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HISTORY OF THE EXECUTIVE VETO IN THE OHIO CONSTITUTION*

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The convention which met in 1787 to draft a federal constitution never seriously questioned the wisdom of providing for an executive veto and this in spite of the fact that only four of the states had at that time any such provision in their constitutions. Only two members, Franklin and Gorham seemed to have spoken against any veto power whatever, while a few, Wilson, Reed, Hamilton and Gouveneur Morris argued for an absolute veto power. The real difference of opinion, however, was between those who favored a qualified veto power in the President alone and those who favored joining with the President a suitable number of the judiciary in the exercise of this power. Realizing that a veto power would be given, Wilson and Madison, probably the two ablest members of the convention, led the fight for the joining of the judiciary and the executive. Not satisfied with the indecisive vote of four states to three against their proposal, they brought the matter up again and again, and even after the matter had seemingly been settled for good, late in the proceedings of the convention Madison

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proposed that all laws of Congress should be submitted to the President and the Supreme Court separately. If both disapproved, a three fourths of both Houses would be necessary to overide the veto; if one only disapproved a two-thirds vote would be sufficient. The convention having decisively defeated this proposal by a vote of eight states to three, the question was not raised again.

It was in the debate on this question that we catch a glimpse of what was probably the half formed opinion of most of the members in respect to the power of the courts to declare laws unconstitutional. Said Elbridge Gerry, as a reason for opposing the joining of the judiciary and executive in the veto power, "They (the courts) have a sufficient check . . . by their exposition of the laws which involved a power of deciding upon their constitutionality. In some states the judges had actually set aside laws as being against their constitution. This was done too with general approbation."

The explanation of the difference in the attitude of the states as reflected in their constitutions and the federal constitutional convention in respect to the veto power is found in the character of this federal body. The attitude of mind back of the Declaration of Independence was not the attitude of mind back of the framing of the federal constitution. Many of the men who, like Jefferson, Sam Adams, and Patrick Henry, were passionate in their desire for individual liberty and jealous and suspicious of governmental power were present neither in body nor spirit in the constitutional convention. That body was a body representing the conservative elements of the country, feeling deeply the need of a strong national government and concerned not so much with preserving the rights of the states as with creating a national government of real power. The sentiment of the convention as a whole was probably expressed by Gerry when he said, "The evils we experience flow from the excesses of democracy," and though Gouverneur Morris was more a hater of democracy than most of the members, he prob-

ably expressed a very general opinion when, in discussing the veto power, he said, "It has been said that the Legislature ought to be relied upon as the proper guardians of liberty. The answer was short and conclusive. Either bad laws will be passed or not. On the latter supposition no checks will be wanted. On the former a strong check will be necessary and that is the proper supposition. *Emissions of paper money, largesses to the people, a remission of debts and similar measures will at some time be popular and will be pushed for that reason.*"

It is not surprising, therefore, that the convention, admiring as it did the British constitution, should have followed the example of the British veto by incorporating the same power in a modified form in the proposed constitution. "It is tolerably clear," says Sir Henry Maine, "that the mental operation through which the framers of the American constitution went was this: 'They took the King of Great Britain, went through his powers and restrained them whenever they seemed to be excessive or unsuited to the circumstances of the United States. . . . It was no anticipation of Queen Victoria but George III himself whom they took for their model.' "

The experience of Ohio in respect to the veto power was altogether different. The people of this western territory were intensely partisan followers of the new Republican party under the leadership of Thomas Jefferson. They did not share the admiration of the "framers" of 1787 for the British constitution, nor were they impressed with the example in the federal constitution of a monarchial veto power. The opposition to the veto power was intensified by the long standing and bitter controversy with the Territorial Governor, General Arthur St. Clair, who possessed under the Ordinance of 1787 the absolute veto power. A remonstrance in the second Territorial Legislature at Chillicothe over the manner of his exercise of this absolute veto power was presented to him on behalf of both Houses and a similar remonstrance was sent to Congress. They re-

