

# EXECUTIVE VETO: THE POWER OF THE PEN IN VIRGINIA

BERNARD L. MCNAMEE\*

## I. INTRODUCTION

The constitutional authority to veto legislation provides one of the most powerful and solemn acts of the chief executive in a democratic republic. Powerful because it allows a single elected official to defeat that which the elected legislative body created. Solemn because the chief executive must conclude that a majority in the legislative body made a decision contrary to the best interests of the people and the State. The veto power is not a power to be used lightly or capriciously, but must be exercised with prudence and deliberation. This article will examine some of the history, characteristics and controversies relating to the veto power in Virginia.

In Virginia, the veto is one of the Governor's most important powers. During his term, Governor George Allen of Virginia vetoed 84 pieces of legislation. None of these vetoes were overridden. He exercised 15 item vetoes on the Commonwealth's appropriation bills and none of these vetoes were effectively overridden by the legislature.<sup>1</sup> The Governor's use of the veto upon each of these pieces of legislation and budget items was made with deliberation, and with the intent to serve the best interests of the Commonwealth and in reflection upon his pledge and duty to uphold the Constitution of Virginia.

---

\* Deputy Counselor to Governor George Allen, Governor's Policy Office. B.A., University of Virginia 1989; J.D., Emory University School of Law, 1993.

1. In 1997, the Speaker of the House of Delegates treated two of the vetoes as amendments, one of which the General Assembly accepted and one that they rejected. The Governor regarded the Speaker's ruling as incorrect and issued Exec. Order No. 76 (1997) which directs that the original vetoes, having not been overridden by the General Assembly, are effective and those items should not be considered part of the budget.

## II. SOURCE OF THE VETO POWER

As Englishmen, the American colonists were familiar with, and embraced, the traditions of the Anglo-legal system. But with the abuses of King George III and the English Parliament, the colonists sought to modify the paradigm for their government. While not repudiating what they perceived as the rights of Englishmen, the American Founders did attempt to change the way laws were made and government ruled. After the false start of the Articles of Confederation, the United States Constitution established checks and balances among the federal branches of government. The executive veto on the acts of Congress was one of these checks, along with the Congressional override of such vetoes.<sup>2</sup>

Though one of the founding states of the American nation under the new federal constitution, Virginia's Constitution did not include an executive veto for acts of the General Assembly. It was not until the Constitution of 1870 that the Governor was provided the authority to veto legislation. That authority continues today.<sup>3</sup> Currently, the Virginia Constitution grants the governor two types of veto power: one over legislation and the other over particular items in appropriation bills.<sup>4</sup>

## III. THE PURPOSE OF THE VETO

The veto is an important and unique power granted to the Governor. But on its face, it appears to be antidemocratic. It is a power delegated to a solitary executive to negate proposed laws that

---

2. U.S. CONST. art. I, § 7, cl. 2. *See generally* THE FEDERALIST No. 73 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

3. VA. CONST. of 1870, art. IV, § 8. VA. CONST. of 1902, art. V, § 76; VA. CONST. of 1870, art. IV, § 8; VA. CONST. of 1971, art. V, § 6. *See* A.E. DICK HOWARD, 2 COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 610 (1974) [hereinafter HOWARD, COMMENTARIES].

4. VA. CONST. of 1971, art. V, § 6 (b) & (d).

have been created by the multi-member legislative body of government. Alexander Hamilton recognized and refuted such criticism in Federalist No. 73:

The propriety of the thing does not turn upon the supposition of the superior wisdom or virtue in the executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it to measures which itself, on more mature reflection, would condemn. The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the favor of the community against the passing of bad laws, through haste, inadvertence, or design.<sup>5</sup>

Therefore, instead of a blunt instrument to frustrate popular will, the veto protects the office of the chief executive and serves the salutary purpose of limiting legislative excesses.

#### *A. Checks and Balances*

One of the fundamental issues of American constitutional theory is the establishment of checks and balances on the various branches of government. The veto serves as one of the tools of the executive branch, which preserves the balance against the legislature. Alexander Hamilton recognized the general value of the veto power in the executive:

An absolute or qualified negative in the executive upon the acts of the legislative body is admitted, by the ablest adepts

---

5. THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

in political science, to be an indispensable barrier against the encroachments of the latter upon the former.<sup>6</sup>

Further, Hamilton warned that the tendency of the legislature to “intrude” and “absorb” the powers of other parts of government made it necessary to provide a veto power.<sup>7</sup>

