



AMERICAN CONSTITUTIONALISM
 VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers

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William D. Mitchell, Constitutionality of Proposed Legislation Affecting Tax Refunds (1933)¹

Near the end of Herbert Hoover's presidential term, Congress passed an emergency appropriations bill to fill various depleted funds in the budget. One provision of that piece of legislation was designed to address refunds for taxes that were incorrectly collected under existing laws. The provision required that the Treasury Department report to Congress details of any large refunds made, whether to individuals and corporations, and further provided that no refunds over \$20,000 were to be made without the approval of the Joint Committee on Internal Revenue Taxation. An exception was made for refunds that were pursuant to a court order.

President Hoover asked Attorney General William D. Mitchell to review the provision, which resulted in this opinion concluding that the provision violated the constitutional separation of powers. The next day, Hoover vetoed the bill, forwarding the attorney general's opinion to Congress. The president urged Congress to adopt a constitutionally valid mechanism for making refunds so that the refunds would not be unduly delayed or put into jeopardy by the threat of an invalid statute. Congress modified the legislation to remove the requirement that executive receive legislative approval before making any refunds.

This is one early form of a legislative veto that eventually became common in a wide variety of congressional statutes. What are the attorney general's objections to the legislative veto? Would any form of legislative veto meet his objections? If the president was willing to sign a bill that included such a veto, should that settle the constitutional question?

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Under the proviso in the urgent deficiency bill the action of the executive officer in the Treasury Department charged with the duty of executing the law respecting refunds would be subject to review by a joint committee of Congress, and the members of that committee would exercise final authority and make the decisions as to whether refund should be made and in what amounts. The Constitution of the United States divides the functions of the Government into three great departments – the legislative, executive, and the judicial – and establishes the principle that they shall be kept separate, and that neither the legislative, executive, nor judicial branch may exercise functions belonging of the others. The proviso in the urgent deficiency bill violates this constitutional principle. It attempts to entrust to members of the legislative branch, acting *ex officio*, executive functions in the execution of the law, and it attempts to give to a committee of the legislative branch power to approve or disapprove executive acts. If the functions to be performed by the joint committee are administrative or executive in character, the bill is subject to the further objection that the selection of the personnel by the Congress is an infringement on the constitutional function of the Executive to make appointments and is an attempt by the legislative branch to make appointments of officials performing administrative or executive functions.

If the process of examination and allowance of a claim for refund of taxes may be viewed as a legislative function, the proviso in this bill is equally obnoxious to the Constitution because a joint committee has not power to legislate, and legislative power can not be delegated to it. These principles are settled by many decisions of the Supreme Court of the United States, to only a few of which need reference be made. In *United States v. Ferreira* (1851), the court considered a statute purporting to authorize a district judge to pass upon claims arising under the Spanish treaty, but which provided that

¹ Excerpt taken from 37 Op. Att'y Gen. 56 (1933).



the claims should only be paid by the Secretary of Treasury if deemed by him to be just and equitable. The court held that the functions of the judge under this statute were not judicial and could not be conferred upon him as a judge, but that he might be considered as a commissioner. . . .

. . . A very recent case is that of *Springer v. Philippine Islands* (1928). The Organic Act, under which the Philippines Government operates, provides for the separation of legislative, executive, and judicial functions. . . . The Phillipin Legislature passed an act attempting to create a board of control, consisting of the Governor General, the president of the senate, and the speaker of the house of representatives, to vote the stock and have a voice in the management of the Philippine National Bank and other government corporations. The court said:

“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. . . .”

It held the act of the legislature violative of the Organic Act.

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[T]he matter of making refunds may involve either legislative, executive, or judicial functions, depending on the system adopted, but in the present case it is unnecessary to make any close analysis of the nature of the function of refunding illegally collected taxes. If it be an executive or judicial function, clearly a joint committee of the Congress may not execute it, and if it is a legislative function it is equally clear that a joint committee may not perform it. Action by a committee is not legislation, and a committee of the Congress cannot legislate.

. . . .
This proviso can not be sustained on the theory that it is a proper condition attached to an appropriation. . . . Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution. . . .

Attempting to have committees of Congress approve executive acts, or execute administrative functions, or participate in the execution of laws is not a new idea. Carried to its logical conclusion it would enable Congress, through committees or persons selected by it, to gradually take over all executive functions or at least exercise a veto power upon executive action, not by legislation withdrawing authority, but by the action of committees, or of either house acting separately from the other. On May 13, 1920, President Wilson vetoed an appropriation Act on the ground that it contained a proviso that certain documents should not be printed by any executive branch or officer except with the approval of the Joint Committee on Printing. . . .

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Since the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpaired by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive. To acquiescence in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents. . . .

. . . . The proviso in this deficiency bill may not be important in itself, but the principle at stake is vital. Encroachments on the executive authority are not likely to be deliberate but that very fact makes them all the more insidious. . . .

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