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# Is the Item Veto Constitutional

Eugene Gressman

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## OBSERVATION

### IS THE ITEM VETO CONSTITUTIONAL?

EUGENE GRESSMAN†

Presidents of the United States have repeatedly urged that they be armed, either by statute or constitutional amendment, with item veto power. That power would permit a President to selectively approve and disapprove individual items or sections in bills passed by Congress and presented to the Executive for approval or disapproval. Already in place in most state constitutions, the item veto is deemed particularly useful to Presidents acting on appropriation bills; questionable “pork barrel” items could be disapproved without having to veto the entire appropriation bill.

Item veto legislation, however, may violate the constitutional requirements respecting presidential vetoes. The Executive’s powers of disapproval are set forth in article I, section 7, clauses 2 and 3 of the Constitution. Those provisions confer power on the President to veto “Every Bill which shall have passed the House of Representatives and the Senate.” The problem lies in the word “Bill.” By long usage and plain meaning, “Bill” means any singular, entire piece of legislation in the form in which it was approved by the two Houses. The constitutional question is whether Congress, by statutory fiat, can expand the word’s meaning by defining as a separate “Bill” each section, paragraph, or item contained within a single “Bill” that passes both Houses as an entirety.

This constitutional question is raised by the provisions of a Senate proposal, known as Senate Bill 43.<sup>1</sup> Senate Bill 43 proposes that the President be given item veto authority with respect to appropriation bills only, for a two-year trial period.<sup>2</sup> Those provisions appear to me to be particularly vulnerable to constitutional infirmity.

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† William Rand Kenan Professor of Constitutional Law, University of North Carolina School of Law. This Observation is drawn from a letter by Professor Gressman, dated July 23, 1985, addressed to several United States Senators. The letter was sent during the Senate consideration of Senate Bill 43, 99th Cong., 1st Sess. (1985). The Bill had been introduced by Senator Mattingly and cosponsored by 46 other Senators. It was reported unfavorably by the Senate Committee on Rules and Administration. S. REP. NO. 92, 99th Cong., 1st Sess. (1985). The Bill was then subjected to a filibuster on the floor of the Senate. It was withdrawn from consideration, at least temporarily, after a third attempt to impose cloture and to end the filibuster failed. 131 CONG. REC. S9942 (daily ed. July 24, 1985).

1. S. 43, 99th Cong., 1st Sess. (1985).

2. Senate Bill 43 describes itself as a bill

[t]o provide that each item of any general or special appropriation bill and any bill or joint resolution making supplemental, deficiency, or continuing appropriations that is agreed to by both Houses of the Congress in the same form shall be enrolled as a separate bill or joint resolution for presentation to the President.

*Id.*

Subsection (a)(1) directs the enrolling clerk in each House to “enroll each item of such [appropriation] bill or joint resolution [as shall have passed both Houses] as a separate bill or joint resolu-

In my opinion, the item veto procedure set forth in Senate Bill 43 is contrary to both the language and the spirit of the bicameral-presentment provisions of the Constitution.<sup>3</sup> Under Senate Bill 43, after an appropriation bill or joint resolution has passed both Houses of Congress in final form and the measure is ready for enrollment for presentment to the President, the enrolling clerk of the House in which the measure originated is directed "to enroll each item [that is, defined as "any numbered section and any unnumbered paragraph" of the appropriation measure as passed] as a separate bill or joint resolution."<sup>4</sup> Each such fragmented "item" is deemed for Senate Bill 43 purposes to be "a bill under Clauses 2 and 3 of Section 7 of Article I of the Constitution."<sup>5</sup> Each such fragmented "bill" is then to be presented to the President for approval or disapproval.

Thus, under the Senate Bill 43 model, an appropriation bill containing 300 separate appropriation items, which was considered and passed by both Houses as a single, whole bill, would be translated at the enrollment stage into 300 separate bills for presentment and veto purposes. But none of those 300 bills would have been considered, voted on, or passed by the two Houses as a separate bill formulation. That is the factor which compels me to conclude that Congress cannot pass or enact 300 separate appropriation bills without subjecting each of the 300 bills to the full deliberative processes of the two Houses. The enrollment process is simply not a part of the legislative procedures set forth in the Constitution.

The Constitution does not permit enactment of such a "section and paragraph veto authority."<sup>6</sup> This becomes clear from a reading of the language of the presentment clauses of the Constitution. Although there is no judicial prece-

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tion, as the case may be." Subsection (b) contains a self-serving declaration by Congress that each such separately enrolled item

shall be deemed to be a bill under Clauses 2 and 3 of Section 7 of Article 1 of the Constitution of the United States and shall be signed by the presiding officers of both Houses of the Congress and presented to the President for approval or disapproval (and otherwise treated for all purposes) in the manner provided for bills and joint resolutions generally.

Subsection (c) defines the term "item" as "any numbered section and any unnumbered paragraph" of an appropriation bill or joint resolution.

3. U.S. CONST. art. I, § 7, cls. 2, 3. The pertinent part of the second clause of § 7 reads:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.

The third clause of § 7 reads:

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

4. S. 43, 99th Cong., 1st Sess. (1985).

5. *Id.*

6. This phrase is derived from the provision in subsection (c) of Senate Bill 43 that defines the term "item," for purposes of presentment to and possible veto by the President, to mean "any numbered section and any numbered paragraph" of an appropriation bill.

dent or authoritative commentary directly addressing this constitutional problem, we do know that the words of the presentment clauses, like all other constitutional language, "are to be taken in their natural and obvious sense, and are to be given the meaning they have in common use unless there are very strong reasons to the contrary."<sup>7</sup> Moreover, the Supreme Court's decision in *INS v. Chadha*<sup>8</sup> gives strong expression to the bicameral nature of legislative action taken within the contours of the presentment clauses. From such sources, I construct the following rationale for my conclusion.

