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

William P. Rogers, **Authority of Congressional Committees to Disapprove Actions of the Executive Branch** (1957)[1]

In 1951, Congress passed a statute that declared that no real property held by the military and valued over $25,000 could be disposed of without the agreement of the armed services committees of both the House of Representatives and Senate. This provision is an example of a "legislative veto," which was a popular statutory mechanism pioneered in the postwar period to provide congressional control over the discretion of the executive branch in making and implementing federal policy. In this case, the legislative veto over executive-branch decisions could be exercised by a single committee in Congress. In other cases, the veto could be exercised by one or both chambers of Congress. The common feature of such statutory provisions is that they void executive actions unless the executive wins the explicit approval of the specified legislative bodies. Presidents frequently objected to such provisions, arguing that they were unconstitutional, and sometimes vetoed bills that contained them. The U.S. Supreme Court finally agreed with the White House in INS v. Chadha *(1983).*

William P. Rogers was the acting attorney general when the White House special counsel asked him to assess the constitutionality of the 1951 provision. Rogers built on the earlier analysis of Attorney General Herbert Brownell, who had successfully urged President Eisenhower to veto or refuse to implement similar legislative provisions in the past. The president recommended that Congress repeal the 1951 provision, but no action was taken.

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Legislative proposals and enactments in recent years have reflected a growing trend whereby authority is sought to be vested in congressional committees to approve or disapprove actions of the executive branch. Of the several legislative devices employed, that which subjects executive department action to the prior approval or disapproval of congressional committees may well be the most inimical to responsible government. It not only permits organs of the legislative branch to take binding actions having the effect of law without opportunity for the President to participate in the legislative process, but it also permits mere handfuls of members to speak for a Congress which is given no opportunity to participate as a whole. An arrangement of this kind tends to undermine the President's position as the responsible Chief Executive.

Action by several prior Presidents on matters of this kind has been somewhat inconsistent. In 1920, President Wilson disapproved an appropriation bill which provided that the printing of magazines by executive agencies must have the prior approval of the Joint Congressional Committee on Printing on the ground that this provision would have vested executive functions in a congressional committee. . . .

During the past dozen years or so, provisions for control by congressional committees have related, in large part, to real estate transactions of the armed forces. . . .

This was interpreted in practice as giving to the committees a veto power over such transactions. . . .

[1] Excerpt taken from 41 Op. Att'y Gen. 300 (1957).

In 1951, a predecessor bill to the law here under consideration was passed by the Senate and House. . . . In disapproving the bill, President Truman emphasized the practical administrative difficulties rather than constitutional objections. . . .

Upon consideration of the veto, Representative Patman urged that if the disapproval power to be vested in the committee was a legislative function, it could be performed only by the two Houses, and that if it was an executive function, it could not be performed by a legislative committee . . . . [A] few months later, President Truman approved without comment the present law.

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In [a] letter to you of July 13, 1955, since published as an opinion of the Attorney General, you were advised:

> "The practical effect of these provisions is to vest the power to administer the particular program jointly in the Secretary of Defense and the members of the Appropriations Committees, with the overriding right to forbid action reserved to the two Committees. This, I believe, engrafts executive functions upon legislative members and thus overreaches the permitted sweep of legislative authority. At the same time, it serves to usurp power confided to the executive branch. The result, therefore, is violative of the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution which places the legislative power in the Congress and the executive power in the executive branch.
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> "Another aspect of invalidity, of equal force, is presented by the proviso. Thus, while the Congress may enact legislation governing the making of Government contracts, it may not legally delegate to its committees or members the power to make contracts, either directly or by conferring upon them power to disapprove a contract which an officer of the executive branch proposes to make. Apart from the right of the Congress as a whole with respect to contractual authority, it is quite clear that committees of the Congress do not have the legal capacity to enact legislation. . . ."

The Attorney General further advised, in connection with [that 1955] bill, that since [the provision in question] was, in his view, separable from the remainder of the act, and as it did not bear upon its substance as a whole, disapproval of the act was not deemed necessary. Instead, it was suggested that the offending section was not to be regarded as a legally binding limitation which Congress could constitutionally impose. In your [signing] statement of July 13, 1955, to the Congress, you advised that [that provision] would be "regarded as invalid by the executive branch of the Government in the administration [of the statute], unless otherwise determined by a court of competent jurisdiction."

Another bill of the 84th Congress contained the same legal infirmity was disapproved. H.R. 9893, a bill to authorize construction at military installations was returned to the House of Representatives on July 16, 1956, without your approval because of objections [to two "come together" provisions allowing committee vetoes of executive action] . . . . In rejecting this requirement, you stated:

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> "Two years ago, I returned, without my approval, a bill containing similar provisions. At that time I stated that such provisions violate the fundamental constitutional principle of separation of powers prescribed in Articles I and II of the Constitution which place the legislative power in the Congress and the executive power in the executive branch.
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> "Once again, I must object to such a serious departure from the separation of powers as provided by the Constitution. Any such departure from constitutional procedures must be avoided.
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> "I am persuaded that the true purpose of the Congress in the enactment of both of these provisions was to exercise a close and full legislative oversight of important programs of the Department of Defense. This purpose can be properly attained by

requiring timely reports from the Executive. Such reports would provide the Congress with the basis for further legislative action it may find to be necessary."

These objectionable provisions were subsequently eliminated.

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It thus appears that you have consistently opposed an invasion of executive office functions and powers through the legislative device of the character indicated. Your position in such regard is, I believe, fully supported by sound constitutional doctrine.

I am of the opinion that [this section of the 1951 law] reflects the exercise of legislative authority not warranted by the Constitution and that it is, therefore, unconstitutional.

You have also asked for advice as to the appropriate course of action which might be taken in the event the indicated provisions are viewed as unconstitutional. I believe the most effective and practical course of action would be to urge the repeal by the Congress of [this section]. . . . If you are agreeable to this suggestion, the Department of Justice would be happy to cooperate with the Bureau of the Budget in preparing such material as may be required.