

SOME THOUGHTS ON THE VETO*

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The American Presidency has exercised an enormous fascination on the minds of historians and political theorists. The result has been an immense literature, with currents and cross-currents of tendency, with evaluation countering evaluation, view neutralizing view. This literature, and particularly its historical component, is often resorted to for the ascertainment of the *correct* view of presidential power, or for arguments leading to what someone is putting forward as the correct view. This is as it should be. But to me the literature on the Presidency—and most emphatically the historical part—teaches a larger and more general truth. Questions about presidential power have in the past produced different answers in different minds; one can conclude that our own received views are self-evidently right only if one is willing to assert that such minds as those of Madison and J.Q. Adams could not see the obvious, as to something closer to them than to us. I would make the contrary assertion. The history of presidential power is a history of the resolution of doubtful questions that remain doubtful; it is not, as I think some would make it, a history of the gradual acceptance of evident truth. It is a history of the molding and remolding of material of high plasticity, still plastic today. For there is no reason to think that that material suddenly froze hard around about 1950.

Our generation—or, to the students among my hearers and readers—your generation—can still mold this office, can still to some practical purpose hold dialogue fundamentally searching the reach of its powers. It is worth examining the material freshly. And we are most strongly led to do this by the obvious fact that this office is not now performing in a satisfactory manner; it has assumed the form of a quadratic equation with two firm answers—“too much” and “too little”—and nothing firm in between. It seems we cannot find a resting place—or, better, a dynamic balance—between presidential weakness and presidential imperialism.

In March, or as soon thereafter as the Yale University Press completes its turnings, there will be forthcoming a book of dialogues¹ between me and my

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1. R. ECKHARDT & C. BLACK, *THE TIDES OF POWER: CONVERSATIONS ON THE AMERICAN CONSTITUTION* 7-9 (1976).

close friend of more than half a century, Congressman Bob Eckhardt of Texas—the one important name I really have a right to drop. At one point in these conversations, as we were talking about the immense and pervasive power—not only as custom but as law—of the unwritten American Constitution, Eckhardt mentioned and stressed the countervailing (though not disconfirming) fact—the fact that the written text remains and can always be recurred to, while the practices that have grown up around or parallel to the text are comparatively plastic. Nowhere are both these things more evidently true than with regard to the Presidency. A good start, then, is from the textually expressed powers of the Presidency, and chief stress may be placed upon what might now be made of them, or done about them. Let us remember, always, that we, quite as much as John Tyler, are the subjects of history, that the historians of the twenty-second century will look back on us to see what we made of the still plastic Presidency. The one thing it is almost impossible they will find is that we effected no major changes—that the material had hardened when Franklin Roosevelt or Lyndon Johnson was in office. Changes, and directions of change, there will certainly have been. The only thing we have to decide is to what extent we can, and will, shape this plastic material consciously and by public resolve. I stress the word “will”, as verb or noun; I have often made, and cannot make too often, the point that it is will, not new constitutional structure, that we need to make our government work.

I start (and in these remarks will finish) with the veto power. It stands first in the Constitution, because, though it concerns the Presidency, it makes the President a part of the legislative process, and so was placed in Article I.

Woodrow Wilson may have been the first to see fully into the importance of this power. His words are not always remembered today; some recent works on the Presidency consider the veto quite briefly, and as a sort of accidental feature of our system, one producing interesting and dramatic incidents from time to time, but not of pervading systematic importance. I think the obviously well-pondered words of Wilson ought to be quoted:

“For in the exercise of his power of veto, which is of course, beyond all comparison, his most formidable prerogative, the President acts not as the executive but as a third branch of the legislature.”²

And again:

“The President is no greater than his prerogative of veto makes him; he is, in other words, powerful rather as a branch of the legislature than as the titular head of the Executive.”³

(I read these words, when I got around to reading them, with some rue, for I had been saying the same thing for some time. Reading can be recommended on a number of grounds, unnecessary to be canvassed here, but it

2. W. WILSON, CONGRESSIONAL GOVERNMENT 52 (1884).

3. *Id.* at 260.

has the distinct drawback that, if indulged in to excess, it almost always destroys the precious illusion of the originality of one's own insights. My own, identical with Wilson's in all but context, arose from my asking myself, "To what state could Congress, without violating the Constitution, reduce the President?" I arrived at a picture of a man living in a modest apartment, with perhaps one secretary to answer mail; that is where one appropriation bill could put him, at the beginning of a new term. I saw this man as negotiating closely with the Senate, and from a position of weakness, on every appointment, and as conducting diplomatic relations with those countries where Congress would pay for an embassy. But he was still vetoing bills.)

