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Seth Barrett Tillman

The Heritage Guide to the Constitution

Fully Revised Second Edition

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from committee or subcommittee chairmanship, and fine. Each house sets its own procedures for punishments less than expulsion. Conviction is by a simple majority. There have been a total of nine Senators and twenty-three House members censured. Censure in the House is more formal. The censured Member must rise while the Speaker reads aloud the actions for which he is being rebuked. In addition, when a Member of Congress is convicted of a crime, he is expected to refrain from voting unless and until his conviction is overturned or he is re-elected.

One important recent development is the establishment of the Office of Congressional Ethics, an internal entity charged with reviewing allegations of misconduct and recommending action to the House Ethics Committee. The Senate has not taken similar action.

David F. Forte

See Also

Article I, Section 5, Clause 1 (Qualifications and Quorum)

Suggestions for Further Research

Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 Wm. & Mary L. Rev. 805 (2010)

Anne M. Butler & Wendy Wolff, United States Senate Election, Expulsion, and Censure Cases, 1793–1990 (1995)

Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L. J. 177 (2008)

Josh Chafetz, *Congress's Constitution*, 160 U. Pa. L. Rev. 715 (2012)

Laura Krugman Ray, *Discipline Through Delegation: Solving the Problem of Congressional Housecleaning*, 55 U. Pitt. L. Rev. 389 (1994)

John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case W. Res. L. Rev. 489 (2001)

Ronald D. Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707 (1988)

Significant Cases

United States v. Ballin, 144 U.S. 1 (1892)

In re Chapman, 166 U.S. 661 (1897)

Powell v. McCormack, 395 U.S. 486 (1969)

House Journal

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

(Article I, Section 5, Clause 3)

The requirement to publish a journal of each house's proceedings occasioned little debate either in the Constitutional Convention or at the ratifying conventions. The British provenance of the practice was well established. The official House of Lords Journal and House of Commons Journal had begun in the early sixteenth century, but the "Parliament Rolls of Medieval England" stretched back much further into the thirteenth century. Parliament's journals, however, merely summarized the activities of each house: the recording of bills proposed, votes counted, and bills passed. Only beginning in 1771 was there a concerted effort to have the actual debates set down, which Parliament finally acceded to in 1803.

Although Justice Joseph Story stated in his *Commentaries on the Constitution of the United States* (1833), "The object of the whole clause is to ensure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents," the Framers in fact did not require the recording of debates but only the basic proceedings as had been the previous British practice. In fact, the official journals of each house contain a list of the bills and resolutions that are introduced, but they do not normally include the text. Instead, in the early decades of the republic, newspaper reporters, either from the galleries or more frequently

from the floor, attempted to record or summarize debates for their publications.

Moreover, there was a provision for secrecy in the clause, which stirred much controversy. At the Constitutional Convention, Oliver Ellsworth unsuccessfully moved to have the secrecy option deleted, while at the Virginia ratifying convention, Patrick Henry railed, "The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them." Others feared that, even aside from the secrecy provision, the permission to publish a journal "from time to time" would allow either branch of Congress to conceal its doings. James Madison assured his fellow Virginians that the discretion was only to allow flexibility for the purposes of accuracy and convenience.

The secrecy provision applies to whether the House or the Senate will have its daily proceedings accessible to the public. Both history and judicial opinion have determined that each house possesses complete discretion over what proceedings shall be secret. *Field v. Clark* (1892). For the first twenty years of the country, secret sessions were frequent. Beginning with the War of 1812, however, both houses have kept most of their proceedings open to the public. The Senate is most likely to hold secret sessions, but over the last seventy-five years, it has done so only during debates over impeachment, classified information, and national defense. The Senate did keep its committee sessions closed, however, until the 1970s.

In 1834, Joseph Gales and William Seaton began the commercially published *Annals of Congress*. Its formal title is *The Debates and Proceedings in the Congress of the United States.* Part of *The Annals* consisted of reports of the First Congress from Thomas Lloyd, a shorthand writer, who published his record of debates in *The Congressional Register,* but whose product has been termed "incomplete and unreliable." Unfortunately, Lloyd was often intoxicated when he took notes, and a later comparison of his notes to what he published in *The Congressional Register* show "only slight resemblance" between the two. *The Annals* also compiled selected paraphrased remarks of the Members of Congress in their speeches and debates gathered from newspaper accounts. The project took twenty-two years to complete, and when finished, covered the years from 1789 to 1824. Congress began underwriting the project in 1849. Meanwhile, in 1824, Gales and Seaton attempted to record contemporaneous debates and publish them in the *Register of the Debates in Congress*, which continued until 1837. Both publications reported Members' remarks in the third person.

A competitive private publication, *The Congressional Globe*, began in 1833. Published by Francis Blair and John C. Rives, it did not at first attempt to include debates verbatim, but only summaries. Reportedly, as Gales and Seaton were Whigs, and Blair and Rives Democrats, partisanship marred the objectivity of *The Globe*'s editing. Later, *The Globe* attempted to record Members' statements verbatim and in the first person. The publication continued until 1873, at which time Congress initiated *The Congressional Record.* The now official *Record* reports the debates on the floor of each House nearly verbatim, and it can also include undelivered remarks and documents. A federal judge has held that the rules allowing a Member of Congress to edit his remarks before publication are unreviewable by the courts. *Gregg v. Barrett* (1985).

