The original documents are located in Box 37, folder "Pay (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

August 27, 1975

MEMORANDUM FOR: Philip W. Buchen
Don Rumsfeld
Richard Cheney
John Marsh
James Lynn

FROM: Roderick Hills

Attached are materials relevant to our scheduled discussion this afternoon with respect to "legislative veto."

Attachments

THE WHITE HOUSE

WASHINGTON

August 27, 1975

MEMORANDUM FOR:

FROM:

SUBJECT: Pay Comparability Act: Legislative Veto

Attached are documents which should be considered in conjunction with our discussion this afternoon concerning what action should be taken with respect to "the alternative pay plan."

The attached documents are:

Tab A - A draft-tentative legal opinion with respect to the constitutionality of the "alternative pay adjustment plan."

Tab B - A compilation divided into three parts of existing legislation which contains

1. One House Vetos
2. Two House Vetos
3. Committee Vetos

Tab C - An analysis by the Acting General Counsel of OMB as to the severability of legislative vetos

THE WHITE HOUSE

WASHINGTON

August 27, 1975

MEMORANDUM FOR

FROM:

SUBJECT: Federal Pay Comparability Act: White House Veto

Since the middle of 1974, and perhaps before, the Justice Department (Office of Legal Counsel and Solicitor General) has advised the White House that legislation that requires the President to submit a decision by him back for a vote by a (i) two house veto, (ii) one house veto, or (iii) a committee veto, is unconstitutional.

The matter received serious attention in your Counsel's office at the time consideration was given to the Title IX regulations drafted by HEW. The Justice Department and OMB were asked:

(a) to complete a list of all existing legislation with a legislative veto,

(b) to determine to what extent the unconstitutionality of the "veto" clause in all these bills would invalidate the balance of the statute, and

(c) to recommend a proper test case to resolve the constitutional issue if it should be determined to proceed.

The first two items have been substantially completed and Justice and OMB have also identified two matters that are ripe for litigation.

The result of this effort is to make it apparent that a judicial decision that all legislative veto procedures are unconstitutional would cause a very substantial disruption of some substantial pieces of legislation.

Although it has been repeatedly stated by a number of us that the increasing tendency of the Congress to employ a legislative veto is bad government and hopefully unconstitutional, we doubt that anyone yet has a full understanding of how great the disruption would be if a court decided that the present opinion of the Justice Department is correct: i.e., that all legislation incorporating a legislative veto is unconstitutional.

Before recommendations as to what Presidential action should be taken with respect to the alternative pay adjustment plan, one more matter deserves attention. During 1974-75 Presidents Nixon and Ford in statutes (e.g., the Budget and Impoundment Control Act of 1974, the Trade Act of 1974, and the AMTRAK Improvement Act of 1975) stated their serious constitutional concern over the legislative veto. Thus, the White House has already publicly recognized its constitutional concern over the matter now in discussion.

Recommendation:

The Federal Pay Comparability Act is a very undesirable statute to make the subject of a constitutional challenge to the concept of "legislative veto." Accordingly, our recommendations are:

(i) that you do institute an "alternative pay adjustment plan," if that is your policy decision;

(ii) that you put your pay plan in effect on October 1, if it is not "vetoed" by either House.

If you agree, the remaining questions are these:

(a) Should you express concern over the constitutionality of the entire procedure?

(b) Should you introduce concurrent legislation asking that your "pay plan" be enacted by Congress to remove the "constitutional" concern?

We recommend against either course unless it is believed that there is a real probability that Congress would enact such legislation in a timely fashion. We should not want to invite the lawsuit quite so openly.

Assuming that you do institute an alternative pay plan at less than 8.6%, and assuming that it is not vetoed, we must nevertheless consider the problems that will be raised if a lawsuit is filed to challenge the procedures.

