual applications and

primarily on the period from 1650 to 1750). Many of the doctrine's more modern critics have attacked the conventional distinctions as being arbitrary, unscientific, and a distortion of reality. See, e.g., the review of such literature contained in Fairlie, *supra* note 78, at 418-31; J. LANDIS, *THE ADMINISTRATIVE PROCESS* 47 (1938):

The desirability of four, five, or six 'branches' of government would seem to be a problem determinable not in the light of numerology but rather against a background of what we now expect government to do.

The most recent efforts in the area reflect the growth of a social scientific approach and more sophisticated concepts of power and function. See, e.g., H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 192-99 (1950); Almond, *A Functional Approach to Comparative Politics*, in *THE POLITICS OF THE DEVELOPING AREAS* (G. Almond & J. Coleman eds. 1960).

⁸⁶ See M. VILE, *supra* note 78, at 13; W. GWYN, *supra* note 78, at 8-9.

⁸⁷ In *Myers v. United States*, 272 U.S. 52, at 291 (1926) Justice Brandeis wrote in dissent:

The separation of powers of government did not make each branch completely autonomous. It left each, in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial.

⁸⁸ M. VILE, *supra* note 78, at 18.

⁸⁹ *Springer v. Phillipine Islands*, 227 U.S. 189, 209 (1928). Justice Holmes dissented, stating:

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

manifestations will be far less rigorous than its abstract statements. The doctrine's history seems to confirm both hypotheses.

The tension between the theory of strict separation and the idea of checks and balances has been a source of debate throughout the nation's history. Among the framers, men such as James Wilson and James Madison disagreed upon which principle was more important,⁹⁰ but virtually all favored the blending of powers to some extent.⁹¹ After the advent of partisan politics Jeffersonian Republicans urged a strict separation of powers,⁹² while at the opposite extreme, placing nearly all emphasis on checks and balances, was the Federalist John Adams.⁹³ Not only the Constitution but the great majority of contemporary political figures fell somewhere between these extremes.⁹⁴

In developing the constitutional doctrine, the courts have tended to emphasize, at least in their general formulations, the idea of strict separation.⁹⁵ Nevertheless, the difficulties of implementing the strict version have produced a reluctance to enforce it. Chief Justice Marshall's statement that "the difference between the departments undoubtedly is, that the legislative makes, the executive executes, and the judiciary construes the law . . ." is immediately followed by the qualification that "the maker of the

⁹⁰ Madison and Wilson were perhaps the two most influential proponents of the new Constitution, and both were concerned with justifying the extent to which it departed from a strict separation of powers. Madison emphasized the need for flexibility in making the most effective and judicious use of that principle, arguing that the blending of powers proposed under the Constitution was essential to insure that each department could defend itself against encroachment by the others. *THE FEDERALIST* Nos. 47 & 48, at 373-87 (J. Hamilton ed. 1864) (J. Madison). Wilson, although admitting the necessity of checks and balances, thought that these ought to be minimized, and he relied most heavily on the idea of separation itself. *J. WILSON, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 51-52 (1792).

⁹¹ See M. VILE, *supra* note 78, at 156-57, 160. See generally Sharp, *supra* note 78.

⁹² See, e.g., J. TAYLOR, *AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES* (1814).

⁹³ See J. ADAMS, *A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA* (1787, 1788).

⁹⁴ An especially good discussion may be found in M. VILE, *supra* note 78, at 119-75.

