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Separation of Powers: Executive and Legislative Branches

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SEPARATION OF POWERS: EXECUTIVE AND LEGISLATIVE BRANCHES

By

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Anyone who has served as legal adviser to the executive branch of the Federal Government is well aware of the treacherous chasms which lie along the path leading to decisions on constitutional questions. In addition to the formidable challenge of the legal issues, a host of other considerations intrude upon ultimate advisory dispositions. Among them, as a Supreme Court Justice dryly observed, is that "Constitutional adjudications are apt by exposing differences to exacerbate them."[1]

Responsibilities of office, however, do not afford the refuge of indecision when judgments are required. A statutory reminder, if one were needed, of the Attorney General's obligation as to legal advisory service has remained in force in substantially the same language since 1789: "The Attorney General shall give his advice and opinion upon questions of law, whenever required by the President".[2] Among the situations which sometimes prompt the President's request for legal advisory opinions are those which arise through legislative enactments. It is the purpose of the present writing merely to set forth an opinion recently given to the President on one provision of the 1956 Defense Department Appropriation Bill which, it seemed to me, raised basic constitutional questions. The advice given to the President, which is being published as an Attorney General's opinion, is set forth below. It is self-explanatory:

July 13, 1955

The President,

The White House.

My dear Mr. President:

You have asked for my advice regarding the validity of certain provisions of H. R. 6042, 84th Congress, first session, the Department of Defense Appropriation Act, 1956.

Section 638 of that act reads as follows:

> "Sec. 638. No part of the funds appropriated in this Act may be used for the disposal or transfer by contract or otherwise of work that has been for a period of three years or more performed by civilian personnel of the Department of Defense unless justified to the Appropriations Committees of the Senate and the House of Representatives, at least ninety days in advance of such disposal or transfer, that its discontinuance is economically sound and the work is capable of performance by a contractor without danger to the national security: *Provided,* That no such

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1 Frankfurter, J., concurring in Youngstown Co. v. Sawyer, 343 U. S. 579, 595 (1952).
2 1 Stat. 92; 19 Stat. 241; 5 U. S. C. § 303.

disposal or transfer shall be made if disapproved by either committee within the ninety-day period by written notice to the Secretary of Defense."

The proviso reserves to the Appropriations Committees of the Senate and House of Representatives the right to disapprove and forbid action by the Secretary of Defense in disposing of or transferring work performed for a period of three years or more by civilian personnel of the Department of Defense.

The Secretary of Defense is otherwise authorized by law to dispose of or transfer such work. In pursuance of that authority, the Secretary of Defense would be permitted to engage in the administration and execution of the law which, by constitutional warrant, has been the responsibility and right of the executive branch since the founding of our constitutional form of Government. The indicated provisions of section 638 effectively intrude upon such responsibility and right.

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.

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. Nevertheless, the Appropriations Committees of the Senate and the House of Representatives have assumed to themselves that power in the present instance.

The bases for the several foregoing conclusions are, in my judgment, fully supported by and are consistent with the Constitution of the United States, views long espoused by past Presidents of the United States, and by opinions of the judicial branch of our Government. These are briefly set forth below.

Article II of the Constitution provides that "The executive Power shall be vested in a President of the United States of America" (Sec.1) and that "he shall take Care that the Laws be faithfully executed" (Sec. 3). Article I of the Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States" (Sec. 1). The division of authority and re-

sponsibility as among the three branches of our Government was described by Chief Justice John Marshall early in the Nation's history: "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; . . . ."[3] Over 100 years later, the Supreme Court reaffirmed this basic constitutional division between the three great branches of our Government. In *Springer* v. *Philippine Islands*,[4] the Court declared invalid certain acts of the Philippine legislature vesting the voting power of stock owned by the Government of the Philippines in a committee consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives of the Philippine Islands. In its opinion, the Court said:

> "Thus the Organic Act for the Philippine Islands," following the rule established by the American constitutions, both State and Federal, divides the Government into three separate departments — the legislative, executive and judicial . . . . And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital — not merely a matter of governmental mechanism . . . .
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> "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 . . .
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> "Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive."[5]

This decision has never been qualified by the Supreme Court or by the lower Federal courts and has generally been followed by State courts dealing with similar questions. Earlier, the Supreme Court had held that duties which the House of Representatives attempted to confer upon a committee were judicial in character and not susceptible of exercise by the legislative department.[6]

The present proviso cannot be sustained on the theory that it is a proper condition attached to an appropriation. It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

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[3] Wayman v. Southard, 23 U. S. 1, 44 (1825).
[4] 277 U. S. 189 (1928).
[5] *Id.* at 201, 202.
[6] Kilbourn v. Thompson, 103 U. S. 168 (1880).