It is interesting that these words of Wilson's occur in contexts that make little of the President's powers other than veto. Wilson, publishing in 1884, saw Congress as the overwhelmingly dominant power. Indeed, both the quotations just given (as the second one exhibits) form a part of this picture; that Wilson was saying that the President was powerful only as a part of Congress, which, in a sense, the veto power makes him. What I think Wilson did not see, or did not bring out with sufficient emphasis, was that this veto power, so firmly fixed in the text, could make the President, in the absence of energetic, principled and tactically imaginative resistance in Congress, the most important part of Congress. And that may be what happened, or is happening. (The weapon of the veto, moreover, could give the President offensive and defensive means for strengthening his other powers; used skillfully, it could get him out of that modest apartment. As to this more later.)

The history of the veto illustrates the power of text over expectation. The prime original purpose for the inclusion of this power was that it was thought to give the President the means of protecting his own office from Congressional encroachment.⁴ There may have been an anticipation that it would be used to vindicate the President's own constitutional views, by being interposed against legislation he considered unconstitutional. (This theme, though I cannot find it in the 1787-88 material, appears very early in veto practice and veto messages; consider Washington's first veto, below, and the other early vetoes. Tyler, in his first veto message, alludes to the prescribed Presidential oath as the source of the obligation to veto bills thought unconstitutional.⁵ This connects in my mind with the suggestion of George III that his coronation oath might obligate him to refuse the royal assent to certain bills.) Certainly it was anticipated that any other use than these would be sparing, would occur only in cases where "the public good was evidently and palpably sacrificed . . ."⁶ Hamilton, in the *Federalist*, even went so far as to suggest that "greater caution" in the use of the veto would be expectable in the case of the

4. See *THE FEDERALIST* No. 73 (J. Gideon ed. 1818) (A. Hamilton).

5. See *VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES* 159 (1886).

6. *THE FEDERALIST* No. 73, at 460 (J. Gideon ed. 1818) (A. Hamilton).

President than in the King of Great Britain,⁷ who by Hamilton's day, never refused the royal assent; this was hyperbole, natural in the polemic context, but even in its exaggeration it underscores an original understanding that the veto would be used only rarely, and certainly not as a means of systematic policy control over the legislative branch, on matters constitutionally indifferent and not menacing the President's independence.

The early history of the use of the veto more than sufficiently confirms this understanding, though like all the history I know anything about, it contains a residuum of unexplained occurrences. According to Mason's count,⁸ all the presidents up to Jackson vetoed nine bills. Washington vetoed two bills in eight years—one because of its plain unconstitutionality.⁹ The other, a bill reducing the size of the military establishment, may have been seen as a dangerous weakening of the country's military force, connected with the Commander-in-Chief power, so that the veto may well be thought to fall within the category of defense of the presidential office, in the very case against dangerous reduction of the force at its disposal for executing its duties.¹⁰ (Indeed, the veto message gives color to this view, for it mentions that one of the companies of dragoons which the bill would have had mustered out had "been lately destined to a necessary and important service"—not specified.) John Adams and Thomas Jefferson vetoed no bills—twelve years without a veto.

Madison vetoed six bills in eight years. Four of these were on constitutional grounds; two were, *prima facie*, on grounds of expediency. One of these two was a pocket veto; Madison thought the bill, which dealt with naturalization "liable to abuse by aliens having no real purpose of effectuating a naturalization . . ."¹¹

There was no policy disagreement; Madison approved of the general purpose of the bill, and at the next session of Congress an amended bill was passed and signed. The other "expediency" veto was plainly animated by a policy difference—the first veto clearly of that kind, and the only one of that kind before 1832. But it should be noted that the policy difference went to a life-and-death issue, connected with presidential responsibility; Madison vetoed a bill chartering a Bank of the United States, on the ground that the proposed charter, in his view, failed to provide adequately for circulating money in time of war, and for the conduct of the war.¹² Perhaps, without stretching too much, such a veto may (like Washington's second veto) be connected with protection of the President's role as Commander-in-Chief, and

7. *Id.* at 460.

