AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal and Great Society Era – Separation of Powers

Congressional Debate on Legislative Veto (1939)[1]

The Executive Reorganization Act of 1939 authorized the president to develop a plan for reorganizing the executive branch. The executive branch had grown rapidly over the course of the New Deal, adding myriad new, overlapping agencies with large staffs. Proposals for reorganization were intended to streamline the executive branch, cutting waste and clarifying lines of responsibility. Reorganization was widely desired but very difficult to achieve in practice. Substantial political and policy interests were tied up with each existing agency, and the possibility of shifting functions and eliminating agencies threatened constituencies close to individual members of Congress. Neither Congress nor the president was eager to try to push through the legislature a detailed plan for reforming the federal government. The possibility of delegating the power to restructure agencies to the president and allowing the chief executive to act with very little interference with Congress promised to get some results but also carried political risks for those who might lose influence in the revamped executive branch.

Rather than legislating a new blueprint for the executive branch directly, the Executive Reorganization Act delegated power to the president to make the necessary decisions. The president's plan would go into effect unless both chambers of Congress passed a concurrent resolution disapproving the proposal. The bill sponsors argued that such a resolution of disapproval was not subject to a presidential veto. This statutory arrangement is known as a legislative veto, authorizing the executive to take action unless Congress objects. Legislative vetoes were innovative in the early twentieth century, but they became increasingly popular as the century progressed. They facilitated the ability of Congress to delegate expansive administrative authority to the executive branch while maintaining legislative oversight and control. In INS v. Chadha *(1983), the Supreme Court struck down the legislative veto as an unconstitutional violation of the requirement to present laws for a presidential signature.*

The congressional debate on the Executive Reorganization Act was one of the more extensive discussions in Congress over the use of the legislative veto. Burton Wheeler was a leading progressive in the Senate, but he had broken with the Roosevelt administration during the fight over the Court-packing plan in 1937. Wheeler proposed an amendment to the Reorganization Act, which would have required positive action by the Congress before any plan was implemented. The amendment was narrowly defeated, allowing the president to implement a reform plan without any congressional vote to support it. Congress never rejected any of the reorganization plans adopted by the administration during the life of the statute.

How might the legislative veto make it easier for Congress to delegate broad powers to the executive branch? Is such a delegation of policymaking power problematic? What are the alternatives ways to reorganize the executive branch? Should Congress be forced to take an up-or-down vote on any plan to reorganize the government? Should Congress be forced to develop the details of a reorganization scheme itself? Why did the president even need an executive reorganization statute? Is a resolution to disapprove a presidential action a "law"? Is the presidential plan for reorganization a law? If the plan goes into effect without Congress ever voting on it, did the president exercise legislative power? Is the president merely implementing a congressional plan for reorganization? How much guidance must Congress give the president for that to be true?

[1] Excerpt taken from *Congressional Record*, 76th Cong., 1st sess. (1939).

Rep. COX (Democrat, Georgia) . . . . Everyone frankly concedes that executive departments of the Government should be reorganized. Congress would probably undertake the task had it the facilities for working out essential details. Here draft is made upon the services of the official who is in the best position to serve congressional needs. The President is designated as the agent to do the work, and heretofore there has been no serious objection to his being entrusted with the duties created by the bill. We must use his service if we are to get desired results. This is an intelligent approach to the solution of the problem.

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As for myself, I am not prepared to accede to the proposition that it is within the competency of the Congress to delegate essential legislative powers to the Executive, or to any other. . . . [This bill] does not delegate any kind of legislative power to the agent of the Congress designated to do the job which the Congress proposes shall be done. The President is charged with the responsibility of making investigation, of ascertaining facts, and then applying the formula or rule which Congress lays down in the bill. There is left to the President no freedom of discretion that he might exercise independently of congressional control. The powers to be exercised under the bill are not legislative. They are not executive, but are ministerial only. The President is not given a roving commission of broad and unlimited powers to work his will upon the problem, but is confined with certain channels by limitations set up in the bill.

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Rep. HINSHAW (Republican, California) . . . . The Constitution says that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President of the United States. . . ."

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The question I want to ask is, suppose that under this bill the Congress of the United States passed a concurrent resolution disapproving the President's plan of reorganization, would it be necessary, if the President chose to veto that concurrent resolution, to pass it again over his veto by a two-thirds vote of the House and Senate.

Rep. WARREN (Democrat, North Carolina). I wish to state . . . that, of course, a concurrent resolution does not go to the President, and therefore there is no possible way by which he could veto it.

Rep. HINSHAW. The gentleman thinks that this concurrent resolution, then, would not be "legislative in effect"?

Rep. WARREN. Absolutely, I do not.

