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THE GOVERNOR'S VETO IN ILLINOIS

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MANY STATES in our Republic in recent years have found themselves in the throes of governmental crises of varying degrees of seriousness, caused or aggravated, at least in part, by constitutional provisions conceived and developed in an earlier day. Rigid procedures established by state constitutions written a century or more ago frequently do not fit the role of government in the fast-moving and problem-laden period of the mid-twentieth century. Some of these constitutional provisions were ill-conceived in the beginning; others have simply seen their effectiveness eroded by time.

This no doubt accounts for the record increase in constitutional review in this decade. About one-half of the fifty states in the last five years have been involved in major constitutional revision activity of one form or another.[1] Two states have scheduled referenda on new constitutions in the spring of 1968, and thirteen other states at present are in various stages of revision by convention or commission.[2]

One such state is Illinois. The first constitution of Illinois lasted thirty years, the second, twenty-two. And now, after almost a century of the third, the call has come for the state to take a new look at the present document and to determine if there should be a Constitutional Convention. This proposition will be submitted to Illinois voters in November, 1968.

One of the most basic functions of a constitution is to define the roles of the various branches of the government. As Jacob Swisher has pointed out: "The relation between the legislative and execu-

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[1] H. BONE & G. CONDON, PRELIMINARY REPORT OF THE GOVERNOR'S COMMITTEE ON CONSTITUTIONAL REVISION AND GOVERNMENTAL REORGANIZATION, 1967 (Mimeographed Task Force Report prepared for 1967 Governors Conference).

[2] CITIZENS CONFERENCE ON STATE LEGISLATURES, STATE CONSTITUTIONAL CONVENTIONS, COMMISSIONS, AND AMENDMENTS PERTAINING TO LEGISLATURES, RESEARCH MEMORANDUM No. 6 (Feb. 1968).

tive departments has been of particular interest. Indeed, few questions have more frequently been the subject of discussion before constitutional conventions in America."[3] It is in this area of discussion that this article will concentrate, and more specifically with the constitutional problems now involving the veto power of the governor and the effect it has had on state government, and in particular, on the Illinois General Assembly.

Since our federal government and every state in the Union except North Carolina have some form of veto provision, it would be well to preface this discussion of the Illinois situation with a more general treatment of this executive function in political thought and historical function. The veto power exercised under the present Constitution in Illinois can be traced to a more general development of this function in American political history which can in turn be traced to at least two parallel and sometimes contradictory lines of development in Western political history.

The first of these lines dates back at least as far as Plato and culminates in the philosophical presuppositions that lie behind the Constitution of the United States. Drawing upon such philosophers from the ancient world as Plato, Aristotle, and Polybius, as well as some concepts from the Middle Ages, the French political scholar, Montesquieu, formulated the doctrine of separation of powers with the corresponding checks and balances in a way that became a basic part of the American constitutional heritage. In his eleventh book of *Spirit of the Laws*, Montesquieu ascribes liberty in England to the separation of the legislative, executive, and judicial powers and the balance of these powers against each other. Although there had been some form of checks and balances during the Medieval period, and although the accuracy of Montesquieu's observations of English government has been challenged, his influence in establishing these concepts, "dogmas of liberal constitution-making . . . is unquestionable."[4]

One of the reasons for including a veto power in American constitutions was to preserve this separation of powers and to make possible a denial of any legislative encroachment on the domain of the executive or the judiciary.[5] There are those who argue that the veto

[3] Swisher, *The Executive Veto in Iowa*, 15 IOWA J. OF HIST. & POL. 155 (1917).

[4] SABINE, A HISTORY OF POLITICAL THEORY 558 (1937).

[5] THE FEDERALIST No. 72, at 510-11 (H. Dawson ed. 1865) (Hamilton).

in effect is a violation of the separation of powers in that it gives the chief executive legislative powers, especially when he uses it for policy reasons. It would seem, however, that when the chief executive uses this power to prevent an infringement of the constitution, the power serves to maintain the doctrine of separation which has become a foundation of American government.