⁹⁵ E.g., *Springer v. Phillipine Islands*, 277 U.S. 189, 201-02 (1928). The Court stated:

It may be stated then, as a general rule inherent in the American constitutional system, that unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

See also, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952); *Humphrey's Executor v. United States*, 295 U.S. 602, 629-30 (1935); *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *Union Pacific Ry. v. United States (Sinking Fund Cases)*, 99 U.S. 700, 718 (1879).

law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."⁹⁶ This realism, coupled with the unavoidable recognition that certain checks and balances are also part of the constitutional mandate, has led the judiciary to adopt more "practical and workable" delineations of power.⁹⁷

For example, at issue in *J.W. Hampton Jr. & Co. v. United States*⁹⁸ was the constitutionality of legislation imposing a duty on the President to analyze differences of production costs in the United States and other countries and make appropriate adjustments in tariff rates. The act was challenged as an unconstitutional delegation of legislative power.⁹⁹ Although Chief Justice Taft stated that granting legislative power to the President would constitute a "breach of fundamental national law," the delegation was nevertheless upheld on the ground that the power to set tariff rates was not purely legislative, but was merely a power to determine how the tariff laws were to be executed.¹⁰⁰

Similarly, in *Field v. Clark*¹⁰¹ the Court considered a law which authorized the President to suspend the operation of an act allowing the free introduction of certain raw materials into this country if he should find that another country is imposing unreasonable tariffs on American goods. Stating that the prohibition of congressional delegation of its power to the executive is "a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution,"¹⁰² the Court upheld the act on the ground that the power is a proper one for executive discretion. Moreover, in *Kilbourn v. Thompson* the Court issued one of its strongest statements supporting the theory of strict separation.¹⁰³ Yet the Court recognized that Congress

⁹⁶ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825).

⁹⁷ Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 GEO. WASH. L. REV. 124, 132 (1969).

⁹⁸ 276 U.S. 394 (1928).

⁹⁹ One of the corollaries to the separation doctrine in this country has been the principle that "none of the departments may abdicate its powers to either of the others." E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957* at 9 (4th ed. 1957). Although the delegation doctrine is presently thought to be of little independent significance, it has in the past been a fruitful source of litigation involving the separation of powers. *Id.*

¹⁰⁰ 276 U.S. at 406.

¹⁰¹ 143 U.S. 649 (1892).

¹⁰² *Id.* at 692.

¹⁰³ 103 U.S. 168, 190-91. The court observed:

It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined.

has the normally judicial power to punish both members and nonmembers for contempt in connection with its proceedings.¹⁰⁴

In sum, "[t]he doctrine of the separation of powers has not been, nor was it intended to be, strictly enforced."¹⁰⁵ Despite its occasionally doctrinaire formulations, separation cannot be mechanically or absolutely imposed. It is not satisfactory merely to say that the power to veto a bill is given to the executive, and therefore the limitations placed on that power by the use of riders are in violation of the separation doctrine. It is equally unsatisfactory to say that the power to legislate is clearly vested in Congress and that any limitations on that power, such as the presidential veto, should be strictly construed. The doctrine does not provide easy answers to disputes between the President and Congress. Instead, it creates "a complex and dynamic pattern of power sharing between the branches with no simple or precise guidelines available which allow consistent . . . condemnation of specific actions, except in extreme cases."¹⁰⁶

The objective of separation of powers and checks and balances is to limit the concentration of power within the branches of government.¹⁰⁷ The doctrine seeks to attain this goal by assuring that no one branch will possess so much authority as to render another branch relatively powerless.¹⁰⁸ Because the pattern of relationships whereby authority is allocated between them is fluid and highly circumstantial, application of the doctrine must be similarly flexible, depending in each instance upon what sort of separation or blending of powers will best maintain a proper balance of capabilities between the respective branches.¹⁰⁹

Arguably, this determination cannot be made on the basis of the simple application of prior case law; instead, it should rely on an analysis of the relationship between the branches and the most appropriate resolution in light of that relationship. The "living"

¹⁰⁴ *Id.* at 197.

¹⁰⁵ A. MASON & W. BEANEY, *supra* note 81, at 61.

¹⁰⁶ Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467, 502-03 (1962).

¹⁰⁷ See *Lichter v. United States*, 334 U.S. 742 (1948); *Chicago & So. Air Lines v. Waterman Steamship Co.*, 333 U.S. 103 (1948); *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940); *Brown v. Walker*, 161 U.S. 591 (1896). See also D. BROWN, *THE GROWTH OF DEMOCRATIC GOVERNMENT* 84 (1959); Caffey, *Federal Executive Power*, 95 CENTRAL L.J. 3, 15 (1922).