These alarms are no mere phantasms of a Founder caught in the paranoia of revolution, but they are threats that continue today. In 1996, the General Assembly of Virginia attempted to usurp the power of the Supreme Court of Virginia. House Bill 736 and House Bill 1240 both attempted to dictate the actions of the Virginia Supreme Court. House Bill 736 attempted to change the Rule of the Supreme Court requiring transcripts of proceedings to be filed in a timely manner with the court, with the penalty for failure to file in a timely manner being dismissal of the suit. House Bill 1240 required the Virginia Supreme Court to produce an annual report on its activities to the General Assembly. Governor Allen vetoed these bills upon the request of the Chief Justice of the Virginia Supreme Court, Harry L. Carrico, and the advice of Virginia’s Attorney General, James S. Gilmore III. Governor Allen’s reasoning was expressed in his message to the House of Delegates:

The Speaker of the House of Delegates requested this bill [House Bill 736] and House Bill 1240 to expose and address perceived inequities in certain rules of the Supreme Court of Virginia. Following approval of these bills by the General Assembly, the Chief Justice of the Supreme Court of Virginia advised my office that he regards both bills to be violative of the doctrine of separation of powers embodied in Article I, Section 5 of the Virginia Constitution.

---

6. THE FEDERALIST No. 66, at 402 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

7. THE FEDERALIST No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

At my request, the Attorney General considered the matter, and he advised me that the constitutional concerns raised by the Chief Justice are substantial. The Attorney General agrees that the validity of these bills under Article I, Section 5 of the Constitution is questionable.<sup>8</sup>

By submitting House Bill 736 and House Bill 1240, the General Assembly was attempting to dictate the actions of a presumably co-equal branch of government.

Requiring one branch of government to file an annual report of its actions with another branch of government is at a minimum denigrating in form. But actually dictating changes in the internal operations of another branch of government by deciding when filing transcripts with the court will be timely is a substantive challenge to the court's independence. An independent judiciary is one of the most important bulwarks of our liberties. Virginia justice becomes susceptible to criticism when attorneys use their position in the legislature to gain changes in the judicial branch's procedural rules. Fortunately, the gubernatorial veto stopped the enactment of this overreaching legislation.

#### *B. Vetoes as Protection from Mob Rule and Special Interests*

Vetoes protect the Commonwealth from the excesses of tyranny by the majority and from parochial interests among legislators that do not serve the common good of the people.

“[The veto power] furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse

---

8. Gov. George Allen, Message to the Va. House of Delegates (May 6, 1996), in J. of the House of Delegates of Va., 1996 Reg. Sess., Vol. II (1996) at 2415-16 & 2416-17 (discussing, respectively, his vetoes of H.B. 736, 1996 Reg. Sess. (Va. 1996) and H.B. 1240, 1996 Reg. Sess. (Va. 1996)).

unfriendly to the public good, which may happen to influence a majority of that body.<sup>9</sup>

There is a presumption that the acts of the General Assembly are rational and for the good of the Commonwealth. Without this presumption, the rule of law would be undermined. There are times, however, when the General Assembly may, usually by a small majority, choose a path that is contrary to the common good. Often this sort of legislation is adopted, not because of some nefarious or conceited scheme concocted by the legislators to undermine the rights of the people, but because of the good faith belief by legislators that the legislation has widespread support. Legislators may form this false impression because the issue is not widely known by the public and, therefore, only those supporting the legislation make their voices heard. At times, this sort of legislation is not in fact popular or good for the Commonwealth. Placing the power to veto in the hands of the Governor provides an opportunity to stop such narrow or unwise legislation.<sup>10</sup> Some may argue that it is the public's own fault if it is not aware of legislation it may not like; and, with passage, victory goes to the vigilant. But with thousands of pieces of legislation each year (2583 bills and resolutions were considered in the 1997 Session<sup>11</sup>), it is unrealistic to expect the public to be aware of all legislation considered by the General Assembly. That is why the Governor's veto is so important. The Governor's veto can serve to raise the visibility of legislation enabling broader public comment to the bill. If the Governor's veto serves to publicize the bill, resulting in opposition to the bill, then such opposition reinforces the righteousness of the veto. If the veto causes the public to show widespread support for the legislation, then the General Assembly can

---

9. THE FEDERALIST No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

10. The Governor has 7 days to act on bills during session and 30 days to act on bills passed within the last seven days of session. VA. CONST. of 1971, art. V, § 6 (b) & (c).

11. Bruce F. Jamerson, Clerk of the House of Delegates and Keeper of the Rolls of the Commonwealth, Final Cumulative Index of Bills, Joint Resolutions, Resolutions and Documents at 436 (June 13, 1997).

override the veto. Under either scenario, the input of the public is maximized.

*C. The Governor's Position Helps Define the Characteristics of the Veto*

Further, it is important to recognize that the veto power is not just a legislative device added to the various executive powers of the Governor. The attributes of the Governor under the Virginia Constitution help define the scope of the veto.