Media access continues to be a major method for the political accountability of the House and Senate. In the very early years, as noted, newspaper reporters normally had free access to the floor to report on or record the statements of the Members. In recent years, radio and television have increased the public's access to Congress's proceedings.

David F. Forte

See Also

Article I, Section 6, Clause 1 (Speech and Debate Clause)

Suggestions for Further Research

N. David Bleisch, *The Congressional Record and the First Amendment: Accuracy Is the Best Policy*, 12 B.C. ENVTL. AFF. L. REV. 341 (1985)

James H. Huston, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986)

Richard J. McKinney, *An Overview of the Congressional Record and Its Predecessor* Publications, in 46 LAW LIBR. LIGHTS 16 (Winter 2002)

Elizabeth Gregory McPherson, *Reporting the Debates of Congress*, 28 Q. J. OF SPEECH 141 (1942)

Seth Barrett Tillman, *The Annals of Congress, the Original Public Meaning of the Succession Clause, and the Problem of Constitutional Memory* (2011), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524008

Significant Cases

Field v. Clark, 143 U.S. 649 (1892)

Gregg v. Barrett, 771 F.2d 539 (D.C. Cir. 1985)

Adjournment

> **Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.**
>
> (ARTICLE I, SECTION 5, CLAUSE 4)

Dividing the legislative department into two chambers was one of the most important checks on the legislative power that the Framers devised. At the same time, the Framers believed that it was vital to the affairs of the nation that one house not be permitted to keep Congress as a whole from meeting and performing its functions. Under this clause, neither house can use its power to adjourn to another time or to another place in order to check the actions of the other legislative chamber. If the two houses cannot agree on a time of adjournment, then pursuant to Article II, Section 3, Clause 1 the President can "adjourn them to such Time as he shall think proper." At the Virginia ratifying convention, James Monroe and George Mason worried that the clause might give the Senate the power to prevent House Members from returning home, but James Madison opined that the President's power to resolve the dispute would prevent the Senate from keeping the House hostage to its will. Since the time of the First Congress, the two chambers have always reached agreement, and the President has never had to intervene.

At the Constitutional Convention, Rufus King raised a different concern. He worried that the two houses of Congress could actually move the seat of government merely by agreeing upon the place to which they would adjourn. The Convention decided that Congress could by law establish the seat of government (see Article I, Section 8, Clause 17), but the Framers left Congress the option of making temporary moves in the face of exigencies. Thus, during the yellow-fever outbreaks in the 1790s, the three departments moved from Philadelphia to Trenton. Of course, during the War of 1812, the government fled from Washington.

Congress has followed the text of the Adjournment Clause. Either house may adjourn or recess for up to three days on its own motion. Longer adjournments or recesses, or adjournments sine die, ending a session require the concurrent resolution of both houses. An adjournment of whatever length ends the "legislative day," requiring much legislative business to be recommenced when the chamber reconvenes. In the Senate, introduced bills must lie over one legislative day before they can be considered. Recesses do not interrupt the legislative process.

A decision by Congress to adjourn is also part of each house's power to "determine the Rules of its Proceedings" (Article I, Section 5, Clause 2). As Thomas Jefferson wrote in 1790, "Each house of Congress possesses this natural right of governing itself, and, consequently, of fixing its own times and places of meeting, so far as it has not been abridged by... the Constitution." The Supreme Court earlier held in *United States v. Ballin* (1892) that when it comes to the constitutional power of each house to determine the rules of its proceedings, "[n]either do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The constitution empowers each house to determine its rules of proceedings." Consequently, courts can be expected to defer to the political

John F. O'Connor, *The Emoluments Clause: An Anti Federalist Intruder in a Federalist Constitution*, 24 HOFSTRA L. REV. 89 (1995)
Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 STAN. L. REV. 907 (1994)

Significant Cases

United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868)
McLean v. United States, 226 U.S. 374 (1912)
Ex parte Levitt, 302 U.S. 633 (1937)
McClure v. Carter, 513 F. Supp. 265 (D. Idaho 1981), *aff'd*, 454 U.S. 1025 (1981)
Rodearmel v. Clinton, 666 F. Supp. 2d 123 (2009)

Incompatibility Clause

... no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.
(ARTICLE I, SECTION 6, CLAUSE 2)

The Constitution establishes several limitations on a person's ability to serve in Congress. For example, Article I, Sections 2 and 3 limit the class of persons eligible to serve in Congress by imposing age, citizenship, and residency requirements. The Incompatibility Clause of Article I, Section 6 imposes a further limitation: it forbids federal executive and judicial officers from simultaneously serving in Congress.