A second line of development parallel to the separation of powers concept, but somewhat contradictory to it, is that of the preservation and utilization of the earlier and much stronger royal veto. The word "veto" most likely came from the power of a Roman tribune through the right of intercession to counter a command of a consul which infringed on the liberties of a citizen. "[T]his was gradually extended to other administrative acts and even to decrees of the senate. The word *veto* (I forbid) was at least occasionally used by the tribune in such cases."[6]

In England, the king with the lords made the laws, either on his own initiative or upon petition. In 1414 the king consented not to alter petitions of the commons, and in 1445 the commons were recognized as a part of the law-making process. The king, however, retained the negative power of declining to accept bills presented to him, but the last time this was used was in 1707, even though in form the laws are still made by the Crown "by and with the consent of the lords temporal and spiritual and the commons."[7]

However, in some American colonies, the veto was rigorously applied. While the colonies were entitled to have representative assemblies which exercised legislative powers in local matters, these acts were subject to the approval of the governor or proprietor; and in the royal colonies, certain acts could be approved only by the king in council. So great was the irritation of the original colonies over this practice that disapproval of laws by the king was mentioned first in the list of grievances in the Declaration of Independence. This is, in part, why only three of the original thirteen states had the veto power in their first constitutions.[8] But the influence was there, and it was not

[6] Fairlie, *The Veto Power of the State Governor*, 11 AM. POL. SCI. REV. 473 (1917).

[7] N. DEBEL, THE VETO POWER OF THE GOVERNOR OF ILLINOIS 11-12 (1916).

[8] South Carolina had adopted a veto in 1776, but abandoned it two years later. New York and Massachusetts were the only other two states with a veto prior to the Federal Constitution, and New York's was vested in a council of revision composed of the governor, the chancellor and the judges of the supreme court of the state.

long before the trend toward an increasing incidence of the use of the veto could be noticed among the states.

The gradual extension of the veto power among the states may be attributed, then, to a line of Western political thought culminating in the doctrine of separation of powers in the Federal Constitution, to vestiges of the influence of the British royal veto and no doubt to certain indigenous factors in the American political situation. These might well include the fact that the territorial governors in authority prior to the granting of statehood had the veto power, and also the fact that, as time passed, fears of executive tyranny diminished while distrust in popular assemblies increased, and the governor came to be "the most important and trusted official in the state."[9] Therefore, by 1815, at least half the states had an executive veto, and since that date no new state except West Virgina has entered the Union without an executive veto in some form.

Before tracing the development of this power in Illinois, it may be well to review briefly the various uses to which this power has been put in the several states. It has already been mentioned above that Alexander Hamilton (writing in *The Federalist*) saw the veto as necessary for the preservation of the separation of powers. This first use of the veto serves as a check on passage by the legislature of unconstitutional legislation, especially as it might encroach on the authority of the executive or judiciary.

Hamilton, however, also saw a second use of the power: "It establishes a salutary check upon the Legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."[10] It is largely in this sense that expansion of the use of the veto power has come, where the governor has utilized the veto for policy reasons, thereby injecting himself into the legislative process. This use of the veto places the governor in a bargaining position by giving him a weapon which can be used when other methods fail and which, in the long run, can help him shape legislation to his liking.

A third major use of the veto has been to check the passage of defective legislation. This has been especially true in situations where

[9] Dorr, *The Executive Veto in Michigan*, 20 MICH. HIST. MAG. 91 (1936).

[10] *Supra* note 5, at 511.

in great haste at the end of a session a large number of bills are rushed through to passage. Close scrutiny by the governor or experts working under him has made it possible to find and recommend changes that no doubt have saved much confusion in the administration of the laws. Bills containing drafting errors, duplicate bills, and bills superseded by provisions in other bills enacted comprise a significant number in this category.[11]

The pattern of development in Illinois has been quite parallel to the national trend described above. The three Illinois constitutions approved in the nineteenth century show a progression from a veto possessed by a council of revision, to a weak gubernatorial veto and then in the present Constitution to a strong executive veto.