The Governor of Virginia is elected statewide for only one four-year term. Therefore, his interests and constituency may be different than those of the legislators. Because he is a statewide official, a governor must look at the impact and value of a bill statewide, not just regionally or by district. Further, since he cannot be reelected, the Governor may not be as heavily influenced by the politically active special interest groups as a legislator may be. Therefore, the executive veto allows the Governor to exercise his judgment as to whether a bill serves the best interests of the entire state. Local legislators may not view the bill in such a broad way when deliberating upon it.<sup>12</sup>

*D. The Veto's Impact on the Relationship between the State and Local Governments*

The veto has an even more important role in Virginia based upon the unique relationship of the State with local governments. Under Virginia's Constitution, and reinforced by the Virginia's Dillon Rule,<sup>13</sup> localities do not have inherent lawmaking powers; instead, each locality's governing authority is delegated to it by the General

---

12. It should be noted that I do not intend to imply that any of the members of the Virginia General Assembly who voted for bills that the Governor vetoed were not in good faith representing what they believed to be the best interests of their constituents.

13. *Boyles v. Roanoke*, 179 Va. 484, 19 S.E.2d. 662 (1942); See JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 89 (5th ed. 1911).

Assembly.<sup>14</sup> Considering this dynamic, the General Assembly has the ability to grant and limit powers in differing degrees between jurisdictions. Such discrepancies may disadvantage one locality *vis-à-vis* another, because representation in the General Assembly is based on population not region. Populous regions can combine their legislative votes to the detriment of less populated regions or in conjunction with legislators who have no interest in the issue whatsoever.

Theoretically, there is a structural barrier in the Virginia Constitution to discriminating or prefatory legislation by the General Assembly. Under Article VII, Section 1 of the Virginia Constitution, "special acts" affecting individual localities require a vote of two-thirds of each house of the General Assembly. But the Constitution provides an alternative lower threshold means to adopt locality specific legislation. The General Assembly may pass general legislation defined by population with a simple majority of both houses.<sup>15</sup> In effect, specific legislation for a particular locality can be passed without the support of two-thirds of the legislature by narrowly defining a county or city by its unique population and without naming the locality, allowing the supposed general legislation to affect only one locality. This loophole in the Constitution can lead to abuse, but the veto can be used to prevent such abuses. Even though there may have been enough majority votes to pass the legislation, rarely would there be the two-thirds majority required to override a veto. Of course, this is a characteristic not inherent in the veto and is subject to the dynamics of population growth and concentration.

An example of a set of bills which affected a limited geographical area, but was an expense to the entire Commonwealth, was the proposal of the establishment of a public defender's office for the City of Charlottesville and Albemarle County. These bills not only proposed that the offices be created, but provided that they would be paid for with state funds.<sup>16</sup> Governor Allen vetoed these bills stating:

---

14. VA. CONST of 1971, art. VII.

15. VA. CONST of 1971, art. VII, § 1.

16. H.B. 93, 1996 Reg. Sess. (Va. 1996); S.B. 141, 1996 Reg. Sess. (Va. 1996); H.B. 1607, 1997 Reg. Sess. (Va. 1997).



I remain unconvinced that establishing and funding a public defender office for the City of Charlottesville and Albemarle County would necessarily be cost-effective or preferable to the use of court-appointed attorneys to represent indigent criminal defendants. There are many attorneys in the Charlottesville area that are willing and able to represent criminal defendants. The veto of this unnecessary bill and its proposed creation of a ten person office will save the taxpayers over \$1.1 million during the next two years.<sup>17</sup>

The Governor reasoned that a new public defender's office in Charlottesville did not serve the general needs of the Commonwealth, and that the services could be provided by another means. There may be times that specific local projects will also benefit the entire Commonwealth, but allowing the Governor to review and approve such legislative initiatives provides an important check in the structure of our government to ensure that the public purse is prudently distributed.

#### *E. Threat of a Veto as a Passive Influence on Legislation*

While the veto power is usually perceived as a negative power, it should not be overlooked that the threat of a veto provides the Governor with the power to influence the creation and passage of legislation.

When a governor vetoes legislation, the executive's opposition to the bill is made clear and the bill is dead. However, the Governor's return of a bill unsigned is not the first time legislators learn of the Governor's position on a bill. The Governor may communicate his opposition to a bill prior to vetoing the bill, during the legislative process, either directly or through his staff. The Governor's warning provides notice to the legislators that if the bill is not modified it will

---

17. Letter from George Allen, Governor of Va., to the Va. House of Delegates (Mar. 24, 1997) (on file with author; to be published in J. of the House of Delegates of Va., forthcoming 1997) (explaining the governor's veto of H.B. 1607, 1997 Reg. Sess. (Va. 1997)).

probably be vetoed. Therefore, the threat of a veto provides an incentive to the legislators to modify the bill. If the Governor could not threaten a veto, the legislators would have no reason to listen to the suggestions of the executive branch.