8. See E. MASON, *THE VETO POWER* 142-43 (1891).

9. See *VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES*, *supra* note 6, at 9.

10. See *id.* at 9-10.

11. *Id.* at 13.

12. See *id.* at 14, 15.

with the effective execution of that power.

Monroe, eight years in office, vetoed one bill, on constitutional grounds, John Quincy Adams none. Though Jackson vetoed twelve, almost all of these were on constitutional grounds. Van Buren vetoed none.

Thus history, made by Presidents all of whom except Van Buren were old enough to remember the adoption of the Constitution, and covering more than the first half-century of the country's history, confirms in usage the view that the original expectation was that the veto would be sparingly employed, and used mainly as a means of defense of the presidency itself and of the Constitution.

Tyler vetoed pretty freely; he was the first to do so. It may be no accident that this happened in the case of the first President to whom the early years of the Constitution's operation were something to be read about; and it may be no accident that it happened in the case of the first President not elected President, but succeeding from the Vice-Presidency, for a want in the informal power of prestige may stimulate the use of an ultimate weapon. The reaction is described by Binkley:

President Tyler's veto of a tariff measure a year later induced the first move in our history toward the impeachment of a President of the United States. Representative John Miller Botts introduced the impeachment resolution charging the President "with the high crime and misdemeanor of withholding his assent to laws indispensable to the just operation of the government, which involved no constitutional difficulty on his part, of depriving the government of all legal sources of revenue, and of assuming to himself the whole power of taxation, and of collecting duties of the people without the authority or sanction of law.

On the motion of John Quincy Adams a select committee of thirteen was appointed which drew up a report formulated by Adams and arraigning Tyler for strangling legislation through the misuse of the veto power. In reply the President sent to the House a vigorous protest which that body, following the precedent set by the Senate in the case of Jackson's protest, treated as a breach of privilege and refused to receive on the ground that the House has the constitutional right of impeachment.

To the present generation the Whig movement to impeach a President for the exercise of the veto power must seem absurd. So popular has the exercise of this power become that its employment rarely fails to elicit applause. This generation has to be reminded that a century ago it had not yet become generally accepted that the President possessed the right to pass independent judgment as to the wisdom of a piece of legislation. He might resort to the veto to protect his office against encroachments or he might refuse his signature to a measure he considered unconstitutional but many believed that only Congress should determine the legislative policies of the government.¹³

The last paragraph comes perilously close to anachronism; it all but invites us to laugh, charitably perhaps, at the "absurd" views held by eminent and well-informed public men during the first fifty years under our Constitution.

13. W. BINKLEY, *PRESIDENT AND CONGRESS 97-98* (1947) (footnotes omitted).

What is really proved, I think, is that *we* have departed—in our expectations and in our tolerance of presidential practice—from the rather clearly demonstrated expectations of those whose expectations count most, the people who personally knew the Constitution's beginnings. We act at our great peril when we consider "absurd" something which seemed not at all absurd to John Quincy Adams—as searching and as balanced a mind as our politics has known.

But the text stayed there. It contained no limitations. It outlived all the people who understood, it may be, what limitations were placed upon it by an unspoken propriety. And if Tyler had not made a beginning toward its unlimited use, it was quite inevitable that some President would have done so.

It is tempting to go on through Cleveland's all-time record of over 300 vetoes, but I want to come on down to now, both to the eternal now of the text, and to the very present now of Mr. Ford's Presidency. Once the use of the veto as a weapon for the sheer enforcement of Presidential policy is firmly accepted as proper, how important is it structurally doomed to be, and how important has it become?

The veto as a weapon of policy obviously has its least importance where the President and majorities in the House and Senate are pretty much of one mind (though even there it may give great power over detail to the President). Our system does not guarantee that this will always be true—indeed one wonders whether, in some way yet mysterious, our system is not veering around to the point where it will rarely be true—where, in other words, the people may be expected to project, on the President and on Congress respectively, contradictory desires and expectations, as they so clearly did in 1972. The veto system then, if it can produce trouble, can produce major trouble. What are its potentialities?

Once it is thoroughly (and eagerly) accepted by the President that he may veto on any grounds he pleases, and once the people and Congress see this as raising no constitutional question, the major issue becomes the probability of override. Some obvious truths should be gone through here.

