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Constitutional Guidance for Lawmakers

How a Bill Becomes a Law: The Constitutional Way

In order to ensure the vitality of the fundamental constitutional principle of separation of powers, the Framers gave the President what Madison in Federalist *No. 47 called a "partial agency" in the legislative process. The President can propose measures to Congress (Article II, Section 7, Clause 2) and either approve or veto bills passed by Congress. It is worth noting that the executive veto is not a fiat—the President must return the vetoed bill to Congress "with his Objections" so that Congress may reconsider the bill in light of these objections. The Presentment Clause serves not only to delineate the President's role in the legislative process; its detailed stipulations also make clear that Congress may not bypass them, for example, by delegating its legislative powers to administrative agencies (see* Constitutional Guidance for Lawmakers *No. 1 on Article I, Section 1: "Legislative Powers: Not Yours to Give Away "). The Constitution insists that laws must be approved by both houses and the President. Administrative regulations circumvent both. This essay is adapted from* The Heritage Guide to the Constitution *for a new series providing constitutional guidance for lawmakers.*

"Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) 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 by their Adjournment prevent its Return, in which Case it shall not be a Law."

— Article I, Section 7, Clause 2

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The Presentment Clause is commonly viewed as a provision that protects the President's veto power, an association reinforced by the clause's name. Yet, the Presentment Clause has a broader function: The clause prescribes the exclusive method for passing federal statutes, indicating that all bills must pass both Houses of Congress and be subject to the President's veto. Thus, with some justification, one might call the provision the Lawmaking Clause.

The Presentment or Lawmaking Clause was often debated during the Founding, but the discussions generally focused on issues not relevant to current interpretive controversies. In the Constitutional Convention, the principal focus was on how difficult it should be for Congress to override the President's veto and on whether the President should possess the veto alone or should share it with the judiciary in a council of revision. During the ratification debates, the Federalists sought to justify the veto and bicameralism as devices for restraining the legislature from invading executive power and for limiting the enactment of hasty and unwise legislation.

The Framers believed that lawmaking was so important that they could not take any chances that the Congress might try to circumvent the President's role in the legislative process.

The Presentment Clause ultimately drafted by the Convention was one of the most formal provisions in the Constitution. The Framers apparently feared that factions would attempt to depart from the constitutional method for passing laws and therefore they spelled out that method in one of the document's longest provisions. The clause describes the specifics of the lawmaking process, including that the President's veto can be overridden by two-thirds of both Houses, that the President has ten days to decide whether to veto a bill, and that congressional adjournments should not deprive the President of his ability to veto measures. The Framers even mentioned that Sundays should not be counted in the ten-day period, and James Madison had the phrase "after it shall have been presented to him" inserted into the clause to "prevent a question whether the day on which the bill be presented, ought to be counted or not as one of the ten days." Moreover, to preclude Congress from bypassing the President by calling a bill by another name, Madison also persuaded the Convention to take the extraordinary step of adding a second Presentment Clause that required submission to the President of "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary." (*See* Article I, Section 7, Clause 3.) Clearly, the Framers believed that lawmaking was so important that they could not take any chances that the Congress might try to circumvent the President's role in the legislative process.

There are two ways that the Presentment Clause might be violated. First, Congress might pass statutes that authorize the legislative Houses or the President to take legislative-type actions without conforming to bicameralism and presentment. Second, Congress or the President might take legislative-type actions on their own initiative without statutory authority. The Framers' efforts have largely proved successful in preventing this second type of Presentment Clause violation. Thus, Congress has rarely if ever attempted to pass laws without either the approval of both Houses or presentment to the President. In addition, the President's assertions of the constitutional authority to take legislative-type actions in the domestic sphere have been relatively rare and, when they do occur, have often been restrained by the courts. *Youngstown Sheet & Tube Co. v. Sawyer* (1952); *but see In re Debs* (1895).

The Constitution has been less successful, however, in preventing Congress from authorizing departures from bicameralism and presentment through the enactment of legislation, such as through statutory delegations of administrative discretion to the executive. These statutes raise complex questions and therefore

may sometimes be constitutional. Still, as a general matter, it seems unlikely that the Framers would have allowed Congress to bypass the bicameralism and presentment requirements simply by passing legislation.

