Reconsidering the Amendatory Veto for Illinois

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I. INTRODUCTION

A significant accomplishment of the Sixth Illinois Constitutional Convention was to strengthen the machinery of Illinois government to make its branches more flexible and to facilitate political give and take. The 1870 Constitution embodied a great deal of distrust of the legislature. The legislature had been constrained to cramming the work of a biennium into a few months, adjourning *sine die* at or about June 30th every odd numbered year. Oversight was a joke. Consideration of veto messages was a freak event. Post-session interaction by legislators with the governor tended to focus on patronage and electoral considerations.

The 1970 Constitution unshackled the legislature to make policy and oversee its implementation. In a creative way the convention enhanced both the legislature and the executive by the changes in the new constitution. The new constitution gave the legislature and its constitutional leaders continuous life whether or not it was actually in session. The governor obtained a wider range of legislative tools including those for budget development and management. As chief executive s/he was given greater authority to organize and manage the executive branch. Veto powers enlarged gubernatorial discretion. The governor can totally veto bills and appropriations, even items in appropriations. But s/he can exercise fine tuning tools as well, reducing items in appropriations and rewriting substantive legislation by means of the amendatory veto. Not only can and does the legislature come back to reconsider vetoes, the traditional requirements to over-

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ride the governor have been relaxed. The override requires a three-fifths constitutional majority in both chambers, not the two-thirds majority required under the 1870 Constitution. To defeat the governor's reduction veto, only concurrent majorities are required to restore the legislature's originally appropriated amount. So the constitution, reflecting the political culture of the state, has structured state government to make public policy through a system of brokerage, negotiation and exchange.²

II. LEGAL AND OPERATIONAL CONSIDERATIONS

One of the unique provisions created for the people of Illinois by the Sixth Illinois Constitutional Convention is the amendatory veto. It is but one part of Section 9 in the Legislative Article of the 1970 Constitution, and reads as follows:

(e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.³

The procedure is straightforward. The governor sends back a bill as passed by the General Assembly with a message indicating exactly how s/he wants its language changed. Considering it "in the same manner as a vetoed bill" means that all procedural requirements of handling any vetoed bill apply to ones for which the governor has "specific recommendations." The bill is handled first in the chamber of its origin. The rules of the Senate and House are not exactly alike, but are procedurally similar.⁴ In the Senate, "motions with respect to bills returned by the Governor may be made by the sponsor or by any member who voted on the prevailing side on the vote on final passage of the bill in question."⁵ In the House, any member "desiring

³. ILL. CONST. art. IV, § 9.
⁴. See HANDBOOK OF THE ILLINOIS LEGISLATURE 89-90 (1985) (Senate Rule 54) [hereinafter HANDBOOK].
⁵. HANDBOOK, supra note 3, at 89-90 (Senate Rule 54).
to take action with respect to a veto shall file a written motion with the clerk" to do so. Informal norms require that the motion be made by the sponsor of the bill.

The mover has three choices with regard to the bill "returned with specific recommendations." One is a motion to accept the governor's specific recommendations, inserting into the bill "the language deemed necessary to effectuate the specific recommendations." This action requires a constitutional majority for passage: 30 votes in the Senate; 60 in the House.

The second choice available in both chambers is to treat the bill as if it were vetoed and to move that the bill pass "notwithstanding" the governor's specific recommendation for change. This motion passes with an affirmative vote of a three-fifths majority of the elected members: 36 votes in the Senate; 71 in the House. This veto override action by an extraordinary majority enacts the bill in the same language it had when it first passed out of the legislature.

There is a third choice, the choice to take no action on the governor's specific recommendations. If both houses fail to accept the governor's recommendations and both houses fail to override the vetoed bill, then the bill dies.

In recent years these choices have been exercised by the General Assembly as it has responded to governors who have employed all their veto options. Table 1 provides statistics on the legislative workload from 1973 through 1986. The first two columns, 1973-74 and 1975-76 cover the Democratic administration of Governor Daniel Walker. The remaining biennia are for the Republican administration of Governor James R. Thompson. While the workload has varied rather substantially, the percentage of bills passed and sent to the governor has fluctuated between 26.4% and 32.7%, while the numbers ranged from 1159 to 1780. The percentage of bills signed by the governor has been rather steady, varying between 77.5% and 84.9% percent. Vetoes in full have seemed to decline, going down each biennium except for 1983-84, and ending at 7.8% of the bills sent to

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6. HANDBOOK, supra note 3, at 226 (House Rule 47(a)(1)).
8. HANDBOOK, supra note 3, at 90-91 (Senate Rule 55). House Rule 50 is the same, but substitutes the word "accept" for the Senate's word "effectuate." HANDBOOK, supra note 3, at 227-28 (House Rule 50).
9. See infra app. at Table 1 at p. 778-79.
10. The bills introduced in 1981-82 are only 71.1% of the number in the peak year, 1975-76. Id.
the governor. Few full vetoes are overridden, ranging from 5% to 18%.

The governor’s use of the amendatory veto has grown steadily. The percentage increased from 3.9% in Walker’s first biennium to 10.8% by Thompson in 1983-84, followed by a decline to 7.1% in 1985-86. Clearly the legislature approves most of the “specific recommendations,” the percentage dipping under 70% only in the last half of Walker’s administration. Thompson’s approval rate has not been lower than 80%. Overrides are rare, typically about 5%. The “no action” response has been more variable, and the median of the percentages shown is 14.7% in the most recent biennium.