First, the raw probability of override is pretty convincingly shown by experience. When Mason wrote in 1890, 433 bills had been vetoed and 29 overridden, but 15 of these overrides occurred in the altogether exceptional circumstances of Andrew Johnson's administration.¹⁴ If we eliminate that unfortunate and to me unattractive man, there are 14 overrides out of 418 vetoes, or about 3 per cent. On Patterson's figures,¹⁵ through Franklin Roosevelt, and again eliminating Andrew Johnson, there were forty overrides out of 755 vetoes, some 5 per cent. Override is not easy, and does not often occur. Why?

Consider what has to happen. Within a fairly short time, you have to or-

14. See E. MASON, *supra* note 8, at 214.

15. See C. PATTERSON, *PRESIDENTIAL GOVERNMENT IN THE UNITED STATES* 53-54 (1947).

ganize a *two-thirds* vote in *each* House. So the first question is, "How hard is this likely to be in one House?"

Let's take the House of Representatives (and here I am indebted to my conversations with Bob Eckhardt). The usual situation, where there is a general opposition between the President and the House, is where the President is of a different party from the House majority. Now the one simple factor that is steady is party loyalty, reenforced by patronage. Let us take a Congress much like the present one, with about 290 Democrats and about 145 Republicans—figures I pick for the exact two to one ratio—and with a Republican President. In our politics, this is about as high as the majority in the House is likely to get. We ought to assume, until some reason to the contrary appears, that equal percentages of Democrats and Republicans will, in the long run, defect, both as to Democrats supporting the President and as to Republicans voting to override. But if (in our 290-145 House) ten per cent of the Republicans and ten per cent of the Democrats switch sides, the override loses by something like 275-160, a very decided victory for the President, as such things are interpreted, and in any case a failure of override by a wide margin.

How big a Democratic majority would it take to get around this? The answer, of course, depends on the percentage of defection. Assuming, *pro forma*, the same 10 per cent defection across party fences both ways, you would need 308 Democrats and 127 Republicans to have a "veto-proof" Congress. I apologize for any slight arithmetic error. The general picture is clear. On a party vote, with defections in equal proportions, override loses heavily in any imaginable House of Representatives.

Let us assume, since there is no reason not to, that the same situation exists in the Senate. And then (as reality requires, for a few overrides do occur) let us soften our assumptions a bit, or the consequences drawn from them, as to both Houses, and say, again *pro forma*, that override in either House has, say, one chance in four. It is important to note that this would mean that override in both Houses has one chance in 4^2 or 16, which is not far from what we find through history.

This very tentative arithmetical analysis could of course be faulted if other factors than party loyalty be regarded as constant, so that there was, systematically, a probability of greater defection from the President's party than from the opposition party. All the factors I can think of run the other way. The large-majority party has, almost *ipso facto* because of size, and certainly if it is the Democratic Party, more diversity of policy views within it than the minority party. The President, moreover, always has something to give or to promise, particularly to members of his own party. Or to threaten. All the factors to which no numbers can be given seem to me to confirm and strengthen the undoubtedly simplistic numerical analysis just given.

(Parenthetically, the situation is even worse where the majority party is the President's own, for in that case the party loyalty of the majority runs to the

President, and against override. F. D. Roosevelt vetoed 136 bills; 5 were overridden.)¹⁶

Now how is all this working out these days? I take the raw statistics, first, of the 93d Congress, and the 94th as far as available at this writing.¹⁷ There have been 52 vetoes. At this lowest ebb of Presidential prestige, eight have been overridden. Most of these overrides were on bills appropriating money for the benefit of particular classes of people—for nurses' training, handicapped persons, railroad retirees, school lunches, "rehabilitation". What happens here is that party lines break entirely, and you get votes like 384 to 43 in the House and 67 to 15 in the Senate (nurses' training) or 397 to 18 in the House and 79 to 13 in the Senate (school lunches) or 398 to 7 in the House and 90 to 1 in the Senate (handicapped persons). This sort of bill—and lopsided override—accounts for six of the eight overrides. The other two were the War Powers Resolution and a bill concerning executive office records, subjects charged with the highest political feeling, running against the Presidency.

On the other hand, bills dealing with economic controls on oil, with strip mining, with air pollution, with emergency employment, with petroleum allocation, were successfully vetoed.