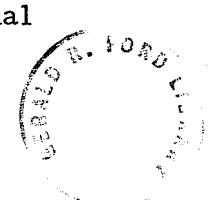
We must also recognize the possibility that opponents of your action may openly attack the action and publicly ask why this Administration expresses constitutional concern over the legislative veto when it applies to "sex regulations" (Title IX), but does not express the same concern when it allows you to hold down a pay increase.

If the lawsuit is filed, we believe the Civil Division will defend it even though the Attorney General believes "the alternative pay plan" is unconstitutional. However, defense would place the Administration as a defender of the constitutional status of the legislative veto even though we are considering a constitutional challenge to it in other cases.

In order to avoid inconsistency in court, and to also avoid contentions that the White House has not been consistent in expressing constitutional concern about the "legislative veto," we suggest the following:

(1) That instead of seeking a test case to challenge the constitutionality of the legislative veto, we instead make every effort to avoid a constitutional challenge. If a constitutional challenge in <u>all</u> legislative veto statutes were upheld, there would obviously be a chaotic effect upon government. We doubt that either good government or good politics justifies any major effort to secure that end. If this Administration were to challenge it or to even express concern in a major piece of legislation, doubt would be cast on all these other statutes for so long as the litigation lasted, and we would be at the mercy of the judicial system to decide how government will work in the future.

(2) We should at once create some dialogue with Congressional leaders to transmit this constitutional concern over the use of legislative vetoes. By ex-



pressing the concern now, we can avoid charges that the White House is not candid with respect to the alternative pay plan and, in view of the strong views of the Attorney General, and other authorities, we may be able to stir some bipartisan effort to rationalize the use of legislative vetoes.

As thoughtful as the Attorney General's views are, we have some significant doubt that a court would in fact decide all legislative veto legislation is unconstitutional. Accordingly, we believe it may be possible to divide existing statutes in various categories and perhaps agree with Congressional leaders as to where a legislative veto is constitutional and where it is not. Even if this "approach" to bipartisan cooperation is rebuffed, it at least protects the White House against the challenge that it has not been candid with respect to the "alternative pay plan."

My dear Mr. President:

This is in response to your request for my opinion concerning the constitutionality of the provision in subsection (c)(2) of section 5305, Title 5, United States Code,—/ which enables one House of Congress to disapprove an alternative pay adjustment plan prepared and transmitted to the Congress by the President pursuant to subsection (c)(1) of that section. You have also inquired about the effect the unconstitutionality of that provision has on the remainder of the subsection. It is my opinion that the one-House disapproval provision unconstitutionally encroaches on the powers and duties of the President and, consequently, is invalid. I conclude, moreover, that such invalidity extends to the remainder of subsection (c) and deprives the following subsections (subsections (d)-(m)) which implement it of any significance, but does not affect the rest of section 5305, in particular not subsection (a).

—/Section 5305 is derived from section 3(a) of the Federal Pay Comparability Act of 1970, Public Law 91-656, 84 Stat. 1946.

Section 5305, as amended by section 202(c) of the Executive Salary Cost-of-Living Adjustment Act, Title II of the Act of August 9, 1975, Public Law 94-82,[1] establishes a semi-automatic system designed to keep federal pay rates comparable with private enterprise pay rates for the same levels of work. Subsection (a) of section 5305 provides that the President shall, on the basis of a report submitted to him by his "agent,"[2] annually adjust the rates of pay of each statutory pay system on a basis of comparability with private enterprise, effective as of the beginning of the first applicable pay period commencing on or after October 1

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[1] The 1975 Act extends the Pay Comparability provisions of 5 U.S.C. 5305 to the Executive, Legislative, and Judicial officials described in 2 U.S.C. 356.

[2] The President's "agent" are the Director, Office of Management and Budget, and the Chairman of the Civil Service Commission. See Executive Order No. 11721, § 201.

of each applicable year, and shall transmit a report of his action to the Congress.—/

—/The text of 5 U.S.C. 5305(a), as amended by Pub. L. 94-82, reads as follows:

"Annual pay reports and adjustments.