The constitution of 1818 followed the pattern of New York in providing for approval of enactments of the legislature by a council of revision composed of the governor and at least a majority of the members of the supreme court. If no action was taken by the council within ten days, the bill became law without approval. If approval was denied, the council was to submit its reasons and suggestions to the body of origin in the legislature. A majority of the elected members of both houses was needed to pass the bill over the rejection of the council. If disapproval of the council came after adjournment, the bill was to be returned to the first meeting of the legislature after adjournment, or again, the bill would become law.[12]

Under these provisions, 3,158 laws were passed. One hundred and four vetoes were delivered (about 3⅓%). Eleven of the vetoes were overridden by the legislature, and two-thirds of the bills vetoed were amended by the legislature along the lines the council suggested.[13]

It soon became apparent, however, that the supreme court was too busy with the judicial duties to continue the legislative review required by the constitution of 1818. Therefore, when a new document was designed in 1848, the veto power was given to the governor alone. Since a simple majority of the members elected to each house could override the veto, this was considered a rather weak suspensive veto.

[11] Prescott has made a study of 1,209 gubernatorial veto messages delivered between 1945 and 1947 in the various states. For a more thorough treatment of the reasons for and frequency of gubernatorial vetoes, *see* Prescott, *The Executive Veto in American States*, 3 WEST. POL. Q. 98-112 (1950).

[12] ILL. CONST. art. III, § 19 (1818).

[13] N. DEBEL, *supra* note 7, at 29-35.

The constitution further provided that if within ten days the governor did not return a bill it would become law without his signature. If the adjournment of a session prevented the return of a bill, it was to be returned the first day of the next session or become a law.[14]

The veto provision of 1848 was used sparingly up to 1869, as only twenty-eight measures had been rejected by that date. Two of these vetoes were overridden by the legislature. During the legislative session of 1869, however, Governor Palmer vetoed seventy-two measures, and in turn had seventeen of these vetoes overridden. The one hundred bills vetoed represent 1⅓% of the 7,510 bills enacted during the period. Nineteen percent of these vetoes were overridden. Had the override provision required a two-thirds vote, eleven of the nineteen would have failed.[15]

The great number of vetoes delivered by Governor Palmer called attention to a developing flood of legislation, especially of a private nature. The subsequent action of the framers of the Constitution of 1870 revealed support for the policy function of the veto as exercised by Palmer and a growing distrust of the legislative branch. This Constitution contained a veto provision so strong that it has become, in use, almost an absolute veto power for the governor.

This provision increases the number needed to override a veto to two-thirds of those elected to each house of the legislature. If not returned by the governor within ten days after being presented to him, the bill becomes law unless adjournment prevents this from happening. When this happens, the bill must be filed with the governor's objections in the office of the Secretary of State within ten days, or, again, the bill becomes law.[16]

[14] ILL. CONST. art. IV, § 21 (1848).

[15] N. DEBEL, *supra* note 7, at 58-62.

[16] ILL. CONST. art. V, § 16. As passed in 1870, the veto provision reads as follows:

"Every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor.

If he approve, he shall sign it, and thereupon it shall become a law; but if he does not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider the bill. If then two-thirds of the members elected agree to pass the same, 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 the members elected to that house, it shall become a law notwithstanding the objections of the Governor; but in all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal.

Any bill which shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner, as

In 1884 an addition was made to the Constitution giving the governor the power to veto particular items in appropriation bills.[17] This authority has been interpreted by the Supreme Court of Illinois to be the authority only to approve or disapprove distinct items or sections in such a bill and not the power to disapprove part of an item or reduce an item.[18]

This briefly has been the constitutional development of the veto power in Illinois. Attention will now be directed in more detail to the current problems presented by this veto power as it now exists.

