



Veto or Not: Constitutional Convention Creates Number, Powers of President

On June 4, Governor Rick Perry of Texas announced his intention to seek the Republican Party's nomination for president in 2016.

On August 15, 2014, Perry was indicted by a Travis County grand jury for allegedly misusing the veto power granted to him by the state constitution.

And on June 4, 1787, it was that very power — the power of the executive to negate acts of the legislature — that occupied the delegates' time at the Constitutional Convention in Philadelphia.

The debate on the scope of the president's power to veto legislation passed by both houses of Congress continues 228 years later.

On that summer day in Philadelphia, the Committee of the Whole (composed of all delegates acting as a committee rather than as delegates representing the states) approved the grant of veto power to the president, as well as empowering the legislature to override the executive "negative" with a two-thirds vote of both bodies. The provision finally adopted by the convention on July 21 read: "Resolved, that the national executive shall have a right to negative any legislative act which shall not be afterwards passed, unless by two third parts of each branch of the national legislature."

The plain language of the provision reveals that the intention of the convention was to require a two-thirds vote of the full body of each branch, rather than the assent of two-thirds of the total members present between the two houses.

Although that seems a simple enough reading of the veto override requirement, difficulty in interpretation arose when the Committee on Style presented their report on August 6.

In that draft version of the Constitution, rather than copying the language as agreed to by the members of the convention, they copied a similar provision in the Massachusetts state constitution. This article read: "But if after such reconsideration, two thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections be sent to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of the other House also, it shall become a law."

Later in their report, the Committee of Detail created the confusion when it wrote, "In each House, a majority of the members shall be a quorum to do business." Did this mean that two-thirds of a quorum could override a veto?

Many of the delegates later expressed an understanding that the provision required two-thirds vote of all members, not just those present. A Supreme Court decision in the 1919 case *Missouri Pacific Railroad v. Kansas* held that two-thirds of members present could override a veto, even if that number





Written by [Joe Wolverton, II, J.D.](#) on June 4, 2015

was well below two-thirds of the total membership.

In taking up this question, James Madison tried again — unsuccessfully — to link federal judges with the president in a council that could revise bills passed by Congress. The convention rejected this proposal eight states to three, Roger Sherman declaring that he “disapproved of judges meddling in politics and parties.”

Gouverneur Morris advocated for giving the president unlimited veto power. While that sounds odd, one must remember that at this point, the president was elected by Congress, so Morris believed that “the tendency of the legislative authority to usurp on the executive” could only be checked by a president possessed of an absolute negative over legislative acts.

James Wilson, too, worried that the legislative branch was given too much power and that unless the president had a nearly unlimited veto, Congress would eventually swallow up all power, executive, judiciary, and legislative.

At this point in the afternoon, the delegates had heard enough and closed off further debate. Hugh Williamson of North Carolina made one last appeal for bolstering the president’s defense against a legislative assault on his prerogatives and moved that a three-fourths vote of the houses be required to override a veto, rather than the two thirds being considered. This motion was seconded and approved by the convention. By the end of the convention, however, Williamson felt his proposal placed “too much power in the president” and he suggested that the threshold be lowered to two-thirds once again.

Finally, with the abundance of hats piling up in the presidential ring, Governor Perry and his Republican rivals might be interested in the other object that occupied the convention delegates 228 years ago today: How many presidents should there be?

Ultimately, the Constitution provided for a single executive, but that decision wasn’t unanimous. In fact, of the 10 state delegations that cast votes on the resolution calling for the creation of one president, three — New York, Maryland, and Delaware — voted against it!

Roger Sherman of Connecticut argued that a presidential council would be necessary to make the Constitution “acceptable to the people.”

Edmund Randolph of Virginia countered, insisting that a single executive “is not a king” and that the “tranquility, not less than the vigor of the government” would be improved under a scheme calling for a single executive.

Ultimately, the Framers of the Constitution chose to create one president and give him veto power over acts approved by the legislature.

Curiously, the threat of the legislature usurping executive power is considered negligible today, although for decades presidents have carried out a plan to consolidate all functions of government into the hands of one “unitary” executive, aggrandizing the office of the president and reducing Congress to mere plaintiffs in lawsuits challenging that all but unlimited authority.



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