quested him to return to them, before adjournment, bills he felt he could not approve so that they possibly might amend them in a way to meet his objections, but he refused, saying, "I am sorry to tell you that it is altogether out of my power to comply with it. The Ordinance of the government has placed in the Governor an absolute negative on the bills of both Houses and your request is that it may by me become vested into a kind of qualified veto. You do not indeed require that should the objections be thought of little weight your acts may become laws without the Governor's assent. That would have been too directly in the face of the Ordinance, though without it I must own I cannot see any use in sending the objections to you." The controversy became so bitter that at one time a mob of very respectable citizens in Chillicothe broke into the house where Governor St. Clair and some of his friends boarded and were only stopped from a physical assault upon the Governor by drawn pistols and the intercession of Thomas Worthington.

It was in this "climate of opinion" that the convention met in 1801 to draft a constitution for the newly created state of Ohio. It is not surprising that in the sketchy Journal of this convention one finds no proposal or even suggestion for an executive veto power. This short constitution was probably copied in large part from the constitution of Tennessee drafted a few years before which constitution contained no reference to a veto power. It was later claimed by Governor Hoadley that since this constitution was never submitted to the people for ratification, but put into effect by the convention itself, it did not represent the true feeling of the people on the question of the veto power, being just a "fortuitious happening," but there certainly is no evidence that the people's representatives did not in this matter truly represent the people's will.

This is evidenced by the fact that when the second constitutional convention met in 1851 opinion had not greatly changed. It is true that by this time the example of the federal constitution had found a place in a number of state constitutions. "We

find," said a member of the convention, "that all the new constitutions made within the last few years, the progressive constitutions as they were called, those embodying the spirit of the day . . . contained a two-thirds vote." The feeling against the veto was however still so strong that the convention voted down by a decisive vote a very modest proposal for a governor's veto which could be overridden by a legislative vote of a majority of the elected members. The sentiment of this convention was probably expressed by Judge Rufus Ranney when, as a delegate, he said, "I conclude by declaring that I shall vote against all vetoes, everywhere, in all forms, and upon all occasions." It is interesting to note that this great lawyer at this early date favored a referendum to the voters of all that he called important legislation. He was opposed, he said, "to giving to the legislature power to enact all laws until they had been submitted to a direct vote of the people."

The argument used in this convention by those who favored a modest executive veto was not only the need of a check upon hasty and ill advised legislation, but as well the need of giving to the office of Governor greater prestige. Thomas Corwin, when governor, said that so far as he could discover the only prerogatives of the governor of Ohio were to grant pardons and commission notaries public. The position of the governor in the popular mind at that time is seen in a statement of a delegate in the convention. "Now, sir, within my recollection, if you were to go around and inquire who was the governor of Ohio where there were twenty men present, they would look at each other in perfect surprise and perhaps not a person present would be able to tell you. . . . On the other hand, if you should go into the state of Pennsylvania . . . if you were to meet little boys and girls and ask them who was the governor of Pennsylvania, they would answer you just as readily as they would give the name of their teacher because of this thing, the veto power, in the hand of the executive."

In the convention of 1874 there was a strong sentiment for

an executive veto. Though the statement of Governor Tom Corwin was often quoted as showing the low estate into which the office of governor had fallen, the real reasons for the existence of such power was, it was argued, found in the need of a check upon unwise legislation. "For more than seventy years," said a delegate, "our laws have been enacted by a simple majority vote of each branch of the General Assembly and the result has been that acts of questionable constitutionality and doubtful expediency have been numbered among the statutes." "Does not every lawyer know," said another delegate, "that our libraries are filled with statute books and the great body of them are filled with repealed statutes which have been enacted through hasty legislation because there was no check upon the General Assembly?"