Virginia's landmark welfare reform legislation is an example of how the threat of a veto helped secure a good bill and avoid counterproductive provisions which would have undermined welfare reform. Governor Allen introduced a welfare reform bill in 1995, a year before federal welfare reform was proposed. The Governor's bill required welfare recipients to work for their benefits and limited the number of years they were eligible to receive benefits. The bill went through a variety of machinations during the committee process of the General Assembly. There was a variety of changes proposed by legislators which would have provided too many exceptions to the strict work and time requirements, and would have provided new entitlements to recipients that would have cost, not saved, millions of dollars to Virginia's taxpayers.<sup>18</sup>

Recognizing that these proposals doomed welfare reform to failure, Governor Allen threatened to veto the entire legislation and lay the failure to achieve welfare reform in Virginia at the feet of the legislators. In light of his threatened veto, and the popularity of true welfare reform among the citizens of the Commonwealth, the General Assembly removed the noxious provisions and passed the Governor's version of welfare.<sup>19</sup> The end result was that welfare reform in Virginia is working and the number of people on the welfare rolls is down 40 percent.<sup>20</sup>

Another facet of Virginia's veto is defined by amendment-veto scenarios between the Governor and the General Assembly. The Virginia Constitution allows the Governor to sign, veto or amend bills

---

18. The various provisions that the General Assembly proposed and which Governor Allen opposed included: allowing education to substitute for work, because dead-end educational programs would be an excuse for avoiding work and getting off welfare; and a guaranteed ratio between case workers and welfare recipients, because of the huge expense of hiring new workers and the consequential creation of a new entitlement.

19. H.B. 2001, 1995 Reg. Sess., 1995 Va. Acts ch. 450 (1995).

20. For the period covering 3/95-9/97. Source: Office of the Secretary of Health and Human Resources of Virginia and the Virginia Department of Social Services.

that are presented to him.<sup>21</sup> As discussed above, the threat of a veto can pressure legislators to amend legislation. This pressure is augmented by virtue of the sequence in which most of the bills reach the Governor's desk.

The vast majority of bills passed by the General Assembly are passed in the last seven days of the legislative session (over 900 in the 1997 Session). The Virginia Constitution provides that the Governor will have 30 days to act on these bills by signing, vetoing or amending them and then the General Assembly will address those actions by the Governor at the Reconvened Session.<sup>22</sup> The Governor may submit amendments to the bills for adoption by the General Assembly during the Reconvened Session. If they are not approved, then the legislation is returned to the Governor and he can veto the bill and the General Assembly has no opportunity to override the veto.<sup>23</sup> (This presumes that the General Assembly has not rejected the amendments and then approved a motion to pass the bill notwithstanding a veto by the Governor.) The threat of this ultimate and absolute veto after the Reconvened Session will often be a persuasive factor in the deliberations of the General Assembly when considering amendments by the Governor.

#### IV. BUDGET VETOES

Besides the ability to veto entire legislation, Virginia's governors may veto specific items in appropriation bills without vetoing the entire bill.<sup>24</sup> The item veto power was adopted in Virginia as part of the Virginia Constitution of 1902.<sup>25</sup> Prior to the adoption of this provision, the Governor had to veto an entire budget.<sup>26</sup> Interestingly, the item veto originated in the Confederate Constitution and has since

---

21. VA. CONST. of 1971, art. V, § 6.

22. *Id.*

23. *Id.*

24. *Id.*

25. VA. CONST. of 1902, art. V, § 76; see also HOWARD, COMMENTARIES, *supra* note 3, at 615-16 & n.31.

26. 2 *Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, held in the City of Richmond June 12, 1901 to June 26, 1902, at 1877 (1906).*

been adopted by a variety of states.<sup>27</sup> This power has gained renewed recognition since the United States Congress recently granted the same form of power to the President of the United States.<sup>28</sup>

The obvious purpose of the item veto power is to empower the Governor to delete particular appropriations. But this is not the simple and straightforward power it may appear. The ability to delete specific appropriations allows the Governor to intervene in the budgetary process and ultimate allocations of state funds.<sup>29</sup>

The item veto is a blunt instrument. The Governor can only choose to let a spending item stand or eliminate it altogether. Furthermore, it is not an affirmative tool for creating legislation, but a negative instrument for eliminating provisions.<sup>30</sup> The instrument is so blunt that the Governor cannot even reduce the amount of an item of appropriation, which would in effect change the scope of the project being funded. Instead, the entire project or spending item must be approved or eliminated by the veto. Though some may argue "why have the power at all if it is so limited?," it must be remembered that it is an extraordinary power. The veto allows the Governor to modify legislation by his direct action upon it. The budget is still law, but in a form that is different than that adopted by the legislature.