The Illinois legislature traditionally has met for the first six months of the odd-numbered year after the general election. This is so because the Illinois Constitution provides that all bills take effect on July 1 next after their passage, unless the legislature (in the case of emergency measures) by vote of two-thirds of all the members elected to each house shall direct otherwise.[19] To avoid the wait of up to a year before legislation can take effect, there is usually a great rush of activity during the last weeks of June; and customarily, the legislature adjourns *sine die* on June 30. This is accomplished by agreement between the two houses of the General Assembly.

It is possible for the General Assembly not to adjourn on June 30, but merely to recess until a later date at which time the veto messages of the governor could be considered.[20] This actually happened in the 1967 session when, facilitated by the fact that the leadership of both houses were of the same political party, instead of adjourning *sine die* the leaders agreed to recess until September 11.[21] Although enough votes

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if he had signed it; unless the General Assmbly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the Secretary of State, within ten days after such adjournment, or become law."

[17] ILL. CONST. art. V, § 16.

[18] Fergus v. Russel, 270 Ill. 304, 348-49, 110 N.E. 130, 147 (1915). "The legislative branch of the government is vested with the discretion to determine the amount which should be appropriated for any particular object. The Governor, as the chief executive of the State, is given the right to approve or disapprove of the action of the legislature in making such an appropriation . . . [B]ut he has not the right to disapprove of a certain portion of an item appropriated and approve of the remainder . . . ."

[19] ILL. CONST. art IV, § 13.

[20] Up until the 1930's, it was the practice of the legislature to recess with sufficient time remaining before June 30 for the governor to complete action on the bills passed and for the legislature to reconvene to receive any veto messages prior to adjourning *sine die* on June 30. ILLINOIS LEGISLATIVE COUNCIL, EXECUTIVE VETOES AFTER ADJOURNMENT, BULLETIN 5-034, 1 (1964).

[21] The General Assembly met on September 11, 12, 18, and 19, and October 16, 17, 18, and 19. It then recessed until March 4 and reconvened on that date for one day only. Although about 500 bills were introduced, no action was taken on any bills. The General Assembly then recessed until July 15, 1968.

could not be mustered to override any of the governor's vetoes, there were twelve attempts to do so in the House and six such attempts in the Senate. One bill, to prevent pollution dumping in Lake Michigan, on which the attempt to override the veto failed, was passed in another form and signed by the governor. Another result of the short session was the repeal of a hastily enacted change in the Illinois inheritance tax law which evoked great public clamor when passed and signed into law by the governor.[22]

Although no vetoes were actually overridden in the 1967 fall session, this was the real purpose for the procedure that year. The decision to recess probably resulted from recommendations made by the Illinois Commission on the Organization of the General Assembly, headed by the very able lawyer and legislator, Representative Harold Katz of Chicago.[23]

One difficulty with reliance upon this procedure, however, is the fact that unless the leadership of the House and Senate are in agreement on matters of adjournment and recess it is impossible to make arrangements for such a session. When the Houses are unable to agree on an adjournment resolution, the governor can prorogue the General Assembly.[24] The most recent instance of this took place in 1963.

The volume of legislation passed by the Illinois General Assembly has rapidly increased in recent years as is evidenced by the following figures.[25]

Year	Number of bills passed
1911	277
1931	492
1951	1,040
1963	1,615
1965	2,211
1967	2,602

[22] This bill, sometimes referred to as the "Widows' Tax Bill" was opposed primarily because it placed under the inheritance tax regulations the proceeds from life insurance policies. While this action has no direct relevance to the veto problem it demonstrates that a recess session can have beneficial effects not only in terms of overriding a veto, but also in correcting actions of the legislature that were not vetoed.