These numbers help to explain the political situation of the bill sponsor. In the General Assembly, members buy a premium on sponsoring bills and getting their bills passed. This is quite different from Congress, where the bills of individual members lose their identity by emerging in a committee bill. In the General Assembly, members jealously protect the substance of their bills and take pride in carrying them through the process. Informally, they even refer to their “batting average” for getting bills enacted. Only a third or fewer of the bills get to the governor’s desk. Sponsors want those bills to survive.

The veto is a deadly tool. Despite the fact that the constitutional three-fifths majority to override is not nearly as steep as the federal model, it still presents a difficult barrier. Since party loyalty is often involved on veto roll calls and no governor’s party has had less than 40% of the seats, overrides cannot be accomplished without defections from members of the governor’s party in both chambers. In short, a governor’s veto is rarely overridden.

When the governor is opposed to a bill that has been passed, the bill sponsor is in a relatively weak position compared to the governor. Because veto in full will kill most bills, the bill sponsor may therefore welcome, or even invite, an amendatory veto. Interest groups can offer endless suggestions for changes for the governor to consider. Therefore, the legislative sponsor may be able to salvage “something” by obtaining an amendatory veto from the governor. The sponsor’s weakness continues in the legislative environment. With an amendatory vetoed bill, for the sponsor to take no action is a total loss. Seeking an override is highly chancy and loses in nearly every instance. Therefore, the sponsor’s typical action is to ask the legislature accept

11. U.S. Const. art. I, § 7, cl. 2. The United States Constitution requires a two-thirds vote by each house to override a presidential veto.
the governor's recommendations, get at least 60 votes in the House and 30 in the Senate, and pass the bill including the governor's changes.

III. LEGISLATIVE CONCERNS

Legislators frequently express concern that the amendatory veto intrudes too deeply upon the legislative process. The intrusion takes several forms that change what may be thought of as a normal legislative pattern.

A. EARLY CONSIDERATIONS OF BILLS

In states where the amendatory veto is not available it is normal for chief executive to be closely attentive to bills beginning their paths to enactment. For bill sponsors the hurdles during early consideration are the committees, interest groups, legislative policy specialists and staff when bills are considered in committee and the amending stage. In Illinois, the governor and her/his staff are rarely visible in this significant shaping stage for legislation. They have nothing to lose by failing to bargain and nothing to gain by indicating highly specific issue positions early in the process.

B. LATE SESSION EXECUTIVE BEHAVIOR

The governor concentrates attention upon major legislation and the balance of revenue measures and spending. The focus in legislative bargaining is upon the governor and four top leaders (House Speaker, Senate President, and the Minority Leaders of those two chambers). Compromises concerning the substantive language of bills are primarily on major legislation, not the hundreds of less conspicuous bills on which ordinary members have spent most of their time.

C. POST-PASSAGE CONSIDERATION

After House and Senate consideration in committees, on the floor and in conference committees, the final passed version of 1600 or more bills go to the governor. After passage, the legislature has 30 days to transmit the bills, and the governor has 60 days to apply the veto powers to them. While that load of bills constitutes a huge task, it is only a third to a quarter of the bills introduced. The governor can ignore the thousands of amendments alive at one time or another during the session. The governor has substantial resources at hand to make her/his judgments. Besides her/his considerable staff, s/he can call upon the executive departments for recommendations. Informally s/he has access to any lobbyist or even legislator from whom s/he
wants to hear on any issue. In contrast to the public process of the legislature, with its open hearings, public record votes and daily accessibility of participants to lobbyists, citizens and the press, the governor proceeds through the veto process with great discretion regarding whose opinions to consider in her/his decisionmaking. S/he has great leverage for bargaining, and can hold legislation of her/his choice hostage to gaining support from others. Not much involved in the earlier legislative bargaining, s/he now enters upon the veto process with few substantive commitments. The amendatory veto means s/he can combine elements from several bills. Legal limits on her/his discretion are almost nonexistent.

D. LEGISLATIVE RESPONSE TO VETOES

As noted earlier, the legislature can act on the governor’s vetoes. However, the issues are framed in the governor’s language. Legislators are barred from amending the governor’s “specific recommendations.” The governor can focus public attention on issues better than legislators can. Interest groups and sometimes specific legislators have frequently given commitments of support to the governor for her/his specific recommendations. Overturning the governor requires an extraordinary majority, necessitating that members of her/his own party to be part of the governor’s opposition. Bargaining is essentially over passage or defeat, not substantive fine tuning of the legislative language.

IV. LEADER HYPERBOLE

Frequently legislators have expressed frustration and concern about gubernatorial use of the amendatory veto. The notion that governors have exceeded their constitutional authority has been argued by numerous legislators. Speaker Michael J. Madigan was quoted as follows:

    Every governor has exceeded his authority and Governor Thompson, I think, has made more use of the amendatory veto than any other governor. In many instances, Gov. Thompson has made policy decisions, and that clearly was not intended. . . . We no longer have a true separation of powers.12

    Governor Thompson has responded simply that legislators are “free to reject an amendatory veto anytime they feel it goes too far,

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and on some occasions they have. They retain the final say, which is the best safeguard of the amendatory veto I know." Others close to the governor are quick to note that legislators themselves often ask the governor to make specific amendments in bills they themselves sponsored and got passed by the General Assembly. By implication, it is argued, legislators acknowledge the need for an amending process that follows legislative bill passage.