"(a) In order to carry out the policy stated in section 5301 of this title, the President shall--

"(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that--

"(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

"(B) makes recommendation for appropriate adjustments in rates of pay; and

"(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

"(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

"(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and

(Continued)

Subsection (c), the constitutionality of which is involved here, authorizes the President to prepare and to transmit to Congress before September 1 of any year "such alternative plan with respect to a pay adjustment as he considers appropriate," if, because of a national emergency or economic conditions affecting the general welfare, he considers it inappropriate to make the pay adjustments required by subsection (a). The President's alternative plan, however, does not become effective if, prior to the expiration of a period of thirty days of continuous session of Congress, either House of Congress

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_/ (Continued from preceding page)

recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems."

adopts a resolution disapproving the alternative plan.[1] In that event, the President is to make the pay adjustments required by subsection (a). 5 U.S.C. 5305 (m).

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[1] The text of 5 U.S.C. 5305(c), as amended by Pub. L. 94-82, reads in pertinent part:

> "(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefore (sic), in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this/sub section shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems."
>
> "(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. . . ."

I.

The basic problem raised by subsection (c)(2) of section 5305 is whether Congress is constitutionally empowered to limit the statutory authority of the President by action taken by a single House. It is my conclusion that such a provision violates Article I, section 7, clauses 2 and 3 of the Constitution, which provide in pertinent part:

> "(2) Every Bill which shall have 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, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .
> "(3) Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

These provisions lay down a fundamental requirement. Before legislative action can become law, the action must be concurred in by both Houses of Congress and presented to the President, and, if disapproved by the President, it must be repassed by a two-thirds vote of each House.[1] Subsection (c)(2) violates this basic constitutional precept in two respects: It does not provide for presentation to the President, and does not require the concurrent action of both Houses.

The records of the Constitutional Convention testify to the great importance the Founding Fathers attributed to the requirement that all legislative action be presented to the President. Indeed, the third clause of Article I, section 7 of the Constitution, quoted above, was specifically designed to prevent evasion of the presentation requirement.

The purpose of the requirement, and of the President's veto power, was explained by Gouverneur Morris as intended to guard against "[e]ncroachment [on the Executive] of the

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[1] Congressional action seeking to nullify a Presidential plan prepared pursuant to statutory authority is clearly of a legislative nature. Indeed, if it were not, Congress would lack the authority to take it. See 37 Op. A.G. 56, 58-62 (1933).

popular branch of the Government." The Constitutional Convention had before it numerous examples of such encroachment that had occurred in Pennsylvania and foreign countries. Farrand, Records of the Federal Convention, Vol. II, pp. 299-300. The Presidential approval requirement was also explained by James Madison as designed "1. to defend the Executive Rights, 2. to prevent popular or factious injustice, . . . to check legislative injustice and incroachments." Id., at 587. In The Federalist No. 73, Hamilton states that the primary reason for granting the President the veto power is to "enable him to defend himself."

During the debate on what is now Article I, section 7, clause 2 of the Constitution, Mr. Madison pointed out that, "if the negative of the President [i.e., the presentation requirement] were confined to bills, it would be evaded by acts under the formal name of Resolution, vote, etc." Farrand, op. cit., Vol. II, pp. 301-305. The Convention thereupon adopted the third clause of Article I, section 7 extending the presentation requirement

to "every Order, Resolution or Vote to which the concurrence of the Senate and House of Representatives may be necessary."[1]

There is a substantial body of subsequent authority that a resolution which has not been presented to the President, even if adopted by both Houses of Congress, is of no legal effect. Thus, the Senate Judiciary Committee in S. Rept. 1335, 54th Cong., 2nd Sess., pp. 5-6, states that concurrent resolutions--

> "have not been used . . . for the purposes of enacting legislation, but to express the sense of Congress upon a given subject, to adjourn longer than three days, to make, amend, or suspend joint rules, and to accomplish similar purposes in which both Houses have a common interest, but in which the President has no concern. . . .
>
> ". . . They have never embraced legislative provisions proper, and hence have never been deemed to require Executive approval."