The fight in this convention for a veto provision was led by Samuel F. Hunt, whose youth was often referred to, and George Hoadley, both from Hamilton County. The fight against it was led by Wm. H. West, "the blind man eloquent," Joseph P. Carberry, and John B. Coats. The question of the veto power took up a good deal of the time of the convention and the debate upon it, due to the great ability of those who participated, was of an unusually high order.

At this time, out of the thirty-seven states in the Union, thirty-two had in their constitutions a provision for some kind of an executive veto, but ten of these, including several close to Ohio, required only a majority legislative vote to override the veto.

The first proposal adopted in the convention of 1874 was for a veto to be overridden by a two-thirds legislative vote. This was later changed to a three-fifths vote and still later to a majority vote of elected members. This last plan was one submitted by Campbell, a much respected member of the convention who had been for many years a member of Congress, as a compromise plan and was thought to be the final decision of the convention, but Hunt and Hoadley were determined to secure

a stronger executive veto power and so the question was again opened up for debate. The able arguments of these men were so effective that the convention again made a decision, and this time in favor of a three-fifths vote. The feeling by this time had become quite bitter as is evidenced by the remarks of West upon the motion of Hoadley to reconsider the vote just taken in favor of a three-fifths vote so as to clinch the vote. "I regret very much," said West, "that this matter has reached the crises where it has. I really did hope in framing a constitution here that I could give it my cordial support. I supposed the matter settled by the compromise we made the other day. . . . I simply desire to state to the convention — but it is not in temper now, I see, to listen to anything or hear anybody. We have nothing more to do, I suppose, but to record the edict of the veteran autocrat of the Commercial and the young princes of the Enquirer, issued forth this morning. It is introducing into the constitution a new feature that our people are not accustomed to and because of which, together with other features, will array against it such opposition as to secure its defeat." "If I have no other legacy or inheritance," said Coats, a bitter opponent of any veto power, "to transmit to posterity in general, or to those who sustain a nearer and dearer relationship who shall survive me or come after me bearing my humble name, I desire to leave to such what I conceive to be the honorable record of my action here in opposition to this proposition. . . . It is an insult to the people to give out to them for their approval an instrument emanating from this body with this objectionable feature incorporated therein."

The prophecy of these men as to the reception the work of the convention would receive at the hands of the people was fulfilled, for the constitution was rejected by them in toto as well as the separate proposals submitted. How far this rejection was due to the inclusion of the veto provision it is hard to say, for there were other provisions which proved to be equally if not more unpopular. That it had its part is seen in the state-

ment of the Cincinnati Commercial, which favored ratification on the eve of the election. Said this paper, "The principles of minority representation and veto have provoked the greatest discussion and dissension on the articles in the constitution and will probably be the main questions in its ratification." Campbell strongly opposed ratification and did so no doubt in part because of the defeat in the convention of his veto plan.

After the vote, however, the newspapers seemed to think that other sources of dissatisfaction were the main causes of its rejection. The length of the convention, lasting as it did for almost a year, wearied the people so that, according to the Ohio State Journal, "There were probably not a thousand men in Ohio who had read the constitution through when they came to vote upon it." The fact, that, of the one hundred and four members, sixty-four were lawyers, and that the entire bar, because of the section on the Judiciary, were a unit for it, made the people suspicious of it. The including, among the separate matters submitted, of a proposal for the licensing of liquor, led the temperance forces to vote en masse against it, and the rejection by the convention with but one vote in its favor, of a resolution permitting the legislature to appropriate school funds to denominational schools, with an attendant bitter debate, created strong Catholic opposition. "The constitution," said the Cincinnati Commercial, "encountered more opposition among Catholics because of the failure to make provision for a division of the school fund than we had anticipated. The advice of the Catholic Telegram to vote against it as a protest against a wrong principle was widely adopted."

