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Sec. 7—Bills and Resolutions

Cls. 1–3—Legislative Process

nity proclamation issued by the President in 1868 did not require reversal of a decree condemning property seized under the Confiscation Act of 1862.<sup>506</sup>

**Presentation of Resolutions**

The purpose of clause 3, the Orders, Resolutions, and Votes Clause (ORV Clause), is not readily apparent. For years it was assumed that the Framers inserted the clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.<sup>507</sup> Why a separate clause was needed for this purpose has not been explained. Recent scholarship presents a different possible explanation for the ORV Clause—that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override.<sup>508</sup> If construed literally, the clause could have bogged down the intermediate stages of the legislative process, and Congress made practical adjustments. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the clause had been interpreted over the years. Briefly, it was shown that the word “necessary” in the clause had come to refer to the necessity for law-making; that is, any “order, resolution, or vote” must be submitted if it is to have the force of law. But “votes” taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or “sense” of the Congress.<sup>509</sup>

Although the ORV Clause excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments, the practice and understanding, beginning with the Bill of Rights, has been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. *Hollingsworth v. Virginia*,<sup>510</sup> in which the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President, is

<sup>506</sup> 12 Stat. 589 (1862).

<sup>507</sup> See 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (rev. ed. 1937), 301–302, 304–305; 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 889, at 335 (1833).

<sup>508</sup> Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005).

<sup>509</sup> S. REP. NO. 1335, 54th Congress, 2d Sess.; 4 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 3483 (1907).

<sup>510</sup> 3 U.S. (3 Dall.) 378 (1798).

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usually cited for the proposition that presentation of constitutional amendment resolutions is not required.<sup>511</sup>

**The Legislative Veto.**—Beginning in the 1930s, the concurrent resolution (as well as the simple resolution) was put to a new use—serving as the instrument to terminate powers delegated to the Chief Executive or to disapprove particular exercises of power by him or his agents. The “legislative veto” or “congressional veto” was first developed in context of the delegation to the Executive of power to reorganize governmental agencies,<sup>512</sup> and was really furthered by the necessities of providing for national security and foreign affairs immediately prior to and during World War II.<sup>513</sup> The proliferation of “congressional veto” provisions in legislation over the years raised a series of interrelated constitutional questions.<sup>514</sup> Congress until relatively recently had applied the veto provisions to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—then began expanding the device to give itself a negative over regulations issued by executive branch agencies, and proposals were made to give Congress a negative over all regulations issued by executive branch independent agencies.<sup>515</sup>

<sup>511</sup> Although *Hollingsworth* did not necessarily so hold (see *Tillman, supra*), the Court has reaffirmed this interpretation. See *Hawke v. Smith*, 253 U.S. 221, 229 (1920) (in *Hollingsworth* “this court settled that the submission of a constitutional amendment did not require the action of the President”); *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth* the Court “held Presidential approval was unnecessary for a proposed constitutional amendment”).

<sup>512</sup> Act of June 30, 1932, § 407, 47 Stat. 414.

<sup>513</sup> See, e.g., Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

<sup>514</sup> From 1932 to 1983, by one count, nearly 300 separate provisions giving Congress power to halt or overturn executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing was included in *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 96–398, 96th Congress, 2d Sess. (1981), 731–922. A more up-to-date listing, in light of the Supreme Court's ruling, is contained in H. Doc. No. 101–256, 101st Cong., 2d sess. (1991), 907–1054. Justice White's dissent in *INS v. Chadha*, 462 U.S. 919, 968–974, 1003–1013 (1983), describes and lists many kinds of such vetoes. The types of provisions varied widely. Many required congressional approval before an executive action took effect, but more commonly they provided for a negative upon executive action, by concurrent resolution of both Houses, by resolution of only one House, or even by a committee of one House.

<sup>515</sup> A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d sess. See H. REP. NO. 94–1014, 94th Congress, 2d sess. (1976), and 122 CONG. REC. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills were not adopted. See *Regulatory Reform and Congressio-*

and some thought that Congress would be the first to perceive the need for amendment and that to leave the matter to the discretion of the states would mean that no alterations but those increasing the powers of the states would ever be proposed.<sup>12</sup> Madison's proposal was adopted, empowering Congress to propose amendments either on its own initiative or upon application by the legislatures of two-thirds of the states.<sup>13</sup> When this provision came back from the Committee on Style, however, Gouverneur Morris and Gerry succeeded in inserting the language providing for a convention upon the application of the legislatures of two-thirds of the states.<sup>14</sup>

