AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers

*Antonin Scalia*, **Testimony on the Congressional Veto** (1976)[[1]](#footnote-1)

*Congressional vetoes – statutory provisions that allowed Congress or a single chamber of the Congress to veto executive actions through the adoption of a resolution – were a subject of intermittent conflict between the president and Congress over the course of the twentieth century. Such veto mechanisms were often advocated as useful tools for allowing Congress to exercise some substantive control over executive rule-making, but the president argued that such vetoes allowed Congress to take law-like actions without going through the normal legislative process (which would include the possibility of a presidential veto) and involved the legislature in essential executive functions of implementing the existing law. In the late 1960s and early 1970s, Congress became particularly interested in exerting more influence over the foreign policymaking of the executive branch. A set of proposals in the mid-1970s would have required presidents to submit to Congress all executive agreements made with the leaders of foreign countries and would have mandated that those agreements expire in sixty days unless both chambers of Congress adopted resolutions approving of the agreements. The administration of President Gerald Ford objected to these proposals, and Assistant Attorney General Antonin Scalia was among those tasked with testifying in a congressional hearing on the proposals. The hearings occurred soon after the U.S. Supreme Court had decided in* Buckley v. Valeo *(1976) that at least some congressional veto provisions were unconstitutional, and Scalia built on those arguments in contending that these bills would likewise violate the system of separation of powers outlined in the U.S. Constitution.*

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. . . . The actual practice flatly contradicts, I think, the witnesses and writers who have suggested that Congress has simply delegated broach authority to the Executive and walked away from its responsibility in this area. . . . [A]t least in the great majority of the situations this bill would cover, the ordinary legislative process is an adequate mechanism for congressional control, and it is not necessary to resort to sweeping devices such as those contained in H.R. 4438, which raises serious constitutional questions.

There are several types of constitutional problems which the bill presents. First, some of the agreements which it purports to give Congress the power to prohibit are not constitutionally subject to legislative control, even under the most limited view of Presidential power. See *United States v. Belmont* (1937). . . . For example, in repelling an attack on the United States pursuant to his constitutional authority, the President, may, as Chief Executive and Commander in Chief, wish to conclude tactical agreements which would permit deployment of United States forces on foreign territory. . . . The Supreme Court has said that the war power of Congress “necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.” . . . *Ex parte Milligan* (1866). . .

[A second type of problem is] presented by the attempt to restrict through concurrent resolutions the exercise of powers conferred upon the President by statute. It is our view that such a device is unconstitutional for two reasons: first, because it violates the general principle of separation of powers, and second, because it contravenes the specific provisions of the Presentation Clauses, Article I, section 7, clauses 2 and 3, of the Constitution.

The principle of the separation of powers provides in essence that each of the three branches of our Government must restrict itself to its allocated sphere of activity: legislating, executing the law, or seeing to its interpretation. With respect to an extremely broad category of matters, the Congress may, if it wishes, preserve all responsibility within itself, requiring actions to be taken, if at all, through the process of legislation; or may, on the other hand, commit responsibility to one of the other two branches of Government. If it chooses the latter course, however, the very essence of the doctrine of separation of powers requires that Congress cannot control the exercise of the responsibility which it has thus delegated except through the plenary legislative process of statutory amendment or repeal.

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When Congress has passed a law, their jurisdiction over the subject matter of the law is *functus officio*. It then passes into the hands of another department of the Government, and it becomes a function of the President, or the Chief Executive of the Government of the United States to see that the law is executed.

If the doctrine of separation of powers does not mean this – if it does not prevent unilateral congressional control over the execution of laws which it has passed – then it is difficult to see how it means anything at all.

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. . . . You have heard . . . the argument that although the Framers intended to prohibit the use of concurrent resolutions in isolation, that did not mean to prevent Congress from passing statutes which, by their terms, establish such a device as part of a legislative scheme. There is nothing in the legislative history of the Constitutional Convention or in past practice which would support this distinction. Nor would it make any sense, since it would enable the serious constitutional prohibition to be nullified by the incredibly simple device of including a provision for defeasance of Presidential action by concurrent resolution in every statute which is passed. . . . This ingenious logic would lead, of course, to the conclusion that even the constitutionally prescribed veto power of the President could be eliminated by a single statute stating that henceforth legislation will become effective without presentation to the President. The President would, after all, have his opportunity to veto that initial bill. The argument is obviously absurd. . . .

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Finally, let me address the argument that the disapproval of Executive action by congressional resolution must be recognized as valid because it is an established constitutional practice. This is met at the threshold by the dual warnings in *Powell v. McCormack* (1969), that an action is not any less unconstitutional because it has been taken before, and that the precedential value of a constitutional practice diminishes in proportion to its distance from the Constitutional Convention. The practice here involved is of very recent origin. The use of concurrent resolutions for the control of some types of Executive action goes back only to the 1930s. . . . A more concise formulation of that traditional test may be found in the statement that a concurrent resolution not presented to the President has “no force beyond the confines of the Capitol.”

This older tradition is obviously entitled to far greater weight than the recent departure from it. In addition, it is well-established that resort may be had to constitutional usage only where the constitutional text is in doubt. *United States v. Midwest Oil Co*. (1915). Here the text of Article I, section 7, clauses 2 and 3, is unambiguous. Lastly, reliance on a practice to establish constitutional validity presupposes that the practice has been generally accepted as legitimate. This description can assuredly not be applied to the concurrent resolution or one-House veto. On those occasions in which their inclusion in a measure otherwise essential has required Presidential acquiescence, Chief Executive have repeatedly expressed doubts concerning their validity. . . . For all of the foregoing reasons, it is impossible to regard the control of agency action by congressional resolution not submitted to the President as an established constitutional practice entitled to respect.

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. . . . [It has also been suggested] that the Presentation Clauses can be avoided by providing for a simple rather than concurrent resolution – that is, a one-House veto – since by its language section 7, clause 3 applies only to resolutions “to which the Concurrence of the Senate and the House of Representatives may be necessary.” I believe, however that this change would compound rather than avoid it. In addition to the Presidential veto, another of the checks and balances established by the Framers was a bicameral legislature, in which each House, elected in a different way, would restrain the other. The omission of specific reference to a one-House resolution in the Presentation Clause was assuredly not meant to sanction avoidance of the Presidential veto by that process. To the contrary, the Framers probably never even envisioned that a single House would purport to take legally effective action on behalf of the entire Congress. . . .

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. . . . There has latterly been a tendency, I think, to assume that musty old concepts such as separation of powers, the Appointment Clause, and the Presentation Clauses, will constitute no real impediment to whatever seems necessary in order to run a streamlined and efficient modern government; and that if a provision makes government sense – if it is a reasonable disposition of political affairs – it will be upheld by the Supreme Court. The trouble with this view is that our Constitution gives us a very distinctive form of government, in which some arrangements which are perfectly sensible and perfectly permissible in the parliamentary systems common to most western democracies, are simply incompatible with ours. You may say, if you wish, that our Constitution prohibits certain reasonable dispositions, builds in certain inefficiencies, for the greater goal of assuring the continuation of a free society. . . .

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1. Excerpt taken from *Congressional Review of International Agreements*, Hearings before the House Subcommittee on International Security and Scientific Affairs, 94th Cong., 2nd Sess. (July 22, 1976), 193-200. [↑](#footnote-ref-1)