The combination of these forces, together with the opposition created by the minority representation and veto provision led, as said above, to the constitution being overwhelmingly defeated at the special election provided for by the convention. Though it was to a degree a party issue, strong Republican counties ruled against it. The Cincinnati Enquirer on the day before the election urged the people to vote against it. Strange

to say, the only thing in the Constitution it favored was the veto provision and that, it thought, ought to have required a two-thirds instead of a three-fifths vote of the legislature for repassage.

In the fall of 1903 Ohio, which had by now gotten along without any veto power for over a century, suddenly gave to its governor the most drastic veto power ever given an executive in this country, for the amendment adopted in that year provided that the governor should have the power to veto any item in any bill, and that for the legislature to override the veto of an item or the entire bill, the vote must be at least two-thirds of each house, with the additional strange provision that the vote must be not less than that which the bill received in its original passage. As a result, regardless of the size of the vote which passed the bill originally even though it were unanimous, a single vote less on repassage would prevent its becoming a law.

It was said in the convention of 1912, in debate, "That veto was given to us by the use of the Longworth Law which we all understand was an infamous law and the people who voted to give the governor a veto power did not find out—a great many of them—that they had voted to give that power, until sometime afterward." "Is it not a fact," said another delegate, "that this malodorous veto power originated in the brain of Marcus Aurelius Hanna."

There is no doubt but that the Longworth law was in large measure responsible for the adoption of this drastic amendment. The constitution of 1851 provided that an amendment to be ratified must receive not only a majority of all the votes cast on the amendment, but as well a majority of all the votes cast for the general officers at that election. The result was, due to the indifference of the people to such trifling matters as constitutional amendments and their consequent refusal to vote for or against a proposed amendment, that it was practically impossible ever to secure the ratification of an amendment even

though those voting on the question itself were vastly in the majority.

This inability to secure any change in the fundamental law became displeasing to the leaders of the Republican party which was then the dominant political party in the state. Certain things they wanted done could only be done by constitutional change and so an ingenius plan called the Longworth law was devised. This law, named after its author or at least its sponsor, Nicholas Longworth, who was then (1902) a member of the General Assembly, provided in effect that if a political party in its state convention voted in favor of a proposed amendment it should be put on the ballot in the party column and a straight vote for the party ticket would count as a vote for the amendment. After this all a proposed amendment needed to insure its adoption was its approval by a dominant political party, for receiving it, the same indifference of the voters which before made ratification well nigh impossible now made adoption equally certain.

This law did not last long, but while it lasted and particularly for a short time after its passage, it was used by the Republican party to secure the adoption of several desired amendments. Three such amendments were approved by this party in the fall of 1902 and, being put in its party column, were of course triumphantly adopted. One of these amendments was the veto amendment discussed above. It would seem, however, unfair to lay all the blame, if blame it be, on the Republican party and Marcus Hanna for the adoption of the amendment, for according to the newspapers of that date, Mayor Thomas L. Johnson of Cleveland, the Democratic candidate for Governor, also favored its ratification.

That this veto amendment was not popular is seen in the fact that only three years after its adoption the General Assembly by a vote lacking only one of being unanimous, submitted to the people an amendment greatly modifying its drastic provisions, but this proposal, lacking the aid of the Longworth law

and the approval of a dominant political party, failed of adoption though it carried every county and received a vote of five to one in its favor of those voting upon it.

It is not surprising therefore that soon after the convening of the liberal constitutional convention of 1912 a resolution was introduced providing for a greatly limited executive veto power. Without much debate and without a single alteration the resolution was approved by the convention and upon ratification by the people became, in 1912, section 16 of Article II of our present constitution which in its main provisions reads as follows:

"Every bill passed by the General Assembly shall before it becomes a law be presented to the governor for his approval. . . . If he does not approve it he shall return it with his objections in writing to the house in which it originated . . . which may then reconsider the vote in its passage. If three-fifths of the members elected to this house vote to repass it it shall be sent to the other house. . . . If three-fifths of the members elected to that house vote to repass it it shall become a law . . . unless the general assembly by adjournment prevents its return in which case it shall become a law unless within ten days after such adjournment it shall be filed by him with his objections in writing in the office of the Secretary of State. The governor may disapprove any item or items in any bill making an appropriation of money and the item or items so disapproved shall be void unless repassed in the manner prescribed for the repassage of a bill."

