

Against the veto.

Poison Pen

BY SANFORD LEVINSON

THIS SUMMER, PRESIDENT Bush issued a veto for the first time. The occasion: a bill—passed by wide but not veto-proof majorities in the House and Senate—that would have expanded federal funding of stem-cell research. Following Bush's announcement, liberals, predictably, denounced his move as a capitulation to the religious right, while conservatives, just as predictably, lauded his commitment to the sanctity of life. What almost no one stopped to consider was whether Bush should have had the ability to veto the bill at all.

Everyone is familiar with the supposed tension between pure democracy and judicial review—namely, that the ability of courts to invalidate state and federal legislation often blocks the outcomes desired by a majority of voters. But, if judicial activism is anti-democratic, then the presidential veto is, well, *very* anti-democratic. Over the course of U.S. history, the Supreme Court has invalidated approximately 165 laws. But presidents have vetoed about 2,550 bills. Congress has overridden only 106 of those vetoes, meaning that the White House has blocked almost 15 times as many federal laws as the Supreme Court. Sometimes, these presidential actions thwart liberal majorities, as in the case of the stem-cell veto, which Americans opposed by a margin of more than 20 percent. On other occasions, it is conservatives who suffer. In 1996, for instance, President Clinton vetoed a ban on partial-birth abortions that was backed by substantial majorities both in Congress and among the American public.

In recent years, of course, we have not had much occasion to witness the power of the veto. Because his party controls Congress, Bush has used the veto sparingly. Clinton, by contrast, shared power for six years with GOP majorities on Capitol Hill, and he vetoed 37 bills. Now, with Democrats surging in House and Senate races around the country, it seems possible that November will bring a return to divided government—meaning that the veto will once again loom large. It is therefore a good time to ask whether American democracy has been well-served by this feature of our constitutional structure. The answer is a resounding no.

THE VETO WAS not always a key tool of executive power; early presidents used it with restraint or, as in the cases of John Adams, Thomas Jefferson, and John Quincy Adams, not at all. Things began to change once Andrew Jackson arrived in office and set about expanding the powers of the presidency. Prior to Jackson, according to UCLA political scientist Scott James, “[s]ettled

practice authorized vetoes where Congress's authority to legislate in a given area was constitutionally murky, or where hasty consideration produced legislation with remediable technical deficiencies.” The veto did *not* operate “to substitute the president's judgment for the Congress's on national policy matters.” In the ensuing decades, however, presidents slowly stopped thinking of themselves as mere enforcers of laws passed by an autonomous Congress. The veto gave them power to block legislation they disliked, and the threat of the veto gave them growing influence over how laws took shape. Soon, presidents were key participants in the legislative process.

The shift begun by Jackson points to an important distinction in the kinds of vetoes presidents issue. Presidents take an oath to “preserve, protect, and defend the Constitution,” and it therefore makes sense that they—like the Supreme Court—are allowed to block legislation they deem unconstitutional. The question is whether they should be able to block legislation for other reasons—indeed, for any reason they wish. There is international precedent for this distinction. In South Africa, the president can send a bill back to the National Assembly if he believes it to be unconstitutional. If the National Assembly fails to address his concerns, the president has one final option: to refer the legislation to the country's highest court. But, if the court accepts the bill, the president must, too. In other words, the South African president cannot veto a bill simply because he believes it to be unwise.

I have no objection to a Constitution-based veto, even if it is unclear whether the president should, in such circumstances, be allowed the last word. Rather, I am concerned about a system—like the one the United States currently has—under which the president becomes, in effect, a third legislative chamber, able, with the stroke of a pen, to negate the views of up to 289 House members and 66 senators.

What is so wrong with permitting the White House to act as another legislative branch? Put simply, the veto tilts the balance of power in Washington too far toward the status quo. It is already difficult enough to gain the consent of both the House and Senate on legislation, and the veto exacerbates this problem. Advocates of change must capture the House, the Senate, *and* the White House, whereas defenders of the status quo need to win over only one. This sets a high barrier to reform; and paralysis on key issues—such as health care and immigration—is too often the result.

Proponents of the veto might respond that the president represents the entire American people in a way that is not true of Congress. After all, members of Congress represent only their constituents, and there is nothing in the institu-

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tional structure of Congress to encourage even a single member to take a national perspective. If you accept this line of thinking, then the veto, while it may promote the status quo, makes the legislative process more democratic.

But the president isn't nearly as representative of the national will as many assume. The obvious case in point is the 2000 election—in which Al Gore won a plurality of the national vote while losing the presidency—but that is hardly the only example. Texas A&M political scientist George Edwards argues persuasively in a recent book that Richard Nixon received more popular votes than John F. Kennedy in 1960. Three additional presidents (Harry Truman in 1948; Nixon in 1968; and Clinton in both 1992 and 1996) failed to win popular majorities, while another (Gerald Ford) never received a single vote at all.

Even for those presidents who do manage to get 50 percent of the vote, the electoral college badly weakens their claim to represent the entire nation. Modern presidential campaigns take place almost exclusively in battleground states, making the vast majority of voters utterly irrelevant. A full 99 percent of all advertising expenditures during the 2004 race occurred in just 17 states; Florida and Ohio alone accounted for more than 45 percent. Because elections are lost or won in just a few states, presidents have little incentive to care about voters in much of the country. Steelworkers in Ohio invariably count for more than residents of non-battleground states like New York and Texas. The president

may be a more national figure than any single representative or senator, but the modern presidency is almost certainly a less national institution than the House or Senate taken as a whole.

IT GOES WITHOUT saying that recent proposals to give presidents line-item veto authority would enhance their power over legislation—and make this problem even worse. These proposals show how fearful Americans remain of truly majoritarian politics. There may, of course, be legitimate reasons for these fears; good arguments against democracy go back at least to the time of Plato. But most people read the Declaration of Independence and the Constitution as embracing popular government. And popular government, if it means anything, must mean a relatively robust form of majority rule, save when basic rights of vulnerable minorities are threatened.

To block legislation at the Supreme Court, it takes a majority of five justices, each of whom has been confirmed by the Senate. The veto, by contrast, is the tool of one person acting alone—one person whose claim to speak for the majority of Americans is dubious at best. Given how much energy has been expended in recent years debating the proper role of the judiciary, it is at least worth raising the question of whether our government would be better off—more efficient, more responsive, more democratic—without a presidential veto. ■