The Framers of the Constitution understood the Incompatibility Clause primarily as an anticorruption device. Painfully familiar with the system of "royal influence," whereby the English kings had "purchased" the loyalty of members of Parliament with appointment to lucrative offices, the Framers sought to limit the corrupting effect of patronage and plural office holding in the new Republic. Drawing on examples provided by the bans on plural office holding contained in contemporaneous state constitutions and in the Articles of Confederation, the Framers crafted a ban on dual office holding, which Alexander Hamilton described in *The Federalist* No. 76 as an important guard "against the danger of executive influence upon the legislative body."

It is easy, in modern times, to underestimate the importance of the Incompatibility Clause. There has been very little litigation involving its meaning, perhaps because its commands are relatively clear. Yet the clause serves a vital function in the American system of separated powers. By preventing joint legislative and executive office holding, the clause forecloses any possibility of parliamentary government in America, and thus preserves a hallmark of American constitutional government: the independence of the executive and the Congress.

Beyond this vital structural function, what is perhaps most interesting about the clause is what it does not, by its terms, prohibit. Neither the clause itself nor any other constitutional provision expressly prohibits joint service in the federal executive and judiciary, or joint service in federal and state office. The latter issue is largely handled as a matter of state constitutional law, which generally forbids most forms of dual federal–state office holding. As for the question of simultaneous service in federal executive and judicial offices, the constitutionality of the practice might be suggested not only by the lack of a textual prohibition, but by a few prominent examples of such service in the early days of the Republic, such the simultaneous service of Chief Justices John Jay, Oliver Ellsworth, and John Marshall in judicial and executive posts. Nonetheless, examples of joint service in the executive and the judiciary have been rare in American history, and a strong tradition has developed disfavoring the practice. Moreover, some might argue that general separation of powers principles render the practice constitutionally suspect.

What little litigation the clause has generated has centered on two questions: its justiciability and its application to service by Members of Congress in the military reserves. In *Schlesinger v. Reservists Committee to Stop the War* (1974), the Supreme Court held that citizens who had filed a civil action to challenge the reserve membership of some Members of Congress were asserting only "generalized grievances about the conduct of government" and therefore lacked standing to sue.

Schlesinger did not, however, decide that the Incompatibility Clause could never be enforced in court. Instead, one might read the case to leave open the possibility of judicial enforcement if a sitting Member of Congress who was also an Officer of the United States were to take official action that adversely affected an individualized private interest. On this view, it was only the plaintiff's lack of a sufficiently concrete and particularized injury that led to the result in *Schlesinger*.

In *United States v. Lane* (2006), the U.S. Court of Appeals for the Armed Forces adopted this view. *Lane* was an appeal of a recusal motion filed by an airman who had been convicted by court-martial of a cocaine offense. Senator Lindsay Graham, a lieutenant colonel in the Air Force Reserves, sat on the Air Force Court of Criminal Appeals that reviewed the airman's conviction. The airman filed a motion to recuse Senator Graham on the ground that his service on the court violated the Incompatibility Clause.

Applying Article III standing principles, the Armed Forces Court of Appeals held that the airman had standing. The court reasoned that the "fact that a Member of Congress sat as a judge in this criminal case" carried "direct liberty implications" for the airman that distinguished his case "from other abstract circumstances where the Incompatibility Clause might be implicated."

The court in *Lane* also rejected a theory under which the Incompatibility Clause would always be nonjusticiable, no matter who the plaintiff. On this theory, compliance with the clause is only a condition for service in Congress, not a disqualification from service in the other branches; and enforcement of this condition rests with Congress alone. This was the litigating position of the United States in *Schlesinger*. Brief of Petitioner, *Schlesinger v. Reservists Committee to Stop the War* (1974). The Office of Legal Counsel has also endorsed this view. 1 Op. Off. Legal Counsel 242 (1977) ("exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress").

Although the United States advanced this "congressional commitment" theory in *Lane*, the court was not persuaded. The court noted that if the government's position were accepted, "Members of Congress could serve as the heads of departments and regulatory agencies, simultaneously participating in the passage of legislation and in the execution of the laws" and yet "no citizen could cite the Incompatibility Clause in challenging a governmental decision bearing directly on the life, liberty, or property of the citizen." In other words, the court believed that leaving the clause to congressional enforcement alone posed too great a risk that the clause would go underenforced.

On the merits, the court in *Lane* held that the position of judge on the Air Force Court of Criminal Appeals is an "office of the United States and cannot be filled by a person who simultaneously serves as a Member of Congress." The Court therefore concluded that the review panel was not properly constituted, invalidated the prior proceedings, and returned the trial record for a new review proceeding.