### A. *Statewide Issues v. Coalition*

As with other legislation, budget bills may pass because of horse trading—legislators agree to vote for issues important to other legislators if those legislators vote for their issue. Appropriation bills provide a particularly good vehicle to carry parochial spending items. The ability of the statewide elected Governor to veto specific appropriations allows the Governor to eliminate spending that he

---

27. HOWARD, COMMENTARIES, *supra* note 3, at 616 & n.31.

28. *Line-Item Veto Act of 1995* (III Stat. 1142). Though this power has just been recently exercised, it is likely to be challenged in federal court. Since the President's item veto was created by statute and not through the Constitution, the constitutional issues are different.

29. *2 Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, Held in the City of Richmond, June 12, 1901 to June 26, 1902* (1906).

30. *Commonwealth v. Dodson*, 176 Va. 281, 295, 11 S.E.2d 120, 128 (1940).

perceives to be counter to the general interests of the Commonwealth.<sup>31</sup> But the item veto's effect is broader than merely allowing the executive to stop expensive or wasteful parochial spending. It is a power broad enough to allow the executive to veto spending which may affect more than one region or the entire state, but which the executive believes lacks sufficient benefits to justify such spending.

### *B. Single Object Rule and Logrolling*

There is an inherent tension in appropriation bills because of the single object rule and the potential for logrolling. Appropriation bills are omnibus in nature which claim to address singular subject spending. But in practice, appropriation bills affect almost every aspect of government, not just the aggregate allocation of funds.

Appropriation bills are more than just a series of dollar figures authorizing how many zeros should be placed on the government cashier's check. Budget bills contain language directing how the money is to be spent. This is appropriate as a general proposition. There is a point, however, where such language leaves the realm of defining how specific funds should be allocated, transcending debits and credits, and becomes free-standing legislation. When such legislating in the budget occurs, a variety of problems arise.

The first problem is a general constitutional issue. Each piece of legislation should only have a single object.<sup>32</sup> One of the reasons for this limitation is to make the subject of each piece of legislation easily identifiable to the public. The theory is that the public can hardly comment intelligently, or even at all, on legislation if they do not know what it is about. If an appropriation bill addresses issues besides spending, it may be hard for the public to comment on the non-appropriation aspects of the bill. The single object rule helps

---

31. *Id.* at 292-93, 11 S.E.2d at 125 (citing *Bengzon v. Secretary of Justice and Insular Auditor*, 299 U.S. 410 [1937]).

32. VA. CONST. of 1971, art. IV, § 12.

ensure that they know the subject matter of any particular piece of legislation.

Further, the single object rule helps to prevent logrolling. Logrolling is the political science term for combining different issues that have less than majority support into one piece of legislation that gains mutual pledges of support from legislators for passage in a single bill. The Supreme Court of Virginia has affirmed that one of the purposes of the executive item veto in appropriation bills “is to safeguard the public treasury against the pernicious effect of what is called ‘logrolling’—by which, in order to secure the requisite majority to carry necessary and proper items of appropriations, unnecessary or even indefensible items are sometimes included.”<sup>33</sup>

### *C. Can the Item Veto Do More to Stop Logrolling?*

Though the item veto in some measure can help prevent logrolling, the instrument is blunt and is incapable of eliminating artfully crafted budget language or items. Such artfully crafted language condenses a variety of conditions on funding into one paragraph of language paired with a specific sum of money. Since the Governor must veto all of the language and related funds in order to be a proper exercise of his veto,<sup>34</sup> the legislature may insulate the offensive conditions by surrounding it with necessary and salutary funding and conditions.<sup>35</sup> The Supreme Court of Virginia has indirectly criticized this activity:

---

33. *Dodson*, 176 Va. at 292, 11 S.E.2d at 125 (citing *Bengzon*, 299 U.S. 410).

34. If the language is unconstitutional then this limitation does not apply. “Of course, if for any reason any item may be unconstitutional it may be stricken out, for it would be futile to require the keeper of the rolls to transcribe it thereon.” *Dodson*, 176 Va. at 296, 11 S.E.2d at 127. In 1996, Governor Allen vetoed a budget provision pertaining to the allocation of funds by the City of Norfolk that supplemented the salary of the Sheriff of Norfolk. Governor Allen deemed the provision to be unconstitutional because it violated the single object rule. Message to Va. Gen. Assembly (Apr. 10, 1996), in J. of the House of Delegates of Va., 1996 Reg. Sess., Vol. II (1996) at 2221 (addressing veto of H.B. 30, 1996 Reg. Sess. (Va. 1996)).