One important statutory departure from the traditional lawmaking process was the legislative veto, in which Congress usually granted each house the authority to nullify administrative actions taken by the executive. One might view the legislative veto from several different perspectives, but in each case the veto is unconstitutional. If the legislative veto is conceptualized as executive power, then it is unconstitutional because the legislators who wield it are not executive officials. If the veto is viewed as involving the power to pass legislation, then it clearly violates the Presentment Clause, because the veto does not conform to the requirements of bicameralism or presentment. Finally, the veto might be viewed as an exercise of the power of an individual House, but such powers are either mentioned in the Constitution, such as the power of each House to pass legislative rules, or can be reasonably inferred because they are traditionally possessed by legislative Houses, as with the power of investigation. The legislative veto, however, falls under neither category. The Supreme Court has largely conformed to the Constitution's original meaning and held legislative vetoes to be unconstitutional. *I.N.S. v. Chadha* (1983); *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise* (1991).

The most common departure from bicameralism and presentment has involved the statutory delegation to the executive of administrative discretion. Although such delegations certainly do not conform to the Presentment Clause, there is a plausible originalist argument that these delegations are constitutional either under the Necessary and Proper Clause or because they confer executive power rather than legislative power. Nonetheless, many originalists reject these arguments and conclude that broad delegations are constitutionally problematic because they give to the executive either legislative or nonexecutive power. The Supreme Court, however, currently holds that these delegations are constitutional, based in part on the nonoriginalist argument that the modern administrative state requires them. *Mistretta v. United States* (1989).

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Recently, the Supreme Court has reviewed a different departure from the traditional lawmaking process—the conferral of cancellation authority on the executive—and held it to be unconstitutional as a violation of the Presentment Clause. *Clinton v. City of New York* (1998). In 1995, Congress enacted the Line Item Veto Act, which despite its name, did not provide the President with veto authority, but instead authorized him to cancel certain spending provisions. This cancellation authority was similar to an ordinary delegation of administrative authority in that it conferred discretion on the executive, subject to a statutory standard, to take certain actions. Cancellation authority, however, differs from an ordinary delegation since it is generally narrower. Whereas an ordinary delegation allows the executive to promulgate a rule of his choosing, cancellation authority permits him only to accept or reject a statutory rule. For example, in the appropriation law area, ordinary delegations under traditional appropriation laws permit the President to spend any sum *between* the amount appropriated and zero, whereas cancellation authority only permits him the choice to spend the appropriated amount or to cancel the appropriation and spend nothing.

Reviewing the cancellation authority provided by the Line Item Veto Act, the Supreme Court found it unconstitutional. In the Court's view, cancellation authority was similar to the power to repeal a law,

because the authority could eliminate an appropriation. The exercise of cancellation authority therefore needed to conform to the Presentment Clause. Of course, if cancellation authority is similar to repealing an appropriation, then the executive's authority under a traditional appropriation to decide how much to spend is similar to enacting an appropriation, because the executive can "legislate" the amount that should be spent. Under the Court's reasoning, then, ordinary delegations may also logically violate the Presentment Clause, but the Court continues regularly to permit such delegations. The Court has yet to resolve this double standard whereby cancellation authority is unconstitutional even though such authority is generally narrower than ordinary delegations.

Several other matters raise questions under the Presentment Clause. First, some have argued that the clause defines *bill* as a provision relating to a single subject; consequently, if Congress were to combine two separate subjects in a measure, that would really be two bills and the President could therefore exercise a kind of item veto by vetoing one of the bills, while approving the other. Historical and structural evidence reveals, however, that the original meaning of bill was a measure that included whatever provisions Congress placed within it. Second, the Line Item Veto Act provided that the President would receive cancellation authority only as to bills that he signed but that he would lack such authority if he vetoed the bill, a provision that arguably places an unconstitutional burden on the President's veto power. Finally, it has been argued that the Presentment Clause requires that Congress pass bills under a majority voting rule, but the clause's language, which simply refers to every bill "which shall have passed" the legislative houses, combined with its structure and history, indicates that each house can employ supermajority rules to govern the passage of bills.

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