Joan L. Larsen

See Also

Article I, Section 2, Clause 2 (Qualifications for Representatives)
Article I, Section 3, Clause 3 (Qualifications for Senators)
Article I, Section 6, Clause 2 (Sinecure Clause)
Article II, Section 1, Clause 2 (Presidential Electors)
Article II, Section 1, Clause 5 (Presidential Eligibility)
Amendment XIV, Section 3 (Disqualification for Rebellion)

Suggestions for Further Research

Members of Congress Holding Reserve Commissions, 1 Op. O.L.C. 242 (1977)
Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994)
Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon the Separation of Powers*, 53 N.C. L. Rev. 111 (1974)
Saikrishna Bangalore Prakash, *Why the Incompatibility Clause Applies to the Office of the President*, 4 Duke J. Const. L. & Pub. Pol'y 143 (2009)
David J. Shaw, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserve*, 97 Geo. L.J. 1739 (2009)

Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y 107 (2009)

Seth Barrett Tillman & Steven G. Calabresi, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. Pa. L. Rev. 134 (2008)

Russell Wheeler, Extrajudicial Activities of the Early Supreme Court, 1973 SUP. CT. REV. 123

Significant Cases

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) No. 72-1188

United States v. Lane, 64 M.J.1 (2006)

Origination Clause

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

(ARTICLE I, SECTION 7, CLAUSE 1)

Consistent with the English requirement that money bills must commence in the House of Commons, the Framers expected that the Origination Clause would ensure that "power over the purse" would lie with the legislative body closer to the people. Under the Articles of Confederation, the national government could not tax individuals, and the Origination Clause was one of several provisions meant to cabin the national revenue power created under the Constitution. The clause was also part of a critical compromise between large and small states, helping to temper the large states' unhappiness with equal representation in the Senate by leaving the power to initiate tax bills with the House of Representatives, where the large states had greater influence.

The final version of the clause was much weaker than the form proposed by Elbridge Gerry of Massachusetts, which would have required all "money bills" (including appropriations) to originate in the House and would have given the Senate no power to amend. Gerry feared that the Senate would become an aristocratic body because of its small size, its selection by legislatures rather than by election, and its six-year term of office. "It was a maxim," he said, "that the people ought to hold the purse-strings."

The strongest proponents of national power opposed the clause in any form. As James Wilson of Pennsylvania explained at the Constitutional Convention, "If both branches were to say yes or no, it was of little consequence which should say yes or no first." What survived the contentious debates was closer to Wilson's vision than to Gerry's. The clause was restricted to bills for raising revenue, and the Senate was given the amendment power (which, Gerry thought, gutted the provision of any real effect).

Even in weakened form, however, the Origination Clause was not meaningless. James Madison, no supporter of the clause at the Convention, gave it a generous interpretation in *The Federalist* No. 58: "The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of the government.... This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."

As it turned out, the Origination Clause has had little effect. For one thing, many revenue bills have their intellectual genesis in the Treasury Department, not in Congress. Furthermore, Elbridge Gerry's fears were well founded: the Senate's power to amend is generally understood in practice to be so broad that the Senate can replace the entire text of a bill that technically originates in the House.

The understanding that the clause is a nullity reflects practice, however, not doctrine. In its most recent Origination Clause case, *United States v. Munoz-Flores* (1990), a divided Supreme Court rejected the argument that origination issues are nonjusticiable political questions. The Court held that a plaintiff with standing may pursue a claim that a revenue statute improperly originated in the

See Also

Article I, Section 5, Clause 1 (Qualifications and Quorum)
Article I, Section 5, Clause 4 (Adjournment)
Article I, Section 7, Clause 2 (Presentment Clause)
Article II, Section 3 (Recommendations Clause)
Article II, Section 3 (Convening of Congress)

Suggestions for Further Research

Butler C. Derrick Jr., *Stitching the Hole in the President's Pocket: A Legislative Solution to the Pocket-Veto Controversy*, 31 Harv. J. Legis. 371 (1993)
Robert Neal Webner, *The Intersession Pocket Veto and the Executive-Legislative Balance of Powers*, 73 Geo. L.J. 1185 (1985)

Significant Cases

The Pocket Veto Case, 279 U.S. 655 (1929)
Wright v. United States, 302 U.S. 583 (1938)
Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974)
Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976)
Barnes v. Kline, 759 F.2d 21 (D.C. Cir. 1985)

Presentment of Resolutions

> **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.**
>
> (ARTICLE I, SECTION 7, CLAUSE 3)

In August 1787 following the submission of the draft by the Committee of Detail, James Madison noted that Congress could evade the possibility of a presidential veto by simply denominating a "bill" as a "resolution." Although his motion to insert the words "or resolve" after the word "bill" in the Presentment Clause (Article I, Section 7, Clause 2) was defeated, the following day Edmund Randolph proposed a freestanding clause with more exacting language, and the Convention approved it. Even before the posthumous publication of Madison's Convention record, Justice Joseph Story took a view similar to Madison's: "[C]ongress, by adopting the form of an order or resolution, instead of a bill, might have effectually defeated the president's qualified negative in all the most important portions of legislation." *Commentaries on the Constitution of the United States* (1833). Nearly all commentators have agreed with that interpretation.

Nonetheless, not all resolutions of Congress require presidential approval because not all are intended to be law. Generally, joint resolutions do require presentment to the President as they are designed to have the force of law. They differ from bills only in that they usually deal with a single subject, such as a declaration of war. Congressionally proposed amendments to the Constitution are also styled as joint resolutions, but they are not presented to the President. Under the form of the amending process in Article V that has been followed in all cases except the Twenty-first Amendment, Congress proposes and three-quarters of the legislatures of the several states approve. Thus, no presidential involvement is necessary for a joint resolution proposing an amendment to the Constitution. *Hollingsworth v. Virginia* (1798).