V. CONSTITUTIONAL HISTORY

William S. Hanley, who was legislative counsel to Governor Richard B. Ogilvie, has reviewed the veto powers of the Governor of Illinois and argues that the amendatory veto has been an accepted, if only occasionally used, practice since statehood in 1818.14

Under our first constitution, the veto power was held in a “Council of Revision” consisting of the justices of the Supreme Court and the governor. This council repeatedly sent enacted bills back to the General Assembly with suggested specific amendments which were then offered to the previously enacted bills, adopted, and sent back to the council for final approval. Two-thirds of all vetoed bills were handled this way for 30 years. When the council was abolished with the 1848 Constitution, a new procedure with the same effect was adopted although not used as widely. . . .

Under the 1870 Constitution, a more direct procedure was employed. On at least one occasion, the governor vetoed a bill but stated in his message what was necessary to make the bill acceptable. The originating house amended the bill to comply with the governor’s corrections, repassed it, sent it to the other house for approval, and then sent it back to the governor who signed it into law. Although this incident occurred in 1907, the action was not exactly an obscurity since the Illinois Supreme Court gave its subsequent blessing to the constitutionality of the proposal and reviewed the procedure without judicial comment.15

13. Id.
Two points may be noted about Hanley’s observations on the amendatory veto under the 1870 Constitution. First, he refers to the changes made as the legislature amending the bill to comply with the governor’s “corrections.” Thereafter, he notes, the practice described “fell into disuse for 50 years.”

Preparatory to the Sixth Illinois Constitutional Convention, a series of issue papers were developed and published. Among them was one entitled “The Executive,” written by Dawn Clark Netsch, who wrote from the vantage point of a law professor and former staff member of Governor Otto Kerner. The underlying assumption of the paper was that “Illinois state government is best able to fulfill its function . . . in the presence of a vigorous, strong governor. . . .” The concluding section of the paper was on the legislative powers of the governor, mostly discussing the veto. After comments on the “item or section veto,” she concluded on a suggestive note:

An alternative to the section veto is the amendatory veto, which permits the governor, instead of disapproving an entire bill, to return it to the legislature with his recommendation for change. The legislature is required to vote on his recommendations before reconsidering the bill. Four state constitutions (Alabama, Massachusetts, New Jersey and Virginia) grant the governor the power of amendatory veto in varying forms. The evidence indicates that it has worked well, and several leading students of the state executive are enthusiastic about its potential for improving legislation. The amendatory veto would undoubtedly work better where the state legislature did not pass the bulk of the legislation in the closing days of the session.

Many members of the constitutional convention came with specific ideas about what they wanted in or out of the next constitution. The mechanism for accessing these ideas from con-con members was for them to submit “member proposals” and all told members submitted 582 proposals. Member proposals varied from a few lines to several pages in length. While substantive committees were not limited to using only these proposals, the proposals constituted elemental substance for committee refinement into constitutional articles.

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18. Id., at 179-80.
Relatively few proposals pertained to the veto powers and only four dealt with the amendatory veto. Two of those were elements in lengthy proposals about the legislature generally. The remaining two focused only upon the idea of an amendatory veto.

William D. Fogal submitted Member Proposal 37, a comprehensive draft of powers for a unicameral legislature. Among its 19 sections were veto provisions in Section 17 for a total veto, an "item or section" veto, a reduction veto, and an amendatory veto. The legislature could override by a two-thirds majority. The amendatory veto was described this way:

The Governor, in returning with his objections a bill for reconsideration at any general or special session of the legislature, may recommend that an amendment or amendments specified by him be made in the bill, and in such case the legislature may amend and re-enact the bill. If a bill be so amended and re-enacted, it shall be presented again to the Governor, but shall become a law only if he shall sign it within 10 days after presentation; and no bill shall be returned by the Governor a second time.19

This handling of the governor's recommendations is an amendment and repassage process. Presumably the passage requirement would be "a majority of members present and voting," as required in Section 16 of this Member Proposal.

Member Proposal 198 was sponsored by Louis J. Perona and four others. It proposed that the veto section of the new constitution contain a provision substantially as follows:

In addition to any veto power provided in this Section, the Governor has the right to exercise a conditional veto in which he may indicate that he will veto a bill unless the General Assembly agrees to a change suggested by him in the particular bill. In such event, if the majority required to originally pass the bill agrees to the change, the bill with the change then becomes law. If the majority required to originally pass the bill fails to agree to the change, the veto of the Governor terminates the bill unless passed by the General Assembly over his veto in the same manner as provided in this Section for approving bills after veto.20

The Perona proposal provided the governor an explicit means to bargain with the legislature, and set the standard for getting approval for his version as a majority. Overturning the governor would presumably necessitate an extraordinary majority, consistent with that needed with other vetoes.