[23] The recommendations of the Katz Commission have been issued as: THE ILLINOIS COMMISSION ON THE ORGANIZATION OF THE GENERAL ASSEMBLY, IMPROVING THE STATE LEGISLATURE (1967).

[24] ILL. CONST. art. V, § 9. The governor can prorogue the General Assembly if it is certified to him that the two houses cannot agree on adjournment by the leader of the house first moving adjournment.

[25] ILLINOIS LEGISLATIVE COUNCIL, *supra* note 20, at 3, except for the years 1965 and 1967, these figures were supplied directly by the Illinois Legislative Council.

This great number of enactments placed the Illinois legislators in a select group of the most prodigious law makers in the nation.[26] The fact that the bulk of this legislation is passed during the closing weeks of the session places a great burden on the governor in his consideration of the bills and causes a situation in which there is little chance for his vetoes to be reconsidered. As Steiner and Gove pointed out:

> The tendency of the General Assembly to complete most of its work during the last weeks of the session insures that only a relatively small number of bills can make the round trip from the capitol to the Governor's Mansion and back to the capitol before June 30. More than half the bills reaching the third reading in the second chamber in 1957 came to a final vote during the last week of the session.[27]

Had it not been for the supreme court decision which ruled that the ten day period permitted the governor to act upon a bill presented to him does not start until the governor is actually in receipt of the bills, it would be virtually impossible for a governor to intelligently approve or disapprove of the legislation presented to him.[28]

As it is, the present governor has fulfilled his responsibility by utilizing a part-time group of young, well-qualified attorneys who receive very little compensation for their efforts to help him consider and screen the mass of legislation presented to him after adjournment. Because bills are often presented at periodic intervals after adjournment, it often takes many weeks beyond the ten days allotted to the governor during the session to approve and disapprove the bills presented to him after adjournment.[29]

Another difficulty is the problem that Illinois has in overriding a veto. Under the constitution of 1870, vetoes have been overridden in only three instances, in 1871, 1895, and 1936. During the 1957 session the House voted to override the veto on a bill, but the Senate did not concur. Contributing to this situation is the fact that Illinois has a unique feature in the House of Representatives which, because of the cumulative voting system, almost guarantees a minority representa-

[26] ILLINOIS LEGISLATIVE COUNCIL, *supra* note 20, at 9: "Illinois is one of an even smaller group of States where more than 1,000 bills are ordinarily passed in a regular session. Other such states are California, Connecticut, Florida, Massachusetts, and New York."

[27] G. STEINER & S. GOVE, LEGISLATIVE POLITICS IN ILLINOIS 34 (1960).

[28] People v. Hughes, 372 Ill. 602, 610, 25 N.E.2d 75, 79 (1940): "The constitution contains no provision respecting the time within which the General Assembly shall present enacted bills to the Governor."

[29] Inspection of the veto messages of Governor Kerner reveal that his last veto message in 1965 was dated August 24, and in 1967, September 8. Veto Messages of Otto Kerner, Governor, in Springfield, Illinois, 74th Biennium, 1965, and 75th Biennium, 1967.

tion of one-third and usually results in a much closer division between the parties.[30] Therefore, according to Steiner and Gove:

> The governor's political influence need be only great enough to persuade most members of his own party, even if they are a distinct minority, to vote to sustain a veto or at least to abstain from voting. Abstainers are acting in support of the executive, because the Illinois constitution requires the affirmative votes of two-thirds of the members elected to each house to override a veto.[31]

The combination of all these factors discussed above no doubt accounts for the fact that Illinois vies only with New York in the number of executive vetoes.[32] "In recent years, Illinois' chief executives have been vetoing from one-sixth to one-eighth of all bills passed at the regular session."[33] Furthermore, the great majority of these vetoes are delivered after the adjournment of the legislature for the reasons discussed above. Witness the following figures:[34]

FULL VETOES
(Item vetoes excluded)

Year	Vetoes before adjournment	After adjournment (recess)
1911	5	17
1931	15	37
1951	16	118
1963	23	209
1965	27	253
1967	32	369

As was mentioned earlier, the difficulty of overriding this growing number of vetoes in Illinois has made the present system, for all practical purposes, an absolute veto power for the governor.