Concurrent resolutions, passed by both houses, apply only to subjects affecting the procedures of both houses, such as fixing the time for adjournment, or to express "the sense of the Congress" on an issue of public policy, or to set revenue and spending goals. Concurrent resolutions are not "law" and are not presented to the President. Similarly, simple resolutions (sometimes just known as resolutions) do not have the force of law and apply only to the operations of a particular branch of Congress dealing with its internal procedures, imposing censure on a Member, setting spending limits for particular committees, or expressing the viewpoint of one house on a public issue. A bill of impeachment

passed by the House of Representatives could technically be seen as in the form of a simple resolution (as might also be Senate approval of treaties and presidential appointments), although it may not officially be designated as such. The Senate's resolution to convict is similar.

For many decades, Congress attempted to use a simple or concurrent resolution (or, at times, so has even a committee within one house) to "veto" executive actions. Congressional expression of disapproval would not go to the President for his signature or veto. In *INS v. Chadha* (1983), the Supreme Court invalidated the use of a resolution by one house (or by extension, a concurrent resolution by both houses) to "veto" an executive action as violative of the Presentment of Resolutions Clause.

By the time of *INS v. Chadha*, there were 295 various types of legislative vetoes in 195 different statutes. Congress initiated the device in 1932, giving President Herbert Hoover the authority to reorganize the executive branch, subject to the approval of Congress. Other versions of the legislative veto became more numerous as the administrative state grew, particularly in the 1940s.

Despite the *Chadha* decision ruling legislative vetoes unconstitutional, legislative vetoes still occur in pieces of legislation. By one scholar's count, between the date of the Court's decision in *Chadha* and 2005, 400 legislative veto-type provisions had been enacted or instituted. Most of these provisions are informal and concern a power of a committee or subcommittee to require its approval before an executive action may go forward. These kinds of arrangements were not directly addressed by the *Chadha* case and have continued ever since.

Often, a President will object to a formal legislative veto in a congressional enactment in his signing statement, citing *Chadha*. Signing statements, however, do not reach "vetoes" that are the result of amicable relationships between members of executive agencies and Members of Congress at the legislative committee and sub-committee levels. An executive agency will agree, for example, not to exceed a budgetary limit except by permission of a particular Congressional committee. As a result, through informal agreements, committees maintain an even stronger veto-type power over executive action. An example of an early informal agreement to allow committee-level vetoes occurred with the "Baker Accord" of 1989, when Secretary of State James Baker allowed certain committees and party leaders the ability to block aid sent to the Nicaraguan Contras.

Some legislation that *Chadha* purportedly struck down is still seen by some as being legitimate. In particular, many in Congress argue that the War Powers Act of 1973 is still in force, though the central component of the legislation is a legislative veto. After *Chadha*, there were proposals to change the War Powers Act from a concurrent resolution from both houses that does not require presentment to a joint resolution of disapproval. Those proposals failed.

David F. Forte

See Also

Article I, Section 7, Clause 2 (Presentment Clause)
Article V

Suggestion for Further Research

CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS (MARY COHN ED., 4TH ED. 1991)

LOUIS FISHER, CONG. RESEARCH SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA (2005), at http://www.loufisher.org/docs/lv/4116.pdf

Gary Lawson, Comment, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373 (2005)

David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253 (1982)

Seth Barrett Tillman, *A Textualist Defense of Article 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)

Darren A. Wheeler, *Actor Preference and the Implementation of* INS v. Chadha, 23 BYU J. Pub. L. 83 (2008)

Significant Cases

Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)
INS v. Chadha, 462 U.S. 919 (1983)

Suggestions for Further Research

Charles Gordon, *Who Can Be President of the United States: The Unresolved Enigma*, 28 MD. L. REV. 1 (1968)

James C. Ho, *President Schwarzenegger—Or At Least Hughes?*, 7 GREEN BAG 2d 108 (2004)

James C. Ho, *Unnatural Born Citizens and Acting Presidents*, 17 CONST. COMMENT. 575 (2000)

Randall Kennedy, *A Natural Aristocracy?*, 12 CONST. COMMENT. 175 (1995)

Jordan Steiker, Sanford Levinson & J. M. Balkin, *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 TEX. L. REV. 237 (1995)

Significant Cases

United States v. Wong Kim Ark, 169 U.S. 649 (1898)

United States *ex rel.* Guest v. Perkins, 17 F. Supp. 177 (D.D.C. 1936)

Presidential Succession

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

(ARTICLE II, SECTION 1, CLAUSE 6)

This provision, side by side with the Twentieth and Twenty-fifth Amendments, is a major anchor for presidential succession in the United States. It provides, as supplemented by the Twenty-fifth Amendment, for the vice president to take over in the event of the removal, death, resignation, or inability of the president. It also authorizes Congress to establish a line of succession beyond the vice presidency. Left unclear by the clause was whether the vice president became president or simply acted as president in a case of succession.