¹⁰⁸ THE FEDERALIST No. 47, at 375 (J. Hamilton ed. 1864). James Madison concluded: [Montesquieu] did not mean that [the] departments ought to have no *partial agency* in, or no *control* over the acts of each other. His meaning, as his own words import . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

¹⁰⁹ See A. VANDERBILT, *supra* note 80, at 49-51.

nature of the Constitution, which makes it adaptable to all contingencies in a constantly changing social order,¹¹⁰ suggests reliance in constitutional decisions of this type on an examination of that social order and its interrelationships.¹¹¹ Prior cases should play a secondary role in such analysis.¹¹²

The actual context of a dispute may even reveal that a particular power should be granted to one branch of government, although it is a power traditionally classified as belonging to another. For example, the Constitution states that Congress has authority over public property.¹¹³ In 1915, however, the Supreme Court upheld the President's argument that he had the power to withdraw public land from private acquisition.¹¹⁴ Similarly, the President has greatly expanded his authority over the conduct of foreign affairs in recent years. Such increased power is, in part, considered necessary because of the critical decisions in this area which must be made quickly.¹¹⁵ It is unlikely, in the absence of extreme abuses, that a court would declare this power an unconstitutional encroachment on legislative authority.¹¹⁶

Thus, the application of the separation of powers doctrine to the conflict between the enactment of nongermane riders and the

¹¹⁰ Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881, 884 (1963).

¹¹¹ *Cf.* Wolf v. Colorado, 338 U.S. 25, 27 (1949). Justice Frankfurter noted that: [t]o rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. . . . The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of "inclusion and exclusion."

This approach was also reflected in an early essay of Mr. Justice Holmes:

[T]he moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless. Views of policy are taught by experience of the interests of life. Those interests are fields of battle.

Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 7 (1894). Court decisions in which the dispute is considered in the context of the current social order are sometimes condemned as "judicial fiat." See, e.g., Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252. Such decisions, however, are not at all unusual in the history of the Supreme Court. See generally Miller, *supra* note 110.

¹¹² The Supreme Court has said that the doctrine of *stare decisis* is not to be applied as rigidly in constitutional cases as in others. E.g., *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962). Similarly, the "intent of the framers" may play a clearly subordinate role in constitutional decision-making to the extent that such intent is not clearly contained in the Constitution. The framers obviously could not anticipate all the complexities of American society in the twentieth century, nor did they try to do so. Their views as to the *specific* institutions of the government and the relationships between those institutions should be far less important than the general principles of the Constitution. See *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

¹¹³ U.S. CONST. art. IV, § 3.

¹¹⁴ *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

¹¹⁵ See note 147 and accompanying text *infra*.

¹¹⁶ See *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

veto power must primarily involve an examination of the interaction between the legislative and executive branches in regard to their relative strengths, especially the influence they can bring to bear on legislation.¹¹⁷ The question is whether the institution of the power to veto nongermane riders, in light of the present-day interaction between the branches, would create an imbalance in the proper allocation of powers between them, or whether it would restore a balance which has been lost as a result of the increased use of riders. Of course, once that question is answered, it will not be subject to reexamination with every shift in the relative powers of the President and Congress. In analyzing the issue for the first time, however, a court must, to the extent that the separation of powers doctrine is involved, consider the balance of power among the branches.¹¹⁸

IV. THE CURRENT BALANCE OF LEGISLATIVE AND EXECUTIVE POWERS

"The Constitution limits [the President's] function in the law-making process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."¹¹⁹ As a restatement of constitutional language, this dictum of Mr. Justice Black cannot be criticized. American Presidents in the twentieth century, however, have developed an enormous degree of extraconstitutional power to influence legislation. One observer has, in fact, concluded that "the President is now the central figure in the legislative process."¹²⁰