It is always freshly boggling to read some of the numbers in the "sustaining" vetoes. The Petroleum Allocation Authority veto, for example, was "sustained" in the Senate by a vote of 61 to 39. No. Not 61 against the bill and 39 for it. Think again. Sixty-one to 39 was approximately the proportion of Johnson's "landslide" margin over Goldwater, and of Nixon's over McGovern. But it's not enough to override a veto. Or take the House vote "sustaining" the veto of a bill dealing with emergency unemployment—"sustained" in the House by a vote of 277 for override to 145 against.

My figures are all approximate (except for votes) and no one can put numbers on some of the factors in the veto game. All numbers, and all non-numerical considerations, establish to the point of large overkill that the overriding of a veto must be looked on as a rarity—that most vetoes stick, and will stick.

What are the consequences for American politics?

First and most obviously, the majorities, even quite large, in "Congress," as that word is commonly understood—that is to say, the House and the Senate—are powerless to fix American policy on anything, foreign or domestic, so long as Congress sticks to the forthright expression of policy judgment in a single bill, and attempts neither circumvention of the veto by "rider," nor reprisal. This simple truth should be printed up and nailed on the wall of every post office. Every candidate for the job of editorial-writer should be

16. *See id.* at 54.

17. All of these figures have been culled from informal sources.

required to take an examination with one question: "If 65 per cent in each House of Congress favor and pass a comprehensive bill on energy, and the President very much does not like it, what happens?" Because then we might hear (and above all, for the sake of mercy, read) less criticism of Congress for its "failure to act," and so on, ad nauseam. If you have a 65 per cent majority in each House strong for a consumer bill, say, and the President is dead set against it, then that consumer bill will not become law.

Secondly (and this paragraph might suggest the shape of another exam question, for editors-in-chief of dailies of over 100 thousand circulation), Congress knows this.

The result is, inevitably, that actual veto can be rather rare even now—the tip of the iceberg, to coin a phrase. For the practical task of the leadership of the House of Representatives and the Senate, in reality and as perceived by that leadership, is not to draft and pass a bill that seems good to strong working majorities in the House and Senate. It is to produce a bill, acceptable to those majorities, or reluctantly swallowed by those majorities, that may get by a veto.

I say and stress "may" because there is no means of compelling the President to announce in advance what his action will be on a bill, or what amendments it will take to buy his signature. Very often, the general direction of his views is known. But exactly how much movement toward those views will be necessary is normally not known.

I suppose here one begins to enter the field of force of games theory, which I know by name only. One player must move toward placating his opponent, while only the opponent knows what it will take to placate him—or perhaps has not yet decided what it will take. If he is not placated, all moves toward that end, and much more importantly toward the ends sought to be achieved by the legislation, will have been entirely in vain. Very often—perhaps typically—the result has to be a compromise which rests on no clear policy, which may be worse than the following-out of either policy—and which may be vetoed anyway. That is the real situation in which the veto power puts Congress, and every citizen should be brought to understand it.

There is one way out, as matters now stand. That is for Congress to accept, virtually verbatim, whatever "recommendations" the President makes. Presumably he will not often veto a bill that closely follows these recommendations. This recourse is not always available; the President may think no legislation needed in respect of a given subject. Perhaps more frequently—at least quite often—he will find it expedient to acknowledge the existence of a problem that needs to be acted on, but present a "White House" bill, that addresses the subject weakly, or in a manner known to be antagonistic to the judgment of majorities in Congress. This was Mr. Nixon's technique, for one example out of very many, with the problem of "consumer protection." To the strong bills put forward in Congress, Mr. Nixon countered with recom-

mendations which would have "protected" consumers as rice paper protects against a monsoon. What ensued was natural enough. Those in Congress who were uninterested in consumer protection, or opposed to it, were given a Presidential standard to which (whether or not wisely or honestly) they might repair. Those favoring strong protection were disheartened; a veto of any strong bill was seen as likely. The result was exactly what Mr. Nixon evidently wanted—no strong consumer bill was passed in his administration. Yet no veto had actually to be interposed.