Other ambiguities in the provision were noted at the Constitutional Convention by John Dickinson of Delaware, who asked, "[W]hat is the extent of the term 'disability' & who is to be the judge of it?" James Madison expressed concern that the provision would prevent the filling of a presidential vacancy by a special election, and he therefore successfully inserted the expression "until the Disability be removed, or a President shall be elected." It is not clear whether this change was intended to apply when the vice president succeeded or only when an officer designated by Congress was called upon to serve in the case of a double vacancy. Nor is it clear whether after a special election the winner(s) serves a full four-year term. In any event, there has never been a special election for president, although the provision allowing for its possibility was included in the country's early presidential succession laws.

A related question is whether "officers" when called on to serve were constitutionally required to retain their position during a period of service as acting president, as both James Madison and some current scholars opine. The 1792 statute seemed to indicate that when an "officer" became acting president, that officer retained his current position until a successor filled the presidential office. The current succession law of July 18, 1947, as amended, contemplates a resignation by statutory successors once they assume the powers of the presidency as acting president. That provision creates an issue as to whether in a case of presidential inability, it is appropriate to have an acting president who does not retain his or her existing office, and, in turn, whether legislative officers in line would violate the Incompatibility Clause of Article I, Section 6, Clause 2, which forbids a member of either House "during his Continuance in Office" from holding an "Office under the United States."

In addition, serious constitutional questions remain regarding the "bumping" provision of

the succession statute, which requires a statutory successor, in the case of cabinet members, to step down once a Speaker or president pro tempore becomes available. The "bumping" provision may run afoul of the requirement of the Presidential Succession Clause that "such Officer shall act accordingly [as acting president], until the Disability be removed, or a President shall be elected."

Another ambiguity may be what kind of "officer" Congress can designate in a statute of presidential succession. The drafting history of Article II, Clause 1, Section 6 indicates that the Framers intended "officers of the United States" as the eligible category, but less clear is whether legislative leaders or legislators are included. Debate surrounding that issue has been a constant since the first succession law, with many scholars contending that neither the Speaker of the House of Representatives nor president pro tempore of the Senate is an officer in the sense contemplated by the Constitution. Proponents and opponents of this view cite provisions of the Constitution for support, such as Article I, Section 2, Clause 5 (Impeachment) and Article I, Section 6, Clause 2 (Sinecure Clause).

Both the First and Second Congresses debated who should be in the line of succession. The secretary of state, the chief justice, the president pro tempore of the senate, and the Speaker of the House of Representatives were all mentioned. On March 1, 1792, Congress resolved the issue by choosing the president pro tempore and the Speaker, respectively, prompting criticism from Madison and others that the congressional officers were not within the contemplation of the succession provision. No occasion called for the law to be implemented. Interestingly, at one point in history—when Chester A. Arthur succeeded to the presidency—there was no Speaker or president pro tempore, and therefore there was no one at all in the line of succession under the law of 1792. From 1886 until 1947, Congress included only cabinet members and not legislators in the line of succession, largely because of doubts whether legislators qualified as "officers." The current succession statute, however, contains the legislative offices, with the Speaker first and the president pro tem next, followed by a line of cabinet officers in the order in which the executive departments were created.

In 1841, when President William Henry Harrison died in office, Vice President John Tyler assumed the presidency for the rest of the term. His claim to president, not simply vice president acting as president, drew criticism. The precedent he set, however, took and became the operating principle when other presidents died in office. These presidents were Zachary Taylor, Abraham Lincoln, James Garfield, William McKinley, Warren Harding, Franklin Roosevelt, and John Kennedy. On the other hand, Tyler's example became a major obstacle for situations involving the temporary inability of a president because, under the wording of this clause, the status of a vice president in a case of death would appear to be the same as in a case of inability or resignation or removal. As a consequence, on a number of occasions vice presidents declined to consider relieving a disabled president because of the Tyler precedent and also because of the ambiguities first raised by John Dickinson. This was the case in 1881 when President James A. Garfield lay dying and some suggested that Vice President Chester A. Arthur take charge, and again in 1919 after President Woodrow Wilson's stroke, when Vice President Thomas R. Marshall was urged to do the same. In 1967, the adoption of the Twenty-fifth Amendment eliminated much of the remaining uncertainties regarding presidential succession.

John Feerick

See Also

Article I, Section 2, Clause 5 (Impeachment)
Article I, Section 6, Clause 2 (Sinecure Clause)
Article I, Section 6, Clause 2 (Incompatibility Clause)
Amendment XXV (Presidential Succession)

Suggestions for Further Research

Akhil R. Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113 (1995)

CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF THE PRESIDENCY (Second Report 2009)

Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 Stan. L. Rev. 155 (1995)

John D. Feerick, From Failing Hands: The Story of Presidential Succession (1965)

Joel K. Goldstein, *Akhil Reed Amar and Presidential Continuity*, 47 Houston L. Rev. 67 (2010)

Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 Fordham L. Rev. 959 (2010)

John F. Manning, Response, *Not Proved: Some Lingering Questions About Legislative Succession to the Presidency*, 48 Stan. L. Rev. 141 (1995)

Ruth C. Silva, Presidential Succession (1968)

Symposium, The Adequacy of the Presidential Succession System in the 21st Century: Filling the Gaps and Clarifying the Ambiguities in Constitutional and Extraconstitutional Arrangements, 79 Fordham L. Rev. 775 (2010)

Seth Barrett Tillman, The Annals of Congress, the Original Public Meaning of the Succession Clause, and the Problem of Constitutional Memory (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1524008

Compensation

> **The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.**
>
> (Article II, Section 1, Clause 7)

This clause accomplishes two things: it establishes that the president is to receive a "compensation" that is unalterable during the period "for which he shall have been elected," and it prohibits him within that period from receiving "any other emolument" from either the federal government or the states.