Dawn Clark Netsch, as a convention member, along with a co-sponsor, submitted Member Proposal 521 on March 3, the cut-off date for such proposals. It called for an amendatory veto along the following lines:

In returning a bill without his approval to the house in which it originated, the Governor may recommend amendments to the bill to satisfy his objections. In such case the house in which the bill originated will first proceed to vote on the amendments recommended by the Governor and then vote on the bill as amended, if the amendments were adopted. If passed, the bill will then be sent to the second house where the same procedure will be followed, after which the bill will be presented to the Governor for his final approval or disapproval.

The Netsch proposal made gubernatorial changes "amendments," each to be treated procedurally as amendments. There is no reference to overriding the governor.

Anthony M. Peccarelli also made the March 3 deadline with Member Proposal 582, the last one in the record. Twenty sections long, it offered a draft of a complete legislative article for a unicameral legislature which would choose a governor and cabinet. The governor's veto powers resemble those in the earlier Fogal proposal and the paragraph about gubernatorial amendments is almost verbatim the same as Fogal's. The final passage provision in the Peccarelli draft was a majority of members elected to the Senate.

The Executive Committee brought out only one proposal, complete in its content. Section 33 defined the amendatory veto:

Within 60 days after the presentation of any bill to the governor, he may refer the same back to the house in which it originated with specific suggestions for change. If, upon reconsideration initiated by the originating house, the specific revision recommended by the governor is adopted by both

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21. Id. at 3078.
22. Id. at 3111-12.
23. PROCEEDINGS, supra note 19, Vol. VI, at 335-412.
houses, each having 15 days in which to act, following a yea
and nay vote entered on their journals, the governor shall then
certify on the bill that it conforms to his suggestions and it
shall become law. Otherwise, the bill shall be considered as
having failed of passage, unless again passed as in the case of
a bill vetoed on its entirety.24

This language is consistent with the earlier proposals. The gov-
ernor’s “specific revision” can be adopted by concurrent majorities,
but the unrevised bill, “having failed of passage,” is treated as a
vetoed bill, possible in its original language only by the extraordinary
majority necessary with vetoed bills. That majority, specified in an
earlier section, was to be a three-fifths majority in each house. The
Executive Committee proposal was accompanied by the committee’s
own explanation and commentary:

This proposed section, which has no counterpart in the
existing Illinois Constitution [sic.], offers an alternative to the
veto which will be especially helpful when the Governor finds
reason to object to portions of a bill whose general merit he
recognizes. For example, he is now with some degree of
regularity compelled to veto some measures merely because of
a technical flaw in their wording.

Under the proposed section, he would have the alternative
of using a qualified veto which points out the specific changes
necessary to make the measure acceptable. If the General
Assembly concurs in those changes by a majority vote, delays
incident to starting completely anew would be avoided. These
are Alabama, Massachusetts, New Jersey and Virginia. All
reports from those jurisdictions indicate that the procedure
has been found useful by both the Governor and the General
Assembly.25

When the Executive Committee’s proposal got its first reading
Frank Orlando spoke on behalf of the Executive Committee. Dawn
Clark Netsch inquired about the latitude the legislature would have
when responding to the governor’s recommended revisions. Orlando
responded that the legislature could only accept the governor’s lan-
guage. Pressed further, Orlando enlisted aid from fellow committee
member, Ron Smith. From there the transcript is as follows.

24. *Id.* at 351.
25. *Id.* at 403.
MR. SMITH: Mrs. Netsch, in the event that the legislature decided to tamper with the language or to change the returned legislation in any way, then the legislature would start from scratch. It would go back into committee, and the legislature would begin anew the whole process of presenting that bill to the legislature.

This provides for only precise corrections accepted by the legislature.

MRS. NETSCH: May I pursue that question?

PRESIDENT WITWER: Yes, go ahead, Mrs. Netsch.

MRS. NETSCH: Then their failure to adopt the precise suggestion that the governor makes by a majority vote—the failure of either house to adopt that precise language—has the effect of a veto of that bill, and the only way that the matter can be revived at that point is by the legislature introducing a new bill and starting the whole process over again. Is that—am I correct in my understanding?

MR. R. SMITH: That's right.

MR. ORLANDO: That is my understanding also, Mrs. Netsch.

MR. R. SMITH: We had testimony to the effect that many of the bills that are returned are returned for corrections or for simple deletions—simply to clean up the language. If the legislature can, instead of sending something back into committee, take care of that kind of problem in one day, we felt that that would be a substantially progressive move.

MRS. NETSCH: Then it was the committee's thought that the conditional veto would be available only to correct technical errors?

MR. ORLANDO: No ma'am.26

The next questioner went on to ask about whether the legislature could revise the governor's changes, and the floor discussion never came back to how much discretion the governor had with his specific recommendations.

Although on first reading the veto provisions were contained in the article on the executive, when these provisions came back from the Committee on Style, Drafting and Submission for second reading, they had been incorporated into the legislative article. They appeared as Section 9, with five subsections, a-e. The amendatory veto, was as follows:

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(e) The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of all the members of each house. If the Governor certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, the bill shall be returned to the house in which it originated and shall be considered as a vetoed bill.27

Although this paragraph was a complete rewrite of the first reading language, the Committee on Style, Drafting and Submission indicated that its new language only made clearer the intent of the convention that legislation not "ping-pong" back and forth between the legislature and governor.