Let me move on to a third and quite crucial point about the veto. I think the veto works in systematic coaction with all the "express" powers of President, in their relation to the "express" powers of Congress, and, most importantly, in coaction with the general "executive power." For there is an asymmetry here: The President may veto any independent action of Congress—indeed, no independent action of Congress, having the force of law, exists, except for the possibility, above evaluated, of override.

But Congress may not veto any independent action of the President, for the peculiar reason that its action in this regard would itself be subject to Presidential veto. This general proposition has some corollaries, or included cases. If the President believes that an Act of Congress encroaches upon his office, he may, under the strictest and most ancient standards, veto it; so, also, if he believes an Act of Congress unconstitutional. If Congress, however, believes that an action of the President encroaches on its powers, or is unconstitutional on other grounds, it may not veto it, because the congressional veto, to have effect as law, must be by concurrence of both Houses, and so, under Article I, § 7, is subject to Presidential veto.

Here is another games theory situation. Player P may not only forbid moves by player C that encroach on P's powers, but may also forbid C's moves where they would check P's perhaps wrong assertion of power. C has no such advantage. But maybe the less I say about games theory the better.

It is true that presidential overreachings, like Congressional overreachings, are subject to judicial oversight, but only in proper lawsuits. Cases cannot always be made.

Let us take the celebrated "destroyer deal." During World War II, and before our entry, Franklin Roosevelt traded the British fifty "overage" destroyers (always carefully so described in public materials, though one rather guesses they must have had life in them yet) for bases in the West Indies. (Bernard Shaw amiably remarked that, had the Americans but known, the British would have given them the bases—with responsibility to defend them—even without getting the destroyers.) Some people thought this unconstitutional; to simplify what is after all a schematized illustration, I will mention only Article IV, § 3, which gives Congress the power to "dispose of . . . Property belonging to the United States." Now suppose Congress had disapproved of this action, on constitutional grounds and on the ground that its

function was being taken over. Its means of disapproval, to have legal effect, would have to be a Joint Resolution; the President could and undoubtedly would have vetoed the Joint Resolution, or even a bill forbidding such transactions in the future.

But turn the situation around. Suppose Congress had wanted to make this deal, and had commanded it by Joint Resolution, while the President disapproved, and considered Congress's action an unconstitutional invasion of his powers as Commander-in-Chief—something like the considerations that may have moved Washington in his second veto, discussed above. The President would certainly have vetoed the Joint Resolution.

With the expansion of the conventionally acceptable range of reasons for veto, and with growth in the frequency of its use, these considerations apply to all policy matters, and not simply to constitutional and invasion-of-function matters. When Congress acts on pure policy within its scope of authority, the President may veto the action. When the President acts on pure policy, within the scope of the "executive power", Congress may not veto the action, unless a two-thirds vote in each House can be mustered for override—the probability of which we have already evaluated.

The asymmetry-of-veto may go far to explain the growth of the President's powers through history. When the President acts, as in the destroyer deal, he himself largely controls, by the known possibility of veto, any official reaction in Congress—any reaction having legal force. Thus one more uncontradicted precedent of successful assertion of Presidential power is created. But when Congress acts on any matter of policy, the President may veto that action.

Take another example, more or less at random—the 1817 "executive agreement" with Canada for reduction of armament on the Great Lakes.¹⁸ This has always seemed to me a less than satisfactory example of the pure "executive agreement"—first, because it was actually submitted to the Senate, and approved there, though after it had gone into effect; secondly, because neither party had or has any motive to violate it (so that its binding character internationally cannot be tested); and thirdly, because, under the most expanded concepts of "standing," no party has or ever had sufficient interest to question it in court (so that its force in municipal law cannot and could not be tested). But, letting all that pass, suppose Congress had wanted to disaffirm it. The President could and would have vetoed the disaffirming action.

Or take the function of the President in "recognizing" or not "recognizing" foreign countries, a function not expressly given him in the Constitution. There was trouble about this early along. If Congress had been disposed to "recognize" a country, the President could have vetoed the bill or Joint Reso-

18. See Matthews, *The Constitutional Power of the President to Conclude Executive Agreements*, 64 *YALE L.J.* 345, 355 (1955).

lution doing this. But if Congress attempted to disaffirm a presidential recognition of a country, the President could and would veto the Joint Resolution or bill.