It is apparent that this amendment was taken from the amendment submitted by the constitutional convention of 1874, for they are almost identical in form and substance. It differs radically from the amendment of 1903 in that it reduces the legislative vote required for repassage from two-thirds to three-fifths, does away with the strange provision about requiring as many votes in repassage as received on original passage, and limits the item veto to appropriating money.

The debate on the question of a veto power did not take up anything like as much time, nor was it of such high quality, in the convention of 1912, as was the debate on the same question in the convention of 1874. This same comparison can be made of the entire debate in these two conventions, for the convention of 1874, called the lawyers' convention and for that reason probably unpopular, was a body of unusually able men, while the convention of 1912, chosen during the progressive movement of that day, was a body of men all sincere and some very able, but not distinguished as a group.

There was considerable sentiment in this convention against the veto power. This expressed itself in a resolution to do away with it entirely which was laid upon the table by a vote of sixty-nine to thirty-one, and a resolution to require only a majority legislative vote to repass a bill after a veto, which resolution was likewise laid upon the table by a narrow margin of seven votes.

The provision, however, which seemed to bother the convention most was the one concerning the power of the governor to veto bills after the adjournment of the legislature. This, it was claimed, in effect gave the governor the power of absolute veto upon many important bills. This arose from the practice of the general assembly of postponing the passage of many bills, including usually the general appropriation bill, until the day of adjournment. "I have stood," said a delegate (Mr. Doty) who had been clerk of the lower house, "at that desk and called sixty-six rolls on sixty-six laws in a single day. These laws go to the governor all at once and then we go home and he can veto every one of them and we can't do a thing." The Maryland Supreme Court (129 Md. 523) cites an instance in that state of five hundred bills being presented to the governor at one time upon adjournment. The convention recognized the possibility of such a power being left in the hands of the governor, but seemed to think the solution was easy in that all the legislature need to do was to stay in session ten days after all

bills were passed, signed, engraved, and presented to the governor, so that they could, if they wished, repass the bills over his veto. The answer from experience made to this was that while this was possible it was not in practice feasible, for the legislature is not willing to stay around or even return after a recess after all the work is done, even to check the governor's veto power.

There is an inconsistency in a democracy giving to the governor in practice such an absolute power over legislative acts, particularly in Ohio where, under the referendum, we have the power to correct ill advised or corrupt legislation. Every state has recognized this and yet no state has found a satisfactory way of preventing it. Various methods have been tried.

1. By providing as did the constitution of Ohio prior to the adoption of the present veto section, that in case the governor vetoed a bill after adjournment the Secretary of State "shall return such bill together with such objections upon the opening of the next following session of the general assembly . . . where it shall be treated in like manner as if returned within the prescribed time." This would seem to be a fairly good provision. The States of Florida, Maine, and Mississippi still retain such a provision in their constitutions. In practice, however, it is wholly ineffective. The following session is often two years after the former session has adjourned; it is a body of almost all new members totally unfamiliar with what went on in the previous session; the house in which the bill originated no longer exists at least in its constituent membership. It is a simpler procedure if the new legislature wants a similar bill passed to pass it as a new measure for this requires not a three-fifths but only a majority vote. At least this is the way the convention of 1914 felt about it, for, when it was suggested that this provision be retained in the constitution of Ohio, the member who had proposed and was in charge of the veto resolution said, "I believe it is one of the most pernicious things in the whole

matter," and the convention by common consent seemed to have dropped the suggestion from further consideration.