The proposition that the president was to receive a fixed compensation for his service in office seems to have been derived from the Massachusetts constitution of 1780, which served as a model for the Framers in other respects as well. The Constitutional Convention hardly debated the issue, except to reject, politely but decisively, the elderly Benjamin Franklin's proposal that the president should receive no monetary compensation. Perhaps the Framers feared that if Franklin's proposal were accepted, only persons of great wealth would accept presidential office.

As Alexander Hamilton explained in *The Federalist* No. 73, the primary purpose of requiring that the president's compensation be fixed in advance of his service was to fortify the independence of the presidency, and thus to reinforce the larger constitutional design of separation of powers. "The legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might in most cases either reduce him by famine, or tempt him by largesses, to surrender at discretion his judgment to their inclinations." For similar separation of powers reasons, Article III, Section 1, provides that federal judges "shall, at stated Times, receive for their Services, a Compensation," although that provision only forbids Congress from diminishing the judges' compensation, not from increasing it. The distinction, as Hamilton noted in *The Federalist* No. 79, "probably arose from the difference in the duration of the respective offices."

The prohibition on presidential "emoluments" is one of several constitutional provisions addressed to potential conflicts of interest. Further, the Compensation Clause eliminated one possible means of circumventing the requirement that the president's compensation be fixed: without this provision Congress might seek to augment the president's "compensation" by providing him with (what would purportedly differ) additional "emoluments." Significantly, the prohibition on presidential emoluments also extends to the states. That requirement helps to ensure presidential impartiality among particular members or regions of the Union.

ARTICLE V

Amendments

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress..."
(ARTICLE V)

The process of amendment developed hand in hand with the emergence of written constitutions that established popular government. The charters established by William Penn in 1682 and 1683 provided for amending, as did eight of the state constitutions in effect in 1787. Three state constitutions provided for amendment through the legislature, and the other five gave the power to specially elected conventions.

The Articles of Confederation provided for amendments to be proposed by Congress and ratified by the unanimous vote of all thirteen state legislatures. This proved to be a major flaw in the Articles, as it created an insuperable obstacle to constitutional reform. The amendment process in the Constitution, as James Madison explained in *The Federalist* No. 43, was meant to establish a balance between the excesses of constant change and inflexibility: "It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults."

In his *Commentaries on the Constitution of the United States* (1833), Justice Joseph Story wrote that a government that provides

> no means of change, but assumes to be fixed and unalterable, must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution.... The great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation, and caution; and to follow experience, rather than to open a way for experiments, suggested by mere speculation or theory.

In its final form, Article V creates two ways to propose amendments to the Constitution: through Congress or by a special convention called by the states for the purpose of proposing amendments (Article V, Convention for Proposing Amendments). In either case, the proposed amendment or amendments must then be ratified by the states, either (as determined by Congress) by state legislatures or by ratifying conventions in the states.

More significantly, the double supermajority requirements—two-thirds of both houses of Congress and three-quarters of the states—create extensive deliberation and stability in the amendment process and restrain factions and special interests. It helps to maintain the Constitution as a "constitution" and not an assemblage of legislative enactments. It also roots the amending process in the Founders' unique concept of structural federalism based on the dual sovereignty of the state and national governments.

The Virginia Plan introduced at the start of the Constitutional Convention called only in a general way for an amendment process that

would allow but not require amendment by the national legislature "whensoever it shall seem necessary." The Committee of Detail proposed a process whereby Congress would call for an amendments convention on the request of two-thirds of the state legislatures. After further debate, the delegates passed language, proposed by Madison (and seconded by Alexander Hamilton), that the national legislature would propose amendments when two-thirds of each house of Congress deem it necessary, or on the application of two-thirds of the state legislatures. Proposed amendments were to be ratified by three-fourths of the states in their legislatures or by state convention. Just before the end of the Convention, George Mason objected that the amendment proposal would allow Congress to block as well as propose amendments, and the method was changed once again to require Congress to call a convention to propose amendments on the application of two-thirds of the states.

The Constitutional Convention made two specific exceptions to the Amendments Clause of Article V, one concerning the slave trade (Prohibition on Amendment: Migration or Importation) and another on voting in the Senate (Prohibition on Amendment: Equal Suffrage in the Senate), but defeated a motion to prevent amendments that affected internal police powers in the states.