It has become rather apparent that on both the national level and on the state level the trend has been towards increasing the responsibility and power of the chief executive and towards decreasing the re-

[30] Because of cumulative voting in each of the three-member representative districts, the custom is in most districts for each party to nominate only two candidates. The result practically guarantees a minority of one-third, and usually produces a much closer balance between the parties.

[31] G. STEINER & S. GOVE, *supra* note 27, at 34.

[32] ILLINOIS LEGISLATIVE COUNCIL, *supra* note 20, at 9.

[33] ILLINOIS LEGISLATIVE COUNCIL, *supra* note 20, at 1.

[34] *Id.* at 3, except for 1965, which figure was supplied directly by the Illinois Legislative Council, and 1967, which figure was derived from an examination of dates of the veto messages in Kerner, *supra* note 29.

sponsibility and power of the legislative branch of government. It has become glaringly obvious that as the executive branch of government on the state level has increased in size and responsibility, there has been a corresponding decrease in the stature of the state legislatures. In most states the veto power has been shown by experience to be an almost absolute veto power. Illinois may be unique because of its cumulative voting system for members of the House of Representatives, but it is certainly not alone in feeling the effects of the strong veto in the traditional balance between legislature and executive.[35]

With specific reference to the Illinois situation, and with the situation discussed in this article in mind, it is the opinion of this writer that three steps should be taken to correct the Illinois Constitution to restore the balance of power between the executive and legislative branches of Illinois government.

First, the legislature, if it has adjourned *sine die*, or has been prorogued, ought to be permitted to reconvene upon the joint call of the President pro tem of the Senate and the Speaker of the House.

Second, the governor should be permitted to have sixty days to act on bills presented to him after adjournment. The bills, however, should be presented to him within ten days after the legislature adjourns, recesses, or is prorogued in June. This should give the governor enough time to act upon the bills passed, and yet it imposes a limitation which requires him to act within a reasonable time on all legislation passed.

Third, the present constitutional requirement necessitating a vote to override a veto by two-thirds of the total membership of each

[35] Prescott, *supra* note 11, at 112. Prescott in his study of the executive vetoes in American states looks rather dismally at the prospect of legislatures asserting themselves against the veto weapon of the governor. He concludes that, "the percentage of vetoed bills which were overridden has declined almost to the vanishing point." He further points out that constitutionally, the governor's veto power today is at a zenith and the trend is to strengthen it. "It remains to be seen whether even with the advancement that has been made in the field of legislative research and planning, that the legislatures can recapture their erstwhile influence and prestige."

McGeary, in his study of the Pennsylvania legislature, confirms the observations of Prescott by pointing out that at the time of his study only once in this century had the veto been overridden and only once had there been an attempt to override that failed (between 1934 and 1945). McGeary further finds no real effort being made to resurrect bills passing with large majorities. Rather after a veto they are laid perfunctorily on the table never more to be taken up. Pennsylvania, too, is a state in which up to 98% of the vetoes are made after adjournment. McGeary, *The Governor's Veto in Pennsylvania*, 41 AM. POL. SCI. REV. 941-46 (1947). *See also* Negley, *The Executive Veto in Illinois*, 33 AM. POL. SCI. REV. 1049-57 (1939).

house should be reduced to three-fifths of the membership present in each house. This recognizes the difficulty, especially in Illinois because of the cumulative voting system which guarantees a strong minority, in obtaining the necessary two-thirds vote to override the governor's vetoes.

The above constitutional changes would materially aid in restoring a proper balance between the governor and the legislature and would help revive the responsibility and importance of the legislature as a separate but co-equal branch of government.