Some measure of the increased presidential power over legislation is derived from the congressional relinquishment of a significant role in legislative drafting. Each year many major bills are written by the executive branch and are presented to Congress as part of a comprehensive program.¹²¹ Similarly, the federal budget

¹¹⁷ H. BLACK, *THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION* 115 (1919). In another conflict between the executive and legislative branches, Justice Jackson considered it "relevant to note the gap that exists between the President's paper powers and his real powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

¹¹⁸ The analysis of the separation of powers doctrine as primarily embracing a theory of balance is of course appropriate for other areas of executive-legislative conflict. See note 3 *supra*.

¹¹⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

¹²⁰ D. CATER, *POWER IN WASHINGTON* 7 (1964).

¹²¹ "The President and his Cabinet have all too often tended to regard themselves as the real legislative department, with the Congress expected to receive and act upon their views . . . Today, the drafting of legislation by the executive departments has become a commonplace." 2 B. SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT* 29 (1963). See also, H. BLACK, *supra* note 117, at 57, 183.

is prepared by the executive branch for presentation to Congress.¹²² It has even been argued that the executive and legislative roles have, in fact, been reversed, for the President "initiates the legislative process and it is the legislature that vetoes by refusing to approve."¹²³

Perhaps even more important in this regard than the opportunity to draft legislation is the President's position as the principal figure of a major national political party. Party loyalties play a large role in gathering support for proposals before Congress, and the President, more than any other individual, is in a position to command those loyalties.¹²⁴

The President may also assert a more direct influence on members of Congress.¹²⁵ The patronage system plays a significant role in the President's efforts to influence legislation,¹²⁶ and the veto power itself may play a much larger part in the aggrandizement of presidential power than is evident. The threat of a veto can have disastrous effects on legislation, and, in light of the relative difficulty of overriding a veto, such threats, veiled and otherwise, may be responsible for the demise of many bills.¹²⁷

The President's position as the principal figure of the national government and his consequent access to the mass media have provided him with an unparalleled opportunity to affect public opinion and, consequently, to bring to bear pressure upon legislators.¹²⁸ Furthermore, the presidential staff serves in part as an administrative bureaucracy and in part as a public relations department, much of its effort being directed toward influencing public opinion. The indirect effect on Congress which results from the President's ability to affect public sentiment provides him with "a leverage upon those who are supposed to check and balance his power."¹²⁹

It is clear that the President today possesses enormous legislative influence. Almost fifty years ago, one scholar designated the

¹²² The overall program of a President is reflected in his budget. Its importance cannot be overemphasized, for it reflects the President's "blueprint for public policy." W. KEEFE & M. OGUL, *supra* note 17, at 400.

¹²³ Breitel, *The Lawmakers*, 65 COLUM. L. REV. 749, 760 (1965).

¹²⁴ E. CORWIN & L. KOENIG, *THE PRESIDENCY TODAY* 78-83 (1956); B. GROSS, *supra* note 16, at 61, 102 (1953).

¹²⁵ H. BLACK, *supra* note 117, at 59-60, 183.

¹²⁶ E. CORWIN & L. KOENIG, *supra* note 124, at 98; W. KEEFE & M. OGUL, *supra* note 17, at 408.

¹²⁷ This possible function of the veto power was recognized by the framers. *See, e.g.*, THE FEDERALIST No. 73, at 551 (J. Hamilton ed. 1864) (A. Hamilton).

¹²⁸ E. CORNWELL, *PRESIDENTIAL LEADERSHIP OF PUBLIC OPINION* 208-53 (1965).

¹²⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring).