The advantage of the Amendments Clause was immediately apparent. The lack of a bill of rights—the Convention had considered and rejected this option—became a rallying cry during the ratification debate. Partly to head off an attempt to call for another general convention or a formal amendments convention under Article V, but mostly to legitimize the Constitution among patriots who were Anti-Federalists, the advocates of the Constitution (led by Madison) agreed to add amendments in the first session of Congress. North Carolina and Rhode Island acceded to the Constitution, and further disagreements were cabined within the constitutional structure.

Madison had wanted the amendments that became the Bill of Rights to be interwoven into the relevant sections of the Constitution. More for stylistic rather than substantive reasons, though, Congress proposed (and set the precedent for) amendments appended separately at the end of the document. Some have argued that this method makes amendments more susceptible to an activist interpretation than they would be otherwise.

Since 1789, well over five thousand bills proposing to amend the Constitution have been introduced in Congress; thirty-three amendments have been sent to the states for ratification. Of those sent to the states, two have been defeated, four are still pending, and twenty-seven have been ratified. Because of the national distribution of representation in Congress, most amendment proposals are defeated by a lack of general support and those amendments that are proposed to the states by Congress are likely to be ratified.

In a challenge to the Eleventh Amendment, the Supreme Court waved aside the suggestion that amendments proposed by Congress must be submitted to the president according to the Presentment Clause (Article I, Section 7, Clause 2), *Hollingsworth v. Virginia* (1798). In *The National Prohibition Cases* (1920), the Court held that the "two-thirds of both Houses" requirement applies to a present quorum, not the total membership of each body. One year later, in *Dillon v. Gloss* (1921), the Court allowed Congress, when proposing an amendment, to set a reasonable time limit for ratification by the states. Since 1924, no amendment has been proposed without a ratification time limit, although the Twenty-seventh Amendment, proposed by Madison in the First Congress more than two hundred years ago, was finally ratified in 1992.

Regardless of how an amendment is proposed, Article V gives Congress authority to direct the mode of ratification. *United States v. Sprague* (1931). Of the ratified amendments, all but the Twenty-first Amendment, which was ratified by state conventions, have been ratified by state legislatures. In *Hawke v. Smith* (1920), the Court struck down an attempt by Ohio to make that state's ratification of constitutional amendments subject to a vote of the people, holding that where Article V gives authority to state legislatures, these bodies are exercising a federal function.

Although some scholars have asserted that certain kinds of constitutional amendments might be "unconstitutional," actual substantive

challenges to amendments have so far been unsuccessful. *National Prohibition Cases; Leser v. Garnett* (1922). The Supreme Court's consideration of procedural challenges thus far does not extend beyond the decision of *Coleman v. Miller* (1939), dealing with Kansas's ratification of a child labor amendment. The Court split on whether state ratification disputes are nonjusticiable political questions, but then held that Congress, "in controlling the promulgation of the adoption of constitutional amendment[s]," should have final authority over ratification controversies.

The careful consideration of the amending power calls into question theories claiming the right of the Supreme Court to superintend a "living" or "evolving" Constitution outside of the amendment process. Non-originalist versions of this argument are those of Akhil Amar, who contends that Article V limits only government and that the people can propose and ratify amendments by popular vote, and Bruce Ackerman, who posits that extra-constitutional "constitutional moments" (such as the period after the Civil War or the New Deal) effectively amend the Constitution through politics (e.g., the election of 1936) followed by judicial codification (e.g., Supreme Court decisions upholding New Deal legislation).

In the end, the Framers believed that the amendment process would protect the Constitution from undue change at the same time that it would strengthen the authority of the Constitution with the people by allowing its deliberate reform while elevating it above immediate political passions. "The basis of our political systems is the right of the people to make and to alter their Constitutions of Government," George Washington wrote in his Farewell Address of 1796. "But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all."

Matthew Spalding and Trent England

See Also

Article I, Section 7, Clause 2 (Presentment Clause)
Article V (Convention for Proposing Amendments)
Article V (Prohibition on Amendment: Migration or Importation)
Article V (Prohibition on Amendment Equal Suffrage in the Senate)

Suggestions for Further Research

RICHARD B. BERNSTEIN, AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT? (1993)
Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-seventh Amendment*, 61 FORDHAM L. REV. 497 (1992)
ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION (1997)
Edward A. Hartnett, *A "Uniform and Entire" Constitution; Or, What If Madison Had Won?*, 15 CONST. COMMENT. 251 (1998)
Seth Barrett Tillman, *A Textualist Defense of Article 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)
JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT (1992)

Significant Cases

Hollingsworth v. Virginia, 3 U.S. (3 Dall.) 378 (1798)
Hawke v. Smith, 253 U.S. 221 (1920)
National Prohibition Cases, 253 U.S. 350 (1920)
Dillon v. Gloss, 256 U.S. 368 (1921)
Leser v. Garnett, 258 U.S. 130 (1922)
United States v. Sprague, 282 U.S. 716 (1931)
Coleman v. Miller, 307 U.S. 433 (1939)

Convention for Proposing Amendments

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(ARTICLE V)

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