35. *Dodson*, 176 Va. at 307, 11 S.E.2d at 132.

The “tying up” of purposes must be more than incidental; the relationship between purposes must appear intrinsically, rather than extrinsically. The real question, therefore, is whether, from the terms of the appropriation bill itself, several appropriations relating to the same subject are so legally “tied up,” are made so legally independent, that one cannot be eliminated from the enactment without, in the words of *Dodson*, “affecting its other purposes or provisions.”<sup>36</sup>

The Virginia Supreme Court has therefore indicated that item vetoes may look beyond the structure of the budget language and look at the actual substance of the item to determine if funding is tied to a single purpose.<sup>37</sup>

At the heart of the Supreme Court’s analysis, a governor’s veto, and any dispute over that veto is the question of “what is an item?” The Supreme Court of Virginia provided a simple statement of what constitutes an item: “An item in an appropriation bill is an indivisible sum of money dedicated to a stated purpose.”<sup>38</sup> It would appear that this is an easy standard to follow when drafting budgets, and when analyzing them for the purpose of item vetoes. Unfortunately, the appropriation bill usually contains various provisions that blur the lines between individual items and separate legislation.

#### *D. The Problem of Free-standing Legislation in the Budget*

Appropriation bills in Virginia usually contain two different types of legislative direction. The first is appropriation of resources. This is the information and language one would expect in a budget bill. It identifies an amount of money and to what purpose it is to be spent—an item. But Virginia appropriation bills also contain free-standing conditions that are not clearly tied to spending. These free-standing

---

36. *Brault v. Holleman*, 217 Va. 441, 449, 230 S.E.2d 238, 244 (1976).

37. *Id.*

38. *Dodson*, 176 Va. at 296, 11 S.E.2d at 127.

conditions are, in effect, separate pieces of legislation that happen to be rolled into the budget bill. They are free-standing because they are not items in that they do not identify a specific amount of money or provide language directly conditioning those funds. Instead, many of these provisions establish directives and conditions on policies which transcend items and spending. Placement of such separate legislation in the budget bill appears to violate the single object rule and prohibitions on logrolling.

A transportation provision in House Bill 29 demonstrates the type of general provision which should be subject to the item veto because it acts as free-standing legislation. In "Item 606 B" the General Assembly amended the budget bill at the end of the 1994-96 biennium.<sup>39</sup>

The Department of Transportation is hereby prohibited from closing or downgrading the status of any area maintenance headquarters or equipment repair shops as proposed in the December 1995 study. In addition, no area maintenance or equipment shop personnel shall have their employment terminated, unless for cause, or be required to be transferred to another location.<sup>40</sup>

This provision acts as a separate piece of legislation directing administrative and personnel policy in the executive branch.<sup>41</sup> This provision provides language stating a policy and it is not paired to any easily identifiable amount of money. Therefore, the Governor was

---

39. In Virginia, state budgets are made for two-year periods beginning July 1 of even years and ending June 30 in the next even year. Since the General Assembly meets every year, the biennial budget may be amended in the interim years. Further, the final months of the biennial budget may be amended because the General Assembly convenes and adjourns before the end of the fiscal year. House Bill 29 was the budget bill amending the 1994-96 biennial budget ending June 30, 1996. H.B. 29, 1996 Reg. Sess. (Va. 1996). House Bill 30 set out the two-year budget beginning July, 1, 1996 and ending June 30, 1998. H.B. 30, 1996 Reg. Sess. (Va. 1996).

40. H.B. 29, Item 606 B, 1996 Reg. Sess., 1996 Va. Acts ch. 1056 (1996).

41. See VA. CODE ANN. § 2.1-114.7 (Michie 1995) (the agency heads shall establish personnel policies for their agencies); VA. CODE ANN § 2.1-20.01:1 (Michie 1995) (agency heads shall supervise and manage their agencies).



unable to veto this provision because its construction did not constitute an item.

House Bill 30, at so-called "Item 4-6.05", contained another example of separate legislation being placed in the budget. In this case the General Assembly dictated the role of Cabinet Secretaries in hiring personnel.

The Governor's Secretaries shall exercise no authority with respect to the selection of applicants for classified positions. The Secretary and the Office of the Secretary shall not review or approve employment offers for classified positions prior to an employment offer being extended.<sup>42</sup>

The provision was unrelated to any specific spending requirement in House Bill 30. In reality, it was a piece of general legislation amending the existing state law peculiar to one group of state officers whose duties are defined in the Code of Virginia.<sup>43</sup> But since it was not an item within the definition of *Dodson*,<sup>44</sup> the Governor could not veto it.