President the "Chief Legislator,"¹³⁰ and it is generally acknowledged that the power of the executive has increased significantly since that time.¹³¹ If the separation of powers doctrine is seen as a fairly strict functional division of authority between the branches of government, with only a limited blending of powers, then any further increase in the presidential legislative power would be unwarranted. That view requires that Congress maintain its dominance in the legislative arena; yet the recent aggrandizement of presidential power has, to some degree, taken the legislative power out of the hands of Congress and placed it in the executive branch. Any increase in presidential legislative power could work to further this process of aggrandizement and might thereby contravene the separation of powers doctrine.

An examination of the various types of veto provisions in effect in the states and their impact on legislative-executive relations may help to illuminate the effect that separate vetoes for nongermane riders would be likely to have in the federal system. One state, North Carolina, provides for no executive veto,¹³² while Washington allows its governor to veto any item of any bill.¹³³ Most of the other states allow some form of an item veto, but this power is typically limited to items of appropriations bills.¹³⁴ Some states allow the governor to reduce items of appropriations bills.¹³⁵ It is extremely difficult to determine the precise effect of the item veto on legislative-executive relations, for many other factors influence the extent of the governor's power to shape legislation.¹³⁶ Some legislatures may override a gubernatorial veto by a simple majority vote,¹³⁷ while others must produce a two-thirds majority.¹³⁸ Some governors are allowed, under the terms of the state's constitution, to return vetoed legislation to the legislature with proposed amendments.¹³⁹ The time which a gov-

¹³⁰ H. MCBAIN, *THE LIVING CONSTITUTION* 117 (1927).

¹³¹ A. MASON & W. BEANEY, *supra* note 81, at 66-67.

¹³² *Cf.* N.C. CONST. art. III, § 5. *See also* Prescott, *The Executive Veto in the American States*, 3 WEST. POL. Q. 98, 99 (1950).

¹³³ WASH. CONST. art. III, § 12.

¹³⁴ Beckman, *The Item Veto Power of the Executive*, 31 TEMPLE L.Q. 27 (1957). The New York constitution is typical: "If any bill presented to the Governor contains several items of appropriations of money, he may object to one or more of such items while approving of the other portions of the bill." N.Y. CONST. art. IV, § 7. *See also* CAL. CONST. art. IV, § 16.

¹³⁵ *E.g.*, MASS. CONST. art. 63, § 5.

¹³⁶ Many of these other factors are intangible. For example, the personality of a particular governor or the strength of his powers of persuasion may have more influence on the votes of state legislators than the threat of a veto. *Cf.* Comment, *Executive Orders and the Development of Presidential Power*, 17 VILL. L. REV. 688 (1972).

¹³⁷ *E.g.*, W. VA. CONST. art. VII, § 14.

¹³⁸ *E.g.*, N.J. CONST. art V, § 1.

¹³⁹ *E.g.*, ALA. CONST. art. V, § 125.

error has to veto legislation during a legislative session before a bill actually becomes law also varies greatly.¹⁴⁰

Nevertheless, one generalization concerning the effect of the item veto in the states is possible: it has contributed to the general increase in gubernatorial control of legislative activities. It has provided "the one additional power necessary to make the veto a potential legislative 'stick' in the hands of any Governor inclined so to use it."¹⁴¹ There is no reason to doubt that a similar effect would result from the institution of any form of an item veto in the federal system, and that the institution of the power to veto nongermane riders would further enhance the President's power to influence legislation. The President would possess a much larger bargaining chip with which to purchase compliance on the part of Congress, and the use of riders to force presidential acceptance of legislation would be eliminated. The President, already in a position to shape legislation to fit his program, would be able to resist effectively any intrusion into that program by Congress.

Furthermore, a qualitative change in the influence of the executive branch on legislation would result from the institution of this power. The power to veto individual sections of a piece of legislation is more than the mere power to reject, for it is the power to alter legislation. A piece of legislation is a product of a complex interaction between individual legislators, interest groups, the public, and the President himself.¹⁴² The individual sections of any bill, including the riders, are reflective of the inevitable compromise that occurs within Congress on any important matter. Some provisions are, in effect, passed by Congress only on the condition that other provisions, sometimes in the form of riders, are included in the bill. To allow the President then to veto the rider separately would be to confer a new and different type of power on the executive.¹⁴³ A majority of Congress may very well oppose a bill in the form in which it is finally approved if the President exercised such a power. Thus the will of one man could conceivably cause the enactment of legislation opposed by a majority of Congress.