The subsection makes it clear that, the first time around, the General Assembly may either override the governor by a three fifths vote or accept his recommendations by a majority vote, but that, the second time around, the General Assembly is limited to a straight override.28

In no way did this language propose to substantively limit the governor's discretion in her/his "specific recommendations." When the legislative article came to the floor on second reading, August 12 and 13, 1970, there was relatively little discussion of the veto. What attention there was focused upon the item reduction veto. A motion to delete it failed as did one to require restoration of a reduction by concurrent three-fifths majorities in both houses.

The motion to delete the reduction veto came from Paul Elward, concurrently a Representative in the General Assembly and a Chicago Democrat. During the debate references were made to the amendatory veto (section 9e):

MR. ELWARD: I think with the present power of the item veto, plus the language that I propose to leave unchanged in section 9(e) where the governor may return a bill with recommendations for change, and given the almost continuous sessions of the legislature in this area, I think we have reached all of the situations that ought reasonably to be reached . . . .29

27. PROCEEDINGS, supra note 19, Vol. VI, at 1532.
28. Id. at 1554-55.
Elward's motion was seconded by William A. Sommerschield, an Elmhurst Republican who previously served on the legislative staffs of Republican leaders in the House and Senate. Supporting Elward, he argued that the reduction veto broadened an already broad range of veto powers, assuming the inclusion of the amendatory (conditional) veto:

MR. SOMMERSHIELD: I don't think we have provided, in my own opinion, a house—a legislature, rather—which is sufficiently powerful to overcome the control that the governor would have if we did not adopt this amendment and get rid of the reduction veto. I think with the amendatory veto and the item veto we have given them certainly a great deal of authority, and with the conditional veto you can use that as a reduction veto any way and say that he will reduce an item conditional on the legislature's action.

I think that, in essence, is a reduction veto, yet it has the safety of building into the system the reaction by the legislature before a conditional veto takes effect. I think that is much safer. I think it provides a firmer check on the action of the executive, and I would urge you to adopt the Elward amendment.30

Elward's motion was defeated, but the Sommershield view of the broad application that the amendatory veto would have is unchallenged in the record. The section as approved was included with Sections 4 through 16 on a vote of 94 to 1,31 after which the Convention continued to struggle with single member districts versus cumulative voting for the House.

On August 14, 1970 the convention completed second reading action on all the substance of its work. After a two-week break it reconvened to consider its finished handiwork. On August 27, 1970 the Style, Drafting and Submission Committee came back to the Convention with Proposal 15, a complete draft of the document along with explanations of changes in phraseology. Its proposed language for Article 5, Section 9(e) is what was finally enacted by the convention. With regard to the beginning of the third sentence, the committee explained that "[s]uch bill shall be presented again to the Governor and . . . [t]his language makes explicit what was implicit,"32 and explained the matter no further.

30. Id. at 4083.
31. Id. at 4106-07.
During the oral presentation of the section there were no questions or particular attention given to the veto powers. The current constitutional provisions were effectively decided when the proposed legislative article passed on third reading on August 31, 1970.

The convention prepared its own "official text with explanation" of the proposed 1970 Constitution. With regard to the amendatory veto it said of the governor, "He will also have the 'amendatory veto' power which allows him to return a bill to the house in which it originated with his objections to it and suggestions for changes." 33

VI. SEARCH FOR SUBSTANTIVE LIMITS ON THE AMENDATORY VETO

It is noteworthy that none of the member proposals for an amendatory veto made any substantive attempt to limit the breadth of the governor's discretion in recommending revisions or amendments. No proposal constrained the amendatory veto of the governor to technical corrections and matters of form in bills. They simply refer to "changes" and "amendments."

An early witness before the Executive Committee which drafted the veto powers, was William Handley, then Governor Ogilvie's legislative counsel. His views have been noted above. He argued for strengthening the governor's power, and specifically advanced his views that the governor should have an amendatory veto in order "to 'correct' a defect in a measure through partial amendment, rather than veto the entire bill. He further suggested that the legislative override of such a veto be limited to a simple majority." 34

When the Executive Committee brought out its proposal for first reading, its commentary on the amendatory veto gave a hint that the governor might assume a narrow view of the amendatory power. It implied that technical flaws in bills were common place, but correctable by the amendatory veto. But that application of the power was only cited as an example of a reason why the governor might object to a portion of a bill. The example is not a limitation on a governor's reasons.

The very brief floor debate in the constitutional convention on the meaning of the amendatory veto has evoked subsequent comment by convention members. Intimates to the process indicate that Orlando did not represent the true intent of the Executive Committee. Dwight P. Friedrich, a member of the committee and one of the designees of

34. GERTZ & PISCIOTTI, CHARTER FOR A NEW AGE: AN INSIDE VIEW OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 218 (1980).
Chairman Joseph Tecson as "our veto team," later expressed that judgment in an Illinois Issues essay. Friedrich referred to Orlando’s "No, ma’am," response to Netsch four times as an incorrect answer. He insisted that the preponderance of the debate record indicated that the intention expressed in the committee and on the floor of the convention was to use the amendatory veto only for "technical errors," "precise corrections," "technical flaws," "simple deletions" and "to clean up the language." A similar assessment has been given by Arvid Hammers, Administrative Assistant to the committee’s Staff Counsel, Jack F. Isakoff. According to Hammers, both he and Isakoff were at the side of the floor during the exchange between Netsch and Orlando. They visibly disagreed with Orlando’s response to Netsch’s question, but the answer went uncorrected into the record. Netsch on the other hand, has since stated that she did not pursue the question further because she got the answer that she wanted at the time, namely, that gubernatorial discretion went beyond mere correction of technical errors.

