AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

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

Note on Lend-Lease

President Roosevelt in the years before the United States entered World War II frequently made executive agreements with the United Kingdom that many congressmen believed required legislative approval. Concerned with presidential power to act unilaterally, but believing that Roosevelt needed some flexibility, Congress in March 1941 passed the Lend-Lease Act, permitting the president to sell "any defense article" to any country whose defense the president concluded was vital to national security. In order to retain some control over the program, Congress included a provision which would end Lend-Lease whenever a majority of both Houses voted for termination. Unlike normal legislation, this concurrent resolution, soon to become known as a legislative veto, would not need a presidential signature to become effective.

Legislative proponents of that measure insisted that if Congress could delegate power to the president, Congress could attach strings to the program. Senator John Connally of Texas declared:

> If we may terminate this bill by its terms on June 30, 1943, then we may terminate it upon any other happening or any other event which may transpire in the future.
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> The reason for that is that it is in the act itself; it is a limitation upon the length of time and the length of operation of the act itself, and in no sense a repeal or modification of an existing act. The provision is written in the heart of the measure that the bill shall not last longer than June 30, 1943, and, prior to that date, it shall not last beyond any time after the Congress shall pass a concurrent resolution.
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> So far as the legal concept of the proposition is concerned, the concurrent resolution might be wholly void; it might have no legal effect whatever; but treated purely as an event, it would terminate operations under this bill; and the Supreme Court of the United States has held that Congress in enacting legislation has the right to hinge its operation either upon some antecedent event or upon some subsequent event, and that upon the happening of that event, such as a proclamation by the President, if that is provided in the law, the act shall either terminate or shall become operative, as the case may be, as provided in the legislation.[1]

Senator Connally correctly noted that Congress may normally condition the operation or termination of a law on a contingent future event. For example, Congress could pass a law authorizing the president to sell arms to Canada if Canda declared war of Germany before 1943 or a law prohibiting arms sales to France if France surrendered to Nazi Germany. The question was whether that contingent event could be a congressional resolution.

The Lend-Lease Act put President Roosevelt in a political and constitutional bind. On the one hand, Roosevelt was convinced that he needed the authority to sell arms to countries fighting Nazi Germany and he feared that Lend-Lease would not pass if stripped of the legislative veto provisions. On the other hand, Roosevelt believed the legislative veto provision unconstitutional and likely to be a burden on future presidents. In the horns of a dilemma, Roosevelt chose to sign the bill and deliver a private note to his attorney general Robert Jackson, objecting to the constitutionality of the veto provision.

[1] *Congressional Record* 87 (1941): 1155.

"I felt constrained to sign the measure, Roosevelt declared,

> in spite of the fact that it contained a provision which, in opinion, is clearly unconstitutional. . . .
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> The Constitution of the United States, Article I, Section 7, prescribes the mode in which laws shall be enacted. It provides that "Every bill which shall have been passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approves he shall sign it, but if not he shall return it, with his objections to that House in which it shall have originated." It is therefore provided that if after reconsideration two-thirds of each House shall agree to pass the bill, it shall become law. The Constitution contains no provision whereby the Congress may legislative by concurrent resolution without the approval of the President. The only instance in which a bill may become law without the approval of the President is when the President vetoes a bill and it is then repassed by two-thirds vote in each House.
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> It is too clear for argument that action repealing an existing Act itself constitutes an Act of Congress and, therefore, is subject to the foregoing requirements. A repeal of existing provisions of law, in whole or in part, therefore, may not be accomplished by a concurrent resolution of two Houses.[2]

Roosevelt asked Jackson to make the note public at an appropriate time to serve as a bar against making the legislative veto a precedent. What do you think of that as a political or constitutional strategy? When, if ever, should presidents sign bills they believe have unconstitutional provisions? Think of the Roosevelt strategy when reading the materials on presidential signing statements in the next chapter.

[2] Franklin D. Roosevelt, "Memorandum for the Attorney General," April 7, 1941, reprinted in Robert H. Jackson, "A Presidential Legal Opinion," *Harvard Law Review* 66 (1953): 1353, 1358.