Rep. HINSHAW. That it would be final. Then you do not agree with the Constitution?

Rep. WARREN. A concurrent resolution never goes to the President. It is only a joint resolution that goes to the President.

Rep. HINSHAW. I am just reading the Constitution. . . .

. . . . I favor reorganization of the executive agencies in order to simplify our Government and save money for the taxpayers, but I do not want to see some plan shoved through by this or any other President or by this or by any other Congress that would make a dictatorship possible in this country.

If I am correct in the premise of my question . . . then under this bill such a plan could be put into effect over the heads of two-thirds of this House. . . .

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Rep. MURDOCK (Democratic, Arizona) . . . . Time after time the question has been asked: Why does not Congress do this thing? This question has been answered, I think, by both logic and experience. Congress has the power to do it, but it is a complicated, technical matter for Congress to do, and Congress has not done it. We delegate to the President of the United States, or . . . we direct the President of the United States in this bill to do certain things. Since has more information and has available all sources of information, as well as having the executive responsibility, the President is in better position to

suggest changes in administrative machinery than Congress could possibly do. Therefore I think it logical to do as this bill does and place the responsibility of studying the need for change and suggestions of change upon the President, leaving to Congress the final say in approving or disapproving all such suggestions.

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Rep. WOLCOTT (Republican, Michigan) . . . . Under the practice of Congress concurrent resolutions concern only intracongressional functions and do not have the effect of law. For this reason it has not been the universal practice to submit them to the President, for signature; but whether a document considered by the Congress is a concurrent resolution, a joint resolution, an order, or a bill, does not depend upon the designation of such a document but rather upon whether it contains matter which is properly to be regarded as legislative in its character and effect.

. . . . A concurrent resolution . . . which gives either positive or negative effect to any action, comes within the category of those orders, resolutions, or bills mentioned in the Constitution, and must be presented to the President for approval. Any other procedure would not be in conformity with the Constitution. To negative the action of the President in case of a veto of the concurrent resolution provided in the bill, which, of course, would follow as a natural consequence, a mere 33 Members of the Senate might nullify the expressed will of the unanimous action of the House.

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Whether the concurrent resolution has a positive or negative effect does not detract from its legislative effect does not detract from its legislative effect. We virtually – I should not use the term "repeal" in this instance because the law has not taken effect, but it nullifies the otherwise valid acts of the President, which we have delegated to him.

Two questions are involved here. One is whether we have the authority to reverse the process under the Constitution by which legislation is enacted. If we hold that this resolution is not negative in its legislative effect, then we must have to admit that we have deleted to the President the lawmaking power, which is equally unconstitutional.

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Rep. COX. . . . Now let me say this . . . It is clearly within the constitutional power of the Congress to attach even a more limited condition than is provided in the instant case, where provision is made for the two Houses acting through concurrent resolution to vacate a reorganization plan. Congress might constitutionally attach the condition that any plan submitted by the President, the agent of the Congress, as he is made in the bill before us, might be vacated, might be set aside, might be nullified, or might be entirely extinguished by a simple resolution of a single House of the Congress.

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Sen. ADAMS (Democrat, Colorado) . . . . The President recommends to us day by day legislation which he favors and we then pass upon it.

I am not clear why there should be any difference in reference to reorganization. I do not think it is a sound, complete criticism of a reorganization bill that we ask the President to make a recommendation to us, as he does . . . in reference to every other thing that comes before the Congress. In those respects the President exercises his constitutional function to make recommendations to us. In this measure we seek to do something different – to delegate authority, and to tie our hands to pass upon the results of the delegation.

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I do not think it is an answer to the need for reorganization for us to ask that authority be finally left in the Congress to assume the burden. We cannot delegate the power to pass legislation. There is no way in which we can do that. Bills which we pass, conferring powers upon the Executive, are sustained only when we lay down the rule that is to be applied. We cannot validly delegate the power to reorganize, any more than we can delegate to the President the taxing power.

We might say in an act of Congress, "The President of the United States shall levy such taxes as he thinks are in the public interest, and when he submits his tax measure to Congress it shall become effective unless by a concurrent resolution of both Houses it shall be disapproved"; but no would contend that such a measure would be valid, because we cannot escape our responsibility. . . .

Sen. WHEELER (Democrat, Montana). . . . What we are now asking is that the Congress of the United States act in accordance with the Constitution of the United States. We are asking only that Congress legislate in the manner provided by the Constitution. I submit . . . that when any lawyer who looks into the question will say, as Attorney General Mitchell said when President Hoover's bill was under consideration, that if the power is retained in one branch of the Congress to kill legislation by voting against it, such a course is unconstitutional. Legislation delegating legislative powers to the President is unconstitutional. And that is what we are doing – delegating to the executive branch of government the power to abolish functions of office and repeal laws, and then say that if one branch of the Congress approves the President's action and the other branch does not, it shall become the law. What lawyer upon the floor of the Senate will rise in his place and say that would be constitutional? . . .