It is against this background that one must consider the oft-repeated formula that goes to the general effect that the President's powers, insofar as they derive from the general "executive power," are interstitial and tentative, since Congress may undo what the President has done. True, in a sense. But not very important, since the disaffirming congressional action is subject to veto. Not true at all, if what one means is that majorities of, say, 65 per cent in each House—an enormous preponderance—may effectively disapprove and annul the presidential action. The result of this asymmetry is that the President, with what might be thought meager textual powers, is institutionally almost untrammelled, since he may veto disapproving action by the very body to which he is supposedly subject, while that body, textually empowered to an enormous degree, is institutionally bound toe and neck by the veto. This institutional reason for the development of Presidential power must be added to the one I have developed elsewhere¹⁹—the structural suitability of the Presidency for the exercise of power, as contrasted with the built-in manyheadedness of Congress.

On this aspect of the veto power—its peculiar and paradoxical disabling of Congress to speak in those cases where the President has power only because Congress has not spoken, I have said at another place:

While I am on the veto, I would like to make one somewhat subsidiary but I think very important point. Let me take you back to the question of the existence of a general "executive power." Without going into details, let me just say that I join the school of thought which would make the extent of such a power or even its existence in most cases, depend largely on the presence or absence of a Congressional determination covering the same policy ground. I take it that if one counts judges, instead of puzzling over the question why some judges who obviously did not believe in it joined the majority opinion, that is the general teaching of the *Youngstown Steel* case.²⁰

Mr. Justice Jackson's opinion in that case²¹ makes the distinctions most clearly. He discerns an ever-narrowing ambit of "executive" power as one progresses from the case where Congress has authorized or supported the presidential action, through the case where Congress has not spoken, to the endcase of express congressional disapproval of the presidential action. This seems to me a sensible spectrum for its purpose. But it leaves unanswered one question: Suppose "Congress," in the narrow sense of "House and Senate," disapproves of some Presidential action, and expresses its disapproval unambiguously either in a Joint Resolution which is vetoed and not passed by override, or in a Concurrent Resolution which simply expresses congressional opinion, without having the force of law, and so is not submitted for veto.

19. See Black, *The Working Balance of the American Political Departments*, HASTINGS CONSTITUTIONAL L.Q. 13 (1974).

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

21. 343 U.S. at 634.

What if anything does this do, in Justice Jackson's frame of reference, to the "executive power"? I think it arguable that independent executive power ought to be seen as greatly constricted under these circumstances. I think it too hasty a dismissal to say that this view violates Article I, Section 7, in that it gives force as law to a "Resolution" of Congress not approved by the President. I know the question is a close one, but I believe that the view just mentioned confuses the issue. The final question, after all, is whether the President's independent exercise of "executive power" is to have the force of law. The affirmative argument for its having this force usually has to be that Congress has formulated no policy for dealing with the presented subject matter. If the Senate and House actually have formulated and agreed on policy, even to the extent of disapproving a presidential step, then this seems to me, veto or no veto, necessarily to alter the factual and political background out of which the presidential power must emerge.

I think occasion might well arise when this could be tried. If it is, and if a justiciable case arises, I would hope that a court would hold that the fact of congressional disapproval, in the narrow sense I have mentioned, had great effect on the propriety of independent presidential action. If this is not so, then the President is in the (to me) paradoxical position of being able to claim the necessity of interstitial or emergency action because of congressional inaction, when he himself, by his veto, has produced this situation.²²

I would only add to this one further thought—that there is another possible use of the Concurrent Resolution that might be a useful weapon in Congress' hands, even where no justiciable law case can be made. Such a Resolution, needing only a simple majority and not subject to veto, might be used in an appropriate case formally to express Congress' disapproval or protect over a presidential claim and exercise of some power which in Congress' view the President does not possess—or even to record Congress' disagreement on policy. If (to take the most conspicuous and most tragic example) Congress had at any time passed such a Resolution formally expressing abhorrence of the Viet Nam War, it is hard for me to believe that that war could have continued very long thereafter. In any case, such a Resolution, expressing merely the sense of Congress, could always prevent the fixing into place of yet one more uncontradicted precedent supporting the existence or the mode of use of the "executive power."

On the whole, Congress, tied down by the veto power, ought to explore fully the use of the Concurrent Resolution. A formal expression of views is, for one thing, a conspicuous event, putting Congress, to some degree, in the newsworthy position which the President automatically and continuously occupies. And the moral effect of such Resolutions could be great—to the point actually of influencing public opinion and therefore presidential action. In the most serious cases, such a Resolution could amount to a solemn warning—by the body ultimately charged with the relevant responsibility—that the question of impeachment may be coming into view.