2. By providing, as does the constitution of the United States and many states which in their constitution have adopted the language used there, that "if any bill shall not be returned by the President (Governor) within ten days after it shall have been presented to him the same shall be a law in like manner as if he had signed it unless the Congress (Legislature) by their adjournment prevents its return, *in which case it shall not be a law.*"

This would seem in first reading to be clear. It shall not be a law. That means that the bill is dead and the governor has no power either of veto or approval. The Georgia Supreme Court declared (*Soloman vs. Commrs. of Cartersville*, 41 Ga. 157) that if the question were de novo they would so hold but that a long continued practice to the contrary led them to an opposite holding, and the Kansas Supreme Court (*State ex rel vs. Ryan*, 123 Kansas 767) held that under such a provision the effect of adjournment was to prevent the bill from becoming a law. Other states having a like provision have held differently, seeming to feel that there was no intent by such a provision to take from the governor his power of veto after a reasonable time for consideration.

The like provision in the federal constitution never received an authoritative interpretation until the decision in *Edwards vs. U. S.* (286 U.S. 482, 52 S. Ct. 627, 76 L. Ed. 1239) in 1932, though its meaning had been much discussed for over a century. Monroe raised the question in a cabinet meeting, and the cabinet dividing, refused to sign a bill after the adjournment of Congress. Hoover and Wilson upon the advice of their Attorney Generals did sign one or two bills under like circumstances. The general practice, however, of the presidents had been to sign all bills during the legislative session "induced by a purpose to avoid rather than decide the question." As the Supreme Court said in the Edwards case, "The general practice of presidents

in being present at the Capital for the purpose of signing bills during the closing hours indicated the existence of doubt and the desire to avoid controversy." In that case the Supreme Court definitely settled the matter by deciding that the President, in spite of this provision, had the power to save bills by signing them after the adjournment of Congress. "The provision," said the court, "that a bill shall not become a law if its return has been prevented by adjournment of Congress is apposite to bills that are not signed, not to those that are signed."

With this interpretation fairly well settled, provisions of this kind whether in federal or state constitutions fail to limit in any way the absolute power of life or death of the chief executive over the many bills presented to him at or after final adjournment.

3. This leaves but one other way to prevent the exercise of this absolute power of veto by the governor and that is for the legislature to remain in session or to return from recess ten days (in Ohio) after all bills are passed, signed by the presiding officers, engraved and presented to the Governor. This was the way suggested in the convention of 1912. When it was pointed out that a very good governor had vetoed a very good bill after final adjournment, the proposer of the present veto provision said, "Can you imagine a legislature in Ohio so stupid that they would give the governor of this state another such opportunity? I cannot." And yet we find in 1935 the General Assembly and the Governor at logger heads because of the Governor's veto absolute in effect on bills left in his hands after previous final adjournment. Again we hear it said that the General Assembly will never adjourn again but only recess until the ten days is over, but the chances are that again and again the General Assembly in its eagerness to get home for good after all the work is done will finally adjourn leaving many bills in the Governor's hands. In fact, there is ground for the suspicion that many times the General Assembly adjourns

gladly, leaving in the hands of the Governor the power of absolute veto with the secret hope that he will exercise it.

This has been merely a cursory review of the development of the veto power through the Ohio constitutions. The language in the present constitution seems simple and the meaning clear, but such is the difficulty in using language to convey ideas that almost every sentence is capable of different interpretations. At what time is a bill "presented to the governor" so as to start the running of the ten days period prescribed for its return? What constitutes an "item" in an appropriation bill? Does "after adjournment" mean only final or does it include temporary adjournments? What is the meaning of the provision "unless the general assembly by adjournment prevents its return in which case it shall become a law unless within ten days after such adjournment it shall be filed by him with his objections in writing in the office of the Secretary of State," in respect to a case like the recent veto of the Governor of items in the appropriation bill, which veto was filed in the office of the Secretary of State many days after the ten days after adjournment had taken place but not longer than ten days after it had been "presented" to him? These questions and particularly the last two named and their effect upon the validity of the recent appropriation bill vetoes by the Governor, will be discussed in a subsequent article.