. . . . [T]he Congress of the United States ought to exercise its functions under the Constitution as the forefathers drafted the Constitution. We ought to have the intestinal stamina to stand up here and say that we can legislate. . . .

Sen. LEWIS (Democrat, Illinois) . . . . If we trust the President, say so, and do so. If we do not trust in him, let us say so, and not send the matters to him, but dispose of them completely in this body. If the President cannot be trusted in the discharge of his constitutional duties, let us withdraw him from cooperation in this task. Let us trust with confidence something to him, as he trusts us to perform our duties. . . .

Sen. ADAMS. . . . In the matter of trust, the question is, Do we trust in the soundness of the Constitution of the United States? Do we believe in the processes of government there laid down?

A legislative body is, as we see day by day, somewhat crude in its methods. We have difficulty in working out detailed legislation on the floor of the Senate, but in the final analysis we speak the voice of the people who sent us here, and it is the process of difference, of dispute, and of consideration, which ultimately results in making of the Congress of the United States the honest spokesman of the opinions of the people of the United States, crude and cumbrous in its processes, with no comparison in efficiency and in expedition with the executive branch.

. . . . [T] privilege is his under the Constitution to merge departments and agencies, and if he cares to undertake it, to do so on his own volition, or if he cares to do it by way of recommending that we do so be legislation, that is his privilege. But when that is within his power, when his body passes an act authorizing him to carry out that purpose, and when he does so and we require that he shall send his action back for our superior judgment, we reflect upon his action in a way that is unworthy, because that is not the tender of legislation. We would thereby propose to review his executive acts as President of the United States, performed within his power under the Constitution. . . .

Sen. WHEELER. . . . I am amazed that the Senator . . . would stand on the floor of the Senate and say that it is part of the executive duties of the President of the United States to merge the various agencies or other branches of the Government. The Congress of the United States created those branches. . . . It was the Congress of the United States that created every single bureau, and not the President of the United States. Consequently, when the question arises of repealing the laws creating those agencies, it is the duty of the Congress of the United States, as the representative of the sovereign people of this country, to say whether or not those laws shall be repealed.

Sen. TYDINGS (Democrat, Maryland) . . . . Under our form of government, the President may formulate a reorganization plan without any act of the legislature, and he may submit it to the Congress with a message showing its need and merit, and the Congress may either accept it in whole or in part or reject it. No law is needed to accomplish the submission of a reorganization plan to the Congress by the President. On the other hand, the Congress itself, after appropriate hearings, may initiate a plan to

reorganize the Government, pass it through both Houses of Congress, and submit it to the President for his approval. If he approves it, it becomes the reorganization plan of our Government. If he disapproves it, he may veto it, and then the law falls unless enough Members of both Houses vote to pass it over his veto in which case it becomes the law anyway.

This is a Government in which legislation is supposed to originate in one of the two Houses of Congress, and not with the Executive. It is the Executive's mission to suggest or recommend appropriate legislation which may be needed from time to time. There is need for reorganization of the Government; but I insist that there is no need or excuse for abandoning the time-honored and constitutional ways of carrying out the objective we have in mind.

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In times of great stress, when the welfare of the Nation depends upon quick action, we must to some extent surrender temporarily some of our legislative functions, perhaps, in the interest of saving the Nation. . . . [In the case of the reorganization bill], there is no real emergency, in the sense in which I use that word, and the President should either formulate some tentative plan for the reorganization of the Government and submit it to the Congress for such action as we may see fit to take, or we should initiate it and pass a bill through the two Houses of Congress and submit it to the Executive for such action as he may see fit to take.

Here we have a legislative proposal which transfer to the President, to some extent, and by our approval, the right of Congress to legislate, and leaves us only the slim authority of approving or disapproving any plan the President may propose. . . .

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[T]he radio these days is full of appeals for democracy, appeals against the totalitarian states, appeals against authoritarianism, appeals against dictatorships. What, in essence, is the difference between dictatorship and democracy? . . . Our method of carrying out these programs, our method of formulating those programs, our method of operating government is different from theirs. We have a representative government. The chosen representatives of the people form the legislative branch, and in that branch resides all the legislative power possessed by the Federal Government. The Executive cannot pass a law or a resolution, or formulate a policy, or spend a dollar, or do one thing that we do not empower him to do. That is all the difference there is between the two forms of government. Yet, while are condemning the authoritarian states, we are bit by bit adopting their methods which we condemn.