It is reasonable to imagine that convention members expected to debate the substance of the amendatory veto again on second and third reading stages of convention consideration, and that the exchange between Netsch, Smith, and Orlando might have obtained further elaboration. But the convention did not, and that exchange became the basis for interpreting the intent of the framers.

After adoption of the 1970 Constitution it did not take long for a case to get to the Illinois Supreme Court questioning the breadth of the governor's authority in the use of the amendatory veto. In People ex. rel Klinger v. Howlett, rather than dealing with the issues of the case narrowly, the court took note that the scope of the governor’s power with the amendatory veto “has not been clearly stated either in the constitution itself or in the committee reports or debates in the constitutional convention.” The court took note of language in the record, including Delegate Orlando’s "No, ma’am"
response to Delegate Netsch. The court therefore concluded:

Upon the basis of the imprecise text of the constitutional provision and the materials before us in this case, we cannot now attempt to delineate the exact kinds of changes that fall within the power of the Governor to make specific recommendations for change. It can be said with certainty, however, that the substitution of complete new bills, as attempted in the present case, is not authorized by the constitution.41

Given the meager limitation on the amendatory veto through supreme court interpretation, the General Assembly adopted a constitutional amendment to substantively limit the governor's amendatory veto power to "the correction of technical errors or matters of form,"42 during 1973. The issue went to the people on a constitutional referendum vote in November, 1974.

Prior to the referendum, Secretary of State Michael J. Howlett distributed an official explanation of the proposed amendment along with arguments for and against the amendment.43 Arguments in favor included the following statements:

(1) Nobody knows how far a Government can go [under the existing constitutional provisions] in re-writing a bill which has passed the General Assembly. . . .
(4) The "amendatory veto" power discourages Governors from participation in the open, public development of new laws. It is easier, and often more dramatic, for a Governor to re-write bills to suit his own tastes after the General Assembly has gone home. This leaves the legislature to "take it or leave it". Only by an extraordinary 3/5 majority of both Houses can the legislature salvage its own legislation by overriding the Governor's action.
(5) The Constitution allows only 15 days for each House of the legislature to consider and vote on the Governor's amendments. This barely permits the General Assembly time to evaluate broad, significant changes proposed by the Governor. Most importantly, the opportunity for the public to react and express its views to legislators becomes impossible in many instances. . . . Finally, because technical changes and

41. Id. at 248-49, 278 N.E.2d at 87-88.
42. 1973 Ill. Laws 3101.
changes in form can be evaluated relatively easily and quickly, the General Assembly will be able to act responsibly within the 15 days allowed each House to accept or reject the changes.

Arguments against the proposed amendment refuted the advantages of the amendment and observed:

5. Adoption of the proposed amendment restricting use of the amendatory veto would invite litigation each time the veto is used by the Governor. The authorized changes would be those for the “correction of technical errors or matters of form”. But these terms are not precise and have no fixed meaning . . .

It is preferable to leave questions about the use of the amendatory veto, with the General Assembly, each time the Governor files recommended changes. There simply is no need for this proposal if the General Assembly is willing to assume its responsibility for either accepting a Governor's changes, letting a bill die, or overriding his veto.45

The electoral outcome was not close. While the proposed amendment had to have a majority, it received only 42.7% of more than three million votes cast at the election. It could have passed with three-fifths of those voting on the proposition, but it got only 49.5% of those votes.46 Presumably the people weighed the reasons for restricting the amendatory veto and accepted the wide latitude announced by the supreme court in Klinger and the procedural constraints of the legislature already in place. The people, in effect, gave popular approval to the negative descriptions of status quo offered by advocates for change.

The previously arguable proposition, that Delegate Orlando was wrong about the Executive Committee's intent to limit the scope of the amendatory veto to technical corrections and errors, was made moot by the people's rejection of an explicit amendment to so limit the amendatory veto power. The supreme court made this clear in 1979 by ruling on the constitutionality of the corporate personal property replacement tax.47 The governor used the amendatory veto to

44. Id. at 4-5.
45. Id. at 6.
reduce the tax rate from 2.85% to 2.5% after the first year, and petitioners asserted that this usage exceeded the constitutional authority. After citing its interpretation in Klinger and noting con-con's Record of Proceedings, the supreme court said: "The absence of further clarification, of course, leaves unclear the drafter's intent as to the precise scope of the amendatory veto power. . . ." The court went on to apply "the understanding of its provisions by the voters who, by their vote, have given life to the product of the convention." Noting that the people rejected a proposal to narrow the amendatory veto, the court asserted:

When this public rejection of the proposed restriction is viewed along with the somewhat imprecise interpretation by the delegates, it is clear that his section 9(e) of article IV was not intended by the voters to restrict the amendatory veto power to a proofreading device. Although the point beyond which the amendatory veto power does not extend is not as clear form the constitutional debates or referendum, that point is not, in our judgment, reached here. The specific recommendations made by the Governor regarding House Bill 2569 contain no change in the fundamental purpose of the legislation, nor are they so substantial or so expansive as to render his use of the veto power violative of section 9(e) of article IV.