It is clear that although the President is afforded the power, and even the obligation, to oversee legislative policy under the provi-

¹⁴⁰ For example, West Virginia allows the governor only five days to return a bill (W. VA. CONST. art. VII, § 14), while New York allows ten days (N.Y. CONST. art. IV, § 7) and Missouri fifteen days (MO. CONST. art. III, §§ 31, 33).

¹⁴¹ Negley, *The Executive Veto in Illinois*, 33 AM. POL. SCI. REV. 1049, 1052 (1939). See generally Beckman, *supra* note 134.

¹⁴² Breitel, *supra* note 123, at 759-77.

¹⁴³ Comment, *supra* note 50, at 127-28.

sions of Article I, Section 7 of the Constitution, he is not given the power to occupy the position of chief policy-maker for the federal government.¹⁴⁴ In light of the extensive power currently available to the President to affect legislation, and the long-standing general trend toward aggrandizement of authority in the executive branch, the added power to veto nongermane amendments to bills would not only increase executive influence but would establish the presidency as the primary locus of policy-making in the federal government. Such reallocation of authority would arguably be in derogation of the separation of powers doctrine.¹⁴⁵

On the other hand, if the separation doctrine is seen not as a device for isolating the legislative function within one branch of the government but is viewed as primarily a balancing formula, in which the dominant feature is the blending of powers, the concern should be over the general balance of congressional and presidential power. A slight increase in the executive's legislative powers, such as the power to veto nongermane riders, would be permissible so long as it did not result in an unacceptable concentration of power in one branch.¹⁴⁶ Focusing on the overall balance of power between the two branches, however, leads to the same conclusion as focusing on the separation aspects of the doctrine: the power of the President is at an historic high, and any increase in that power at the expense of Congress would violate the separation of powers doctrine.

There are several reasons underlying this increased power of the executive branch. The need for decisive action in times of national emergency has thrust the President to the forefront in this era of daily crises.¹⁴⁷ The uncertain dimensions of the term "executive power"¹⁴⁸ have, to some degree, created hesitation to declare actions of the executive branch as outside its power.¹⁴⁹ Furthermore, the abdication of Congress from some of its traditional functions has created a void which the President has filled.¹⁵⁰ For example, through the Budget and Accounting Act of

¹⁴⁴ H. BLACK, *supra* note 117, at 115.

¹⁴⁵ See notes 85-86 and accompanying text *supra*.

¹⁴⁶ See notes 87-94 and accompanying text *supra*.

¹⁴⁷ E. CORWIN & L. KOENIG, *supra* note 124, at 29:

In the course of the last half century expansion of the presidential role has been substantially continuous, thanks to a succession of strong Presidents, to our involvement in two world wars, to "an economic crisis more serious than war," to "a cold war" more baffling in some respects than "a shooting war," and to a succession of industrial strikes or threats of strikes.

¹⁴⁸ U.S. CONST. art. II, § 1.

¹⁴⁹ E. CORWIN & L. KOENIG, *supra* note 124, at 2-3.

¹⁵⁰ *Id.* at 56.

1921¹⁵¹ the Congress transferred to the President the task of formulating the national budget.¹⁵² Whatever the causes, there is little doubt that the President possesses enormous power in all spheres of governmental activity.¹⁵³

Thus, if the separation of powers doctrine is seen primarily as a constitutional balancing concept, under which there must be a general balance between the aggregate of powers residing in each of the three branches, it is clear that the branch which least needs fortification through the grant of additional power is the executive. The Presidency has increased its power substantially in this century,¹⁵⁴ and any further increase, under this concept of the separation doctrine, would only further imbalance the scales in favor of that branch.¹⁵⁵ Thus the proposed increase in the presidential veto power finds vindication in neither of the dominant concepts contained in the separation of powers doctrine.