**Proposals by Congress.**—Few difficulties of a constitutional nature have arisen with regard to this method of initiating constitutional change, the only method, as we noted above, so far successfully resorted to. When Madison submitted to the House of Representatives the proposals from which the Bill of Rights evolved, he contemplated that they should be incorporated in the text of the original instrument.<sup>15</sup> Instead, the House decided to propose them as supplementary articles, a method followed since.<sup>16</sup> It ignored a suggestion that the two Houses should first resolve that amendments are necessary before considering specific proposals.<sup>17</sup> In the *National Prohibition Cases*,<sup>18</sup> the Court ruled that, in proposing an amendment, the two Houses of Congress thereby indicated that they deemed revision necessary. The same case also established the proposition that the vote required to propose an amendment was a vote of two thirds of the Members present—assuming the presence of a quorum—and not a vote of two-thirds of the entire membership.<sup>19</sup> The approval of the President is not necessary for a proposed amendment.<sup>20</sup>

<sup>12</sup> Id. at 558 (Hamilton).

<sup>13</sup> Id. at 559.

<sup>14</sup> Id. at 629–630. "Mr. Madison did not see why Congress would not be as much bound to propose amendments applied for by two-thirds of the state as to call a Convention on the like application. He saw no objection however against providing for a Convention for the purpose of amendments, except only that difficulties might arise as to the form, the quorum etc. which in Constitutional regulations ought to be as much as possible avoided."

<sup>15</sup> 1 ANNALS OF CONGRESS 433–436 (1789).

<sup>16</sup> Id. at 717.

<sup>17</sup> Id. at 430.

<sup>18</sup> 253 U.S. 350, 386 (1920).

<sup>19</sup> 253 U.S. at 386.

<sup>20</sup> In *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798), the Court rejected a challenge to the Eleventh Amendment based on the argument that it had not been submitted to the President for approval or veto. The Court's brief opinion merely determined that the Eleventh Amendment was "constitutionally adopted." Id. at 382. Apparently during oral argument, Justice Chase opined that "[t]he negative of the President applies only to the ordinary cases of legislation: He has nothing to do with the proposition, or adoption, of amendments to the Constitution." Id. at 381. See

**The Convention Alternative.**—Because it has never successfully been invoked, the convention method of amendment is surrounded by a lengthy list of questions.<sup>21</sup> When and how is a convention to be convened? Must the applications of the requisite number of states be identical or ask for substantially the same amendment, or merely deal with the same subject matter? Must the requisite number of petitions be contemporaneous with each other, substantially contemporaneous, or strung out over several years? Could a convention be limited to consideration of the amendment or the subject matter which it is called to consider? These are only a few of the obvious questions, and others lurk to be revealed on deeper consideration.<sup>22</sup> This method has been close to being used several times. Only one state was lacking when the Senate finally permitted passage of an amendment providing for the direct election of senators.<sup>23</sup> Two states were lacking in a petition drive for a constitutional limitation on income tax rates.<sup>24</sup> The drive for an amendment to limit the Supreme Court's legislative apportionment decisions came within one state of the required number, and a proposal for a balanced budget amendment has been but two states short of the requisite number for some time.<sup>25</sup> Arguments existed in each instance against counting all the petitions, but the political realities no doubt are that if there is an authentic national movement underlying a petitioning by two-thirds of the states there will be a response by Congress.

**Ratification.**—In 1992, the nation apparently ratified a long-quieted 27th Amendment, to the surprise of just about everyone. Whether the new Amendment has any effect in the area of its sub-

Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005), for extensive analysis of what *Hollingsworth's* delphic pronouncement could mean. Whatever the Court decided in *Hollingsworth*, it has since treated the issue as settled. See *Hawke v. Smith* (No. 1), 253 U.S. 221, 229 (1920) (in *Hollingsworth*, "this court settled that the submission of a constitutional amendment did not require the action of the President"); *INS v. Chadha*, 462 U.S. 919, 955 n.21 (1983) (in *Hollingsworth*, "the Court held Presidential approval was unnecessary for a proposed constitutional amendment . . .").

<sup>21</sup> The matter is treated comprehensively in C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st Sess. (Comm. Print; House Judiciary Committee) (1957). A thorough and critical study of activity under the petition method can be found in R. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* (1988).

<sup>22</sup> *Id.* See also *Federal Constitutional Convention: Hearings Before the Senate Judiciary Subcommittee on Separation of Powers*, 90th Congress, 1st Sess. (1967).

<sup>23</sup> C. Brickfield, *Problems Relating to a Federal Constitutional Convention*, 85th Congress, 1st sess. (Comm. Print; House Judiciary Committee) (1957), 7, 89.

<sup>24</sup> *Id.* at 8–9, 89.

<sup>25</sup> R. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 73–78, 78–89 (1988).