Though not ruling specifically on the issue, the Supreme Court of Virginia has indicated that such general provisions are inappropriate stating, "An item of an appropriation bill obviously means an item which in itself is a specific appropriation of money, not some general provision of law which happens to be put into an appropriation bill."<sup>45</sup> The court further indicated that the standard for determining when such provisions are separate language, which may be vetoed, depends on whether it is "something which may be taken out of a bill without affecting its other purposes or provisions. It is something which can be lifted bodily from it rather than cut out."<sup>46</sup> Though this language

---

42. Act of Apr. 17, 1996, ch. 912, § 4-6.05, 1996 Va. Acts 1741, 2150 (the 1996-98 biennium appropriation bill).

43. See VA. CODE ANN. §§ 2.1-113, 2.1-51.8:1, 2.1-55.10:1 (Michie 1995).

44. *Dodson*, 176 Va. at 296, 11 S.E.2d at 127.

45. *Id.* (quoting *Bengzon*, 299 U.S. 410).

46. *Id.* at 290, 11 S.E.2d at 124.

is encouraging, the Governor chose not to veto the stand-alone provisions without clear guidance from the Supreme Court.

*E. Can the Governor Veto Such Stand-Alone Legislation?*

It is the general position of the Governor that stand-alone provisions, or riders as they are also known, should be subject to an item veto. By construction such provisions, when placed in the budget, should constitute logrolling. Abuse of the budget in this manner is offensive to the single object rule and frustrates the ability of the people to be fully notified as to the substance of the legislation. Further, it is a serious threat to the separation of powers:

"[I]f through the appropriations process, the Legislature were able to compel the Governor either to accept general legislation or to risk forfeiture of appropriations for a department of government, the careful balance of powers struck in [the state constitution] would be destroyed, and the fundamental principle of separation of powers . . . would be substantially altered."<sup>47</sup>

Governor Allen, in his 1996 veto message to the General Assembly regarding the biennial budget bill,<sup>48</sup> chastised the legislature for making certain provisions beyond the reach of the Governor's veto.<sup>49</sup> Governor Allen and the Office of the Attorney General attempted to bring this issue before the Virginia Supreme Court along with the general litigation over the partial enrollment of the "caboose" budget bill, House Bill 29.<sup>50</sup> The Virginia Supreme Court declined to

---

47. *Karcher v. Kean*, 479 A.2d 403, 416 (N.J. 1984) (quoting *Opinion of the Justices*, 428 N.E.2d 117, 120 (Mass. 1981)).

48. H.B. 30, 1996 Reg. Sess. (Va. 1996).

49. Gov. George Allen, Message to the Va. Gen. Assembly (Apr. 10, 1996), in J. of the House of Delegates of Va., 1996 Reg. Sess., Vol. II (1996) at 2220.

50. See *Gilmore v. Landside*, 252 Va. 388, 478 S.E.2d 307 (1996).

decide the issue of whether free-standing legislation in appropriation bills are subject to gubernatorial vetoes.<sup>51</sup>

### *F. Balanced Budget*

There is another dynamic to the Virginia item veto. This aspect relates to the mandated balanced budget provision of the Virginia Constitution where the Governor is given the responsibility of enforcing this provision.<sup>52</sup> The item veto helps the executive meet that obligation by allowing him to eliminate certain spending items. The scope of the item veto cannot be limited to the purpose of merely balancing the budget; however, because the item veto predates the balanced budget provision of the constitution. Therefore, the item veto provides an additional tool to the governor in relation to this obligation, and is not a limitation on its use.

---

51. The Gilmore case was brought directly in the Supreme Court under VA. CODE ANN. § 8.01-653 (Michie 1992). Among other things this section states:

In any such proceeding the court shall consider and determine all questions raised by the Attorney General's petition pertaining to the constitutionality or interpretation of any such act, even when such questions may not be necessary to the decision of the question of the duty of the Comptroller and Treasurer of the Commonwealth to make payment of the moneys appropriated or directed to be paid.

*Id.* Based on this provision, the Attorney General sought the Supreme Court's direction on whether the Governor could veto free-standing legislation despite the lack of an actual governor's veto of such legislation, which would have constituted an active controversy.

52. VA. CONST. of 1971, art. X, § 7. This section states:

Other than as may be provided for in the debt provisions of this Constitution, the Governor, subject to such criteria as may be established by the General Assembly, shall ensure that no expenses of the Commonwealth be incurred which exceed total revenues on hand and anticipated during a period not to exceed the two years and six months period established by this section of the Constitution.

*Id.*

### *G. Specific and Severable Issue*

The amendment and veto power of the Governor has been eroded by recent actions of the General Assembly. In 1994, the voters approved an amendment to the Virginia Constitution, which would allow the legislature to determine if the Governor's amendments to a bill were specific and severable.<sup>53</sup> This provision became effective in 1995 and was exercised that same year.