Here, the court appears to set an outward substantive limit on the amendatory power of the governor. The governor may make no changes in the fundamental purpose of a bill, and he did not in the matter tested.

The most recent challenge responded to by the supreme court dealt with numerous tax issues, but also the amendatory veto. With regard to the latter, it expanded somewhat on the substantive limit on the amendatory power suggested in Continental Illinois:

It is clear that the power encompasses more than mere proofreading to correct technical errors. It therefore becomes a question of guided discretion to judge whether the changes are less than fundamental alterations but more than technical corrections. We think the changes made in the act at the bar

48. *Id.* at 495.
fall within that middle area. They were intended to improve the bill in material ways, yet not to alter its essential purpose and intent. The changes constituted minor enhancements which spoke to the clarity, fairness and practical requirements of the Act. They did not exceed the scope of the Governor's amendatory veto power.51

Here the court found and approved qualitative improvements in legislation by the governor. This suggests the question, are only "enhancements" or changes "intended to improve a bill" constitutional? Would changes to water down the intent or make loopholes in application also "fall in the middle area?" The court may have opened for itself more subjectivity than the framers intended.

VII. RECENT SKIRMISHING—MADIGAN AND THOMPSON

Concerned about the extent to which Governor James R. Thompson has used the amendatory veto, in 1984 Michael J. Madigan, Speaker of the House, appointed a special task force "to study the need to modify the governor's amendatory veto."52 While the task force was diverse, its members were mostly sympathetic to the legislative branch. After study, consultation and hearings the task force defeated a motion to recommend the abolition of the governor's amendatory veto authority. Then it adopted a proposal to recommend a constitutional change in the amendatory veto. This proposal would have allowed the legislature to adopt the governor's specific changes by a majority of members elected, but it could also reject the recommended changes by a constitutional majority, thereby overriding the amendatory veto and enacting the bill in the form in which it was originally sent to the governor.53 This proposal was introduced to the 84th General Assembly54 but died because it did not obtain the necessary three-fifths support in the House (65 yeas, 47 nays, April 22, 1986).

Meanwhile, Governor Thompson defended as judicious his use of the amendatory veto while suggesting its vulnerability to court curtailment:

I've been very careful with the amendatory veto. I've done a lot of creative things with it—things which I think are good for the Illinois business climate. But you never know where the Supreme Court's going to step in (and perhaps declare it unconstitutional). Tort reform is particularly in the realm of the Supreme Court, and I don't want to be losing a very worthwhile power for this and future Illinois governors on an issue such as this one.55

By September, 1987, Speaker Madigan again concluded that Thompson's amendatory vetoes were insufficiently judicious. He gave notice of this concern in a press release on September 21, citing an agreement among House Democrats to "reject outright the governor's action on one measure, H.B. 1867, to establish a clear constitutional test of the amendatory veto power...."6 On September 22, when Representative Myron Kulas, sponsor of the bill, H.B. 1867, moved acceptance of the governor's amendatory veto, Speaker Madigan stated:

The Governor's specific recommendations for change with respect to House Bill 1867 changed the fundamental purpose of this Bill and made substantial and expansive changes contrary to the Illinois Supreme Court decisions. . . . After careful consideration of this issue, the Chair rules that with respect to his veto of House Bill 1867, the Governor has exceeded the scope of his authority granted to him by Article IV, Section 9e of the Illinois Constitution of 1970, to return a bill with specific recommendations for change. Therefore, Mr. Kulas's motion which incorporates the Governor's specific recommendations for change is out of order.7

A brisk debate of the constitutional issues followed, the Speaker's ruling was appealed, and the motion to appeal was defeated, with 49 "aye" votes to 66 "no." Because that day was the 15th calendar day after the bill had been returned with the governor's specific recommendations, the bill died. The governor took no action and offered no statements or press releases on the matter.

VIII. CONCLUDING OBSERVATIONS

The 1970 Constitution writers strengthened and unfettered state government from impractical constitutional limitations. Both the legislature and governor were made stronger by, among other things, the veto powers. The governor has sharp and selective veto tools for both substantive and fiscal legislation. The legislature, which only overrode four vetoes under the 1870 Constitution, has a much more realistic capacity to override vetoes today. The traditional two-thirds constitutional majority under the 1870 provisions gave the governor especially intrusive powers given the partisan competitiveness of the state and three-member districts with cumulative voting. Even after 1970 to get two-thirds or more of both chambers to vote against the governor would be a political rarity. To have continued that standard would have greatly inhibited veto overrides even after the cutback of the House. How then should the dispute over the use or abuse of the amendatory veto be viewed?

A. The dispute is a minor one, well within the range of expectable disagreement in a system of checks and balances. Madisonian democracy anticipated that the best check on the possibility of tyranny by government over the people was to create separate branches of government and give them incentives to check one another. That legislators perceive abuse in the governor's exercise of amendatory discretion is hardly surprising. That a governor would resist a narrowing of that discretion is likewise expectable. But in the exercise of their options the legislature and governor have not brought government to a standstill. The amendatory veto is not the basis of a constitutional crisis.

B. The constitutional history of the veto powers reveals no consensus to substantively or qualitatively limit the governor's discretion with the amendatory veto. Even if Delegate Orlando's "No ma'am" was wrong at the time, the electorate rejected a formal amendment to implement that constraint. If Delegate Sommershield's remarks, suggesting that the reduction veto power was implicit in the amendatory veto, are exercised by a governor, the governor could amendatorily change appropriations not just downward, but upward as well.