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 acquiesce in legislation encroaching upon the executive authority results in the establishment of dangerous precedents. The first Presidential defense of the integrity of the powers of the Executive under the Constitution was made by Washington when the House of Representatives insisted on being recognized as part of the treaty-making power. In his message to the House of Representatives of March 30, 1796, he said:

> "It is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved: . . . ."[7]

From that day to this the Presidents have almost unvaryingly felt compelled to resist interferences with the Executive power. John Adams, Jefferson, Madison, and John Quincy Adams, in succession, found it necessary to voice opposition to such encroachment. Succeeding Presidents also recognized the need and duty to pass the Executive authority on to their successors unimpared by the adoption of dangerous precedent.

About a year ago, you also found it necessary to disapprove an act of Congress which would have invaded the prerogatives of the executive branch of the Federal Government. H. R. 7512, 83rd Congress, second session, related to an agreement authorizing the Secretary of Defense to convey federally-owned lands situated within the Camp Blanding Military Reservation, Florida, upon condition that, prior to the consummation of such an agreement, the Secretary of Defense or his designee "shall come into agreement with the Committees on Armed Services of the Senate and of the House of Representatives concerning the terms of such agreement." In your veto message to the House of Representatives[8] you stated:

> "The purpose of this clause is to vest in the Committees on Armed Services of the Senate and House of Representatives power to approve or disapprove any agreement which the Secretary of the Army proposes to make with the State of Florida pursuant to section 2 (4). The practical effect would be to place the power to make such agreement jointly in the Secretary of the Army and the members of the Committees on Armed Services. In so doing, the bill would violate the fundamental constitutional principal 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."

The views expressed in that message have force in the present situation.

Past Attorneys General also have consistently advised the executive branch of the constitutional invalidity of legislative enactments which would destroy the independence and integrity of the separate branches of the Government (see, for example, 37 Op. A. G. 56).

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[7] WILLIAMS, E. THE STATESMAN'S MANUAL, vol. 1, App XVII.
[8] 100 CONG. REC. 7135 (1954).

Another factor in the present situation requires consideration. Whenever a provision in a statute is found invalid, question arises whether the whole act falls or only the objectionable section. This depends on whether the unconstitutional provision is separable from the rest of the act. In deciding that question, the courts endeavor to ascertain from the terms of the act and its subject matter whether Congress would have intended the balance of the act to stand without the obnoxious provision.[9]

When H. R. 6042 passed the House of Representatives with Senate amendments on June 20, 1955, section 638 merely required a certification and report by the Secretary of Defense to the Appropriations Committees of the Senate and House of Representatives at least 60 days in advance of the disposal. As stated by a member of the Senate, the purpose of section 638 as it then read was to give to the two Appropriations Committees a "period in which to determine whether an activity should be discontinued. The committee could not veto anything."[10] This view was confirmed by another Senator who stated: "We do not even have the right of veto over the closing of the plant. All we ask is that the Secretary make a report before he takes action. It seems to me that that would be in accordance with sound precedents and would be in keeping with the interests of the country."[11] The bill then went to conference with section 638 reading as indicated.

The present section 638 was added in the House of Representatives during consideration of the conference report and was passed without consideration of its constitutional implications.[12] The bill as thus amended was passed by the Senate without debate.[13]

The multibillion dollar Defense Department Appropriation Act covers many varied subjects bearing upon national defense. Section 638 is in the nature of an addendum and does not bear upon the act as a whole or any other particular portion of it. It is my opinion that the proviso which purports to vest disapproval authority in either of the two Appropriations Committees is separable from the remainder of the act and, if viewed as imposing an invalid condition, does not affect the validity of the remaining provisions.

Respectfully,

(s) HERBERT BROWNELL, JR.

Attorney General

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9 Dorchy v. Kansas, 264 U. S. 286, 289 (1924).
10 101 CONG. REC. 7421 (1955).
11 *Id.* at 7422.
12 101 CONG. REC. 8216 - 8218 (1955).
13 *Id.* at 8154.