This provision of the constitution specifically provides that the Governor's amendments should be specific and severable. In a sense it functions as a single object rule approach to each amendment submitted by the Governor. The provision further provides that if the house to which the amendments are returned concludes that the amendments are not specific and severable, then they are to be "acted upon in accordance with Article IV, Section 11" of the constitution. Article IV, Section 11 is a statement of the process by which the legislature acts on bills. In effect, if the amendments are not specific and severable, then the General Assembly may restart the legislative process and send the bill and amendments back to committee and start over on the bill.

The problem is that the definition of specific and severable relies on the caprice of the legislators. Therefore, there is no objective measure of what constitutes specific and severable. In 1995, the General Assembly took the various amendments the Governor recommended to the appropriations act and declared that they were not specific and severable. Upon this declaration, the entire budget bill was sent back to committee and parts of it were rewritten, even parts not recommended for amendment.

The General Assembly's action in this process was obviously beyond the scope and authority that the constitutional provision meant to confer. The budget amendments on their face were specific and severable. Some in the General Assembly tried to justify the action by claiming that since the budget is a limited amount of money, any amendment changes the whole document, and therefore, necessarily

---

53. VA. CONST. of 1971, art. V, § 6(b)(iii).

cannot be specific and severable. This would have some persuasive logic if it were not for the fact that in past practice budget amendments, as with Governor Allen's amendments in this instance, identified specifically how each amendment would be funded and it was never before considered necessary to rewrite the entire budget.

Without discussing the motives for the General Assembly's actions, the effect was to eliminate *de facto* one of the Governor's constitutional powers in regard to budget bills. Realizing that hard fought provisions in appropriation bills were at risk if he submitted amendments, Governor Allen decided not to submit budget amendments in 1996 or 1997. This meant that Governor Allen could only submit vetoes and that those vetoes were subject to being overridden by the General Assembly at the Reconvened Session. No longer did the Governor have the ability to ask for changes in the budget and have the leverage of ultimately vetoing provisions in the budget if the amendments were not agreed to. Governor Allen's message to the General Assembly stated his position:

In past years, my predecessors and I have submitted amendments to the enrolled appropriation bill in accordance with our constitutional authority. My decision this year to exercise only the governor's item veto authority, and not the authority to recommend amendments, is thus unprecedented.

In the 1995 Session, the General Assembly applied the new provisions of the Virginia Constitution regarding the specificity and severability of amendments in a manner utterly incompatible with the plain meaning of those terms. As a result, for the first time, a governor's amendments to the appropriation act were not allowed to be considered. Instead, the budget bill was returned to committee, where deliberations were resumed and significant changes not recommended by the governor were made in the budget.

This misapplication of the new constitutional provisions has largely undermined the salutary aspects of the governor's amendment power, especially with regard to appropriation legislation.

Indeed, if I were to offer budget amendments this year, and the House of Delegates majority were to vote again to return the appropriation bill to committee, that action would place at risk all that was accomplished in this session, including the General Assembly's favorable action on many of my legislative priorities requiring appropriations.

For that reason, I have refrained from submitting amendments to House Bill 30. Instead, I have chosen to exercise my veto authority, where feasible, to correct what I perceive as unsound provisions of the bill. If the validity of any veto is challenged, the General Assembly's recourse will be to override the veto or to challenge it in the courts, as has occurred on rare occasions in the past.<sup>54</sup>

Because of the misuse of the specific and severable provisions of the Virginia Constitution pertaining to amendments by the General Assembly, the Governor, and ultimately the citizens of the Commonwealth, lost an important weight in the balance of power between the executive and legislative branches of government.

---

54. Gov. George Allen, Message to the Va. Gen. Assembly (Apr. 10, 1996), *in* J. of the House of Delegates of Va., 1996 Reg. Sess., Vol. II (1996) at 2220.

## V. CONCLUSION

The veto power is not a clearly defined instrument for use by the Governor. A Governor must examine the dynamics of the substantive issues to which he applies the veto, and he must also examine the intermixed legal and constitutional issues involved in the actual act of vetoing legislation. Despite the importance of the veto power, there are still a number of issues to be resolved as to the extent of that power in Virginia.

The issue most likely to provide continued tension and dispute between the Governor and the General Assembly is the separate stand alone legislation which is placed in appropriation bills. It is likely that the legislature will continue to assert power on executive activities through budget bills, especially when the party in control of the General Assembly is different from the party in control of the Governor's Office. There will likely be a point in time, however, when a governor will challenge the General Assembly's power grab by vetoing such language in the budget. The result will be a conflict between the Governor and the General Assembly which will be waged in court. Until that time however, the veto in Virginia will still be a potent tool of the Governor, but with an uncertain scope of application.