C. The check on the governor has to be procedural, not substantive. To subject recommended changes to scrutiny about whether or not they are fundamental changes, much less whether or not they

58. Netsch, The Executive, supra note 17, at 177.
59. The Federalist No. 51 (J. Madison).
are intended to improve the legislation in material ways, is to fall into subjective folly. The Illinois Supreme Court is moving in that direction.

The act of veto, including the amendatory veto, is a political act reserved to the governor. The constitutional process reserves to the legislature the possibility to respond with acceptance, rejection or override. The legislature is the most appropriate judge of whether or not the governor's suggestions for legislation go too far or not far enough.

D. Structural and procedural arrangements have made gubernatorial amendments too easy to effect and too difficult to defeat. Because gubernatorial amendments are too easy, the governor is not as involved in the legislature's amending actions as he would otherwise be. The bargaining, compromising and perfecting process in the legislature goes forward amid a general understanding by legislators, lobbyists and agency liaisons that the action completed in the legislature by June 30th is not final.

On the other hand, most citizens are inclined to think that the legislative process, which is constitutionally required to be performed in open sessions, with publicized hearings, record proceedings, record votes, and easy access by citizens and the press, is where public law is written. In fact, the governor gets her/his say much more privately. S/he can engage in as much or little consultation with people beyond her/his staff as s/he wishes. While some lobbyists, citizens, agency people and legislators do get the governor's ear to affect the substance of vetoes and veto messages, many do not. This is particularly relevant for the amendatory veto because the opportunity to recommend changes allows attention not only to major principles, but to minor details as well. The general veto—up or down—does not require lobbying of a negotiating sort. The general veto is not a tool for fine tuning. But the amendatory veto is. To manipulate legislation into what is intended as final form in the confines of an executive chamber does not square with the principle of requiring the legislature to have open processes.

The appropriate check on the governor's amendatory discretion is the capacity of the legislature to override. Theoretically the legislature has three options: accept the governor's recommendations by constitutional majorities in both houses; reject the recommendations by not acting to accept them; override the governor by three-fifths constitutional majorities in both houses. Actually only about five percent are overridden and fifteen percent allowed to die.

Procedural requirements bias legislative outcomes. Because the override is highly unlikely to succeed, the sponsor must choose either
to move acceptance of the governor’s recommendations or let the bill die. People who know how the legislature works know that for bill sponsors, passing bills is the measure of success. So the bias of the system is such that after the policy making session of the General Assembly is over, the governor, under self-controlled access circumstances, can substantively rewrite legislation to slant it toward the satisfaction of groups, interests, agencies and partisan concerns that suit her/him and her/his supporters.

If the bias of the existing amendatory veto is bad, there should be a procedural remedy. The one proposed by Speaker Michael J. Madigan puts the legislature’s original enactment on an even ground with the governor’s recommended changes. The legislature can take no action, leaving the bill to die; accept the governor’s recommendations by constitutional majorities in both houses; override the governor’s recommendations and enact the originally passed language by constitutional majorities in each house.

This would change the bias of the amendatory veto. Instead of the bill sponsor calculating options after the governor’s free shot at substantive changes, the governor would have to calculate. S/he could use the total veto to kill a bill with little likelihood of an override. However, if s/he would save the bill by specific recommendations, they would have to obtain majority support in the open, public processes of both legislative chambers to pass into law. Alternatively, the bill sponsor could save the version of bill that previously passed by getting majority support from both legislative chambers. Both versions would be subject to the same standard of legislative approval. All the legitimating features of open access and representational democracy would apply to both versions of the legislation after the options have been narrowed to two.

E. Providing that both the governor’s recommendations and the previously passed version of the bill can be enacted by constitutional majorities, the amendatory veto would be procedurally comparable to the reduction veto. As an “original amount” may be “restored” to an appropriation bill by constitutional majorities, so the legislatively passed language of a bill could be restored by the same kind of majorities. The fine tuning available on appropriations with the reduction veto is approximated by the fine tuning available in the amendatory veto. The two revisory veto powers would be symmetrical in the options available to the legislature. The total veto, with its three-fifths requirement for override, would remain along

60. ILL. CONST. art. IV, § 9(d).
with the total veto on appropriation items and the same override requirement. These would continue as the governor's heavy artillery for veto. The revisory vetoes would allow specific amendments with legislative majorities necessary for override—a lighter kind of weaponry for engagements between the executive and legislative branches.

The legislative process should allow the key policy makers, members of the General Assembly and the governor, to build consensus. They represent different parts of the same statewide constituency. Their full interaction is needed to serve the needs not only of the parts but the whole. The mismatch of amendatory powers is not a matter of crisis proportions, but it does not well serve the balance of powers. It should be amended to put the veto powers into better symmetry and allow majority rule to have the primary place in the refinement of legislative language in state policy making.
TABLE 1
ILLINOIS GENERAL ASSEMBLY WORKLOAD, 1973 THROUGH 1986

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<td>92.2%</td>
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* Includes appropriation bills reduced or item vetoed and 4 bills filed without signature (2 in 1973-74 and 2 in 1975-76).