First, under the plain language of the presentment clauses, the bill or resolution that is to be presented to the President before it can become law is one that has "passed [both] the House of Representatives and the Senate."<sup>9</sup> It tortures the English language to say that, in the 300-item hypothetical mentioned above, 300 separate bills were in fact "passed [by both] the House of Representatives and the Senate." Obviously, neither House would have seen or considered or debated or voted on 300 separate bills or resolutions, even after final emergence from a conference committee. A fragmented bill that is never subjected to the full bicameral process is not a bill or resolution within the meaning of the presentment clauses.

Second, the enrollment process, wherein the fragmentation occurs under Senate Bill 43, is not mentioned in the Constitution as a step in the bicameral development of a bill or resolution to be presented to the President. Nor is it considered a part of the "step-by-step, deliberate and deliberative process,"<sup>10</sup> by which the two Houses consider and pass a given bill or resolution. Enrollment is a ministerial creature of internal procedure, a meticulous preparation of "the final form of the bill, as it was agreed to by both Houses, for presentation to the President."<sup>11</sup> Thus when an enrolling clerk is directed by Senate Bill 43 to disassemble a unitary appropriation bill passed by both Houses and reconstitute it into 300 separate bills, the clerk is not enrolling what was in fact "agreed to by both Houses." Rather, the clerk is dividing a single bill into 300 separate bills. That kind of bill division, I submit, can only be performed by the two Houses themselves, acting in the traditional bicameral fashion.

Third, the decision whether to adopt and then present one or 300 bills is a matter of legislative choice, a "kind of decision that can be implemented only in accordance with the procedures set out in Art. I."<sup>12</sup> The political and practical factors and the give-and-take of the competing interests that enter into the passage of a single appropriation bill may be significantly different from those involved if the two Houses considered 300 appropriation bills separately. Those deliberative political functions cannot be short-circuited by authorizing the en-

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7. The Pocket Veto Case, 279 U.S. 655, 679 (1929); see *Wright v. United States*, 302 U.S. 583, 588 (1938).

8. 462 U.S. 919 (1983).

9. U.S. CONST. art. I, § 7, cl. 2.

10. *Chadha*, 462 U.S. at 959.

11. C. ZINN, HOW OUR LAWS ARE MADE, H.R. DOC. NO. 509, 94th Cong., 2d Sess. 44 (1976).

12. *Chadha*, 462 U.S. at 954.

rolling clerk to change the nature, the form, and the number of appropriations to be considered "passed" by both Houses for presentation to the President.

Put differently, Congress cannot delegate to an enrolling officer in either House the legislative function of deciding how many appropriation bills shall be presented to the President, or the form those bills shall take. *Chadha* held that Congress cannot delegate to a single House any kind of legislative function that must be performed by both Houses in a bicameral manner, such as the enactment of a bill or resolution that affects the interests of those outside the legislative branch.<sup>13</sup> By an even larger token, because an appropriation is of the essence of a legislative judgment both as to substance and form, Congress cannot delegate such decision-making to an enrollment clerk. I must emphasize that Senate Bill 43 deals with something more fundamental than a matter of ministerial form or internal procedure or rules. It deals with an integral part of the deliberative bicameral process, which must "be exercised in accord with a single, finely wrought and exhaustively considered, procedure."<sup>14</sup>

Fourth, I suggest that the Senate Bill 43 procedure would unconstitutionally augment the presidential veto powers by permitting the President to veto appropriation bills or items that were never separately considered or passed by the two Houses in such fragmented form. There is no language in the presentment clauses that entitles the President to approve or veto a bill other than in the form in which it passed both Houses. Those clauses clearly state that the bill which is to be presented to the President, the bill that he may veto or approve, is the bill "which shall have passed the House of Representatives and the Senate." In other words, the President has no constitutional authority to pick and choose from among 300 appropriation bills—none of which was separately considered by both Houses—those that he approves or disapproves.

This last constitutional consideration may well be the source of the commonly expressed fears that giving the President item veto authority would significantly alter the balance of power between the Executive and the Congress. By permitting the President to exercise item veto power over appropriations, Senate Bill 43 would augment presidential involvement in the legislative process beyond what the framers of the presentment clauses intended. Such augmentation would be at the expense of the Congress, which would lose its established power to present appropriation bills to the President in the precise form produced by the deliberative processes of the two Houses.

That the lack of presidential item veto power may be thought to produce inefficiency and undue burdens on governmental processes is no constitutional excuse for freeing the exercise of executive or legislative power from "the carefully crafted restraints spelled out in the Constitution."<sup>15</sup> The explicit prescription for bicameral legislative action embodied in the presentment clauses, whereby Congress presents to the President only those bills that have truly been subjected to the full deliberative process, cannot be amended by legislation, as

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13. *Id.* at 948-59.

14. *Id.* at 951.

15. *Id.* at 959.

Senate Bill 43 seeks to do.<sup>16</sup> Nor can Congress, by statute, redefine the constitutional term "Bill" to include each and every "item" in a duly enacted unitary bill. The item veto device, at least in the form proposed by Senate Bill 43, is quite inconsistent with the bicameral and presentment procedures mandated by article I, section 7, clauses 2 and 3 of the Constitution.

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16. See *id.* at 958 n.23.