¹⁵¹ 31 U.S.C. §§ 1, 2, 11, 13-24, 41-58 (1970).

¹⁵² 31 U.S.C. § 11 (1970). Similarly, the Employment Act of 1946, 15 U.S.C. §§ 1021-24 (1970), calls for the President to make periodic economic reports, and specific legislative proposals are expected to be part of such reports.

¹⁵³ The President under the Constitution has broad powers to appoint and remove public officials. U.S. CONST. art. II, § 2, cl. 2. The power of appointment is "untrammelled under Article II of the Constitution." *Washington v. Clark*, 84 F. Supp. 964, 966 (D.D.C. 1949), *aff'd sub. nom. Washington v. McGrath*, 182 F.2d 375 (D.C. Cir.), *aff'd*, 341 U.S. 923 (1950). This power extends to all federal executive employees, from clerks to Cabinet members. *Baldauf v. Nitze*, 261 F. Supp. 167 (S.D. Cal. 1966). Incident to the power of appointment (*Keim v. United States*, 177 U.S. 290 (1900)) is the broad power of removal. *Myers v. United States*, 272 U.S. 52 (1926). *But see Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

In times of war the President's powers are extensive. In such times the Congress may delegate to the executive, because of the national emergency, many powers which could not otherwise be granted. *McKinley v. United States*, 249 U.S. 397 (1919). Not only does the President have broad power as to the actual conduct of the war (*Fleming v. Page*, 50 U.S. (9 How.) 603 (1850)), but he has correspondingly expanded powers over domestic affairs. *Dakota Central Cent. Tel. Co. v. South Dakota*, 250 U.S. 163 (1919). *See also Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

The power of the executive branch in the field of foreign affairs is exclusive. *United States v. Curtiss Wright Export Co.*, 299 U.S. 304, 319 (1936). His power to make treaties is subject to the advice and consent of the Senate (U.S. CONST. art. II, § 2, cl. 2), but executive agreements can be made with foreign powers without Senate approval. These agreements prevail over any state constitution or law. *United States v. Belmont*, 301 U.S. 324 (1937).

Pursuant to the duty to "take Care that the Laws be faithfully executed" (U.S. CONST. art. II, § 3), the President may use federal troops when he finds that they are required in order to quell potentially dangerous domestic situations. His decision in this regard is "conclusive." *Sterling v. Constantin*, 287 U.S. 378 (1932).

¹⁵⁴ The increase in executive power, "in comparison with the other two great departments has been the outstanding American political phenomenon of the twentieth century." A. VANDERBILT, *supra* note 80, at 53. *See also* E. CORWIN & L. KOENIG, *supra* note 124, at 27: "Taken by and large, the history of the presidency is a history of aggrandizement."

¹⁵⁵ In assessing the separation of powers issue in the Steel Seizure Case, Justice Jackson felt it important to consider the general increase of presidential power in recent years. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring).

V. CONCLUSION

Although it is a much maligned device, the legislative rider does serve some useful purposes, including acting as a check on the use of the presidential veto power. The power to veto entire pieces of legislation, along with numerous extraconstitutional mechanisms enjoyed by the executive in his attempt to influence legislative policy, provides the President with extensive legislative power. Any further increase in that power should be viewed with skepticism, for if the separation of powers doctrine is to retain its significance, it must serve to protect the legislative branch in its traditionally dominant policy-setting role. This traditional pattern has been subjected to increasing executive encroachment during recent decades. The institution of the broad power to veto riders would violate the separation doctrine, however that doctrine is viewed, for through it the President would be placed in a position to supplant Congress to an even greater degree in the legislative function, and the general power of the executive branch would be increased at the expense of Congress. A presidential veto of nongermane riders would thus appear to violate the constitutional mandate contained in the separation of powers doctrine.

—*Richard A. Riggs*