22. Tucker lecture by Charles Black, Washington and Lee University, *forthcoming in* 34 WASH. & LEE L. REV. (1977).

All this is, of course, only a very partial answer to the veto problem. I cannot now think of any complete answer.

One possibility is constitutional amendment. Such an amendment could lower the majority necessary for override, or even perhaps expressly lay upon President some limitation of grounds for veto—limitations which would in the first instance have to be policed very largely by his own political morality, though evident transgression would probably make override more likely. I shrink, even now, from fundamental amendment of a Constitution that has worked as well as ours has, overall. (This feeling once so full-hearted, fades these days—yet I cling to it.) Specifically, I fear the dismantling of any mechanism of leadership, unless and until an alternative appears—and it is the veto, far more than anything else, that makes the President a leader as to legislation.

Short of constitutional amendment, I would recommend first, that Congress—*pari passu* with its development of leadership capacity in itself—take heart and use freely any one of its present powers through which it may indirectly affect the veto power. The rider should be used with discrimination but unabashedly—not as a mere trick, but as a means of restoring constitutional balance. Congress has the ultimate power—the power of the purse—and it is not impossible that, before the historians of the twenty-second century pick up their, to us, unimaginably well-engineered pens, Congress may have become emboldened enough, and have developed leadership enough, to use it.

Two recent developments may contribute to making this appropriate. The Twenty-second Amendment has now brought it about—foolishly, in my view—that in any President's second term the veto power, with all the other Presidential powers, is employed without any possible responsibility or accountability to any electorate, with nothing to gain or lose. The Twenty-fifth Amendment (probably more foolish than the Twenty-second, though it is hard to strike the balance of folly between them) has brought it about that the Presidency may be occupied, as it is now occupied, by someone never elected either to that office or to the Vice-Presidency. Someone never elected to anything, someone who never even held public office, could become President by appointment.

I find I have written entirely on the veto, though with attention to its relations with other powers. It is, as Wilson saw so clearly, by far the greatest of the President's powers. It stimulates the growth of all the others, for it makes nearly impossible congressional pruning-back of that growth. The mere possibility of its exercise cuts deep into the legislative process, affecting that process from the beginning.

I am irresolute, as I have shown, as to remedy. But I am resolute on one thing. The American people should be brought to understand this power in all its reach; out of such understanding some remedy may come—perhaps by

way of a new convention, enforced by public opinion, as to the proprieties of the exercise of this ultimate weapon. It may seem impossible now, but over decades it may come to be perceived, by the public and by Congress, that government by veto is an undesirable thing in itself, quite apart from the merits of any particular bill. If this should happen, then it might be that Congress, urged on or at least freed by public opinion, would develop a convention of override on pure policy vetoes. Such a convention could be implemented without outrage to any individual conscience, for override requires only a two-thirds vote of those *present*, provided there is a quorum,²³ and these conditions could be met by the mere absence of Members of Congress and Senators who could not conscientiously cast a vote for the bill.

(A coda on the "pocket veto": In seminar, a student of mine, Richard Zuckerman, Yale Law '75, did a study on this, and whatever learning I have on it comes from him. The modern question, however, seems to me to need no learning. My summary and decided opinion is that, under modern conditions, a necessary element in the pocket veto—that Congress by adjournment "*prevent*" the return of the bill—is plainly missing, if each House, during adjournments (which now are always fairly short), has designated an agent to receive vetoed bills and messages. The "pocket veto" was put into Article I to prevent *Congress'* frustrating the President's veto power by adjournment. When Congress sets up arrangements which *eliminate* that effect of adjournment, there is no reason why the "pocket veto" should continue to have force; indeed, it no longer has any warrant in the literal text, if one reads that text freshly. The text does not say, or necessarily imply, that adjournment will always "prevent" return; it provides only for the case where it does. The pocket veto is an absolute veto not subject to override, and no reasons need to be given for it; such an institution should be treated *stricti juris*, and if return is in fact *not* "prevented," then that should be good enough.)

23. Missouri Pacific Ry. Co. v. Kansas, 248 U.S. 276 (1919).