And further--

> ". . . the general question submitted to us, to wit, 'whether concurrent resolutions are required to be submitted to the President of the United States,' must depend, not upon

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[1] The concurrence of both Houses of Congress is required for the exercise by Congress of its legislative powers. See S. Rept. 1335, 54th Cong., 2nd Sess., p. 8.

> their mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. . . . (at p. 8)

Another formulation is to be found in Congressman Mann's statement that a concurrent resolution has no force beyond the confines of the Capitol. 42 Cong. Rec. 2661 (1908). Similarly, in Quintana v. Holland, 255 F.2d 161, 164-166 (C.A. 3, 1958), the court held that a concurrent resolution not presented to the President does not have the force of law and therefore does not have the effect of changing the statute to which it purports to apply.

These considerations apply even more forcefully to a one-House disapproval provision in that it also violates the second branch of Article I, section 7--the requirement that legislative action of the Congress must be concurred in by both Houses. It is no answer to say that because Congress could have wholly denied the President the authority to submit an alternative plan, it therefore was empowered to attach conditions to the exercise of

that authority--even a condition not envisioned by the Constitution. That the greater power, viz., to deny absolutely, does not necessarily include a lesser power is best explained by an analogy from the law of property: A person is entirely free under the common law to refuse to sell his real property, but if he chooses to sell it he cannot subject it to continuing restrictions, so-called "restraints on alienation," which are inconsistent with full title in the new owner. So also, the Congress has authority to deprive the President completely of substantive powers in a number of fields; but unless it is willing to take that drastic step, it cannot leave the powers intact and yet subject them to formal restrictions other than those that can subsequently be imposed by the normal legislative process.

Otherwise the constitutional doctrine of the separation of powers would be subverted. That doctrine, which, as James Madison stated during the first session of the First Congress, is the most sacred principle in our Constitution and, indeed, in any free Constitution (Annals of Congress, First Cong., col. 581) necessarily

requires that after Congress has enacted a statute its power is at an end, and that the law is to be executed free from Congressional interference except, of course, by the enactment of new legislation. See, e.g., James Madison, id., at col. 582; Senator Davis, Cong. Globe, 39th Cong., 1st Sess., p. 186 (1866).

The need for the doctrine that Congress can not subject a grant of powers to the President to control by a resolution not presented to him should be obvious: Without it the carefully drawn legislative procedure of the Constitution could be entirely evaded by a congressional grant of enormously broad powers and authorities to the President, subject to the condition that neither House of Congress shall disapprove their exercise by the Executive. The effect of such development would be that Congress could elude the constitutional responsibility to write specific laws and that the law of the land would be the implementing regulations written by the Executive over which Congress merely holds a power of

disapproval.—/ This is not the constitutional system the Founding Fathers sought to establish.

—/Such a system seems to exist in the United Kingdom where much legislation merely authorizes a Minister of the Crown to draft regulations which are subject to disapproval by either House of Parliament under the Statutory Instruments Act of 1946 (9 & 10 Geo. 6 c 36).

Concededly, at the time of the enactment of the Federal Pay Comparability Act in 1971, there did exist some precedent legislation granting powers to the President subject to disapproval of their exercise by a single House. Two provisions of that type were section 6 of the Reorganization Act of 1949, 5 U.S.C. 906[1] and the legislation relating to the Commission on Executive, Legislative, and Judicial Salaries, 2 U.S.C. 359. I recognize that constitutional power may be established by practice in appropriate circumstances. These circumstances, however, are lacking here.

First, a constitutional practice presupposes some frequency of usage. In 1971, when the Federal Pay Comparability Act was approved, clauses providing for disapproval of Presidential action, however, were relatively recent and exceedingly rare. They consisted of the two referred to above and a handful of scattered statutes dealing largely with the disposal of surplus property.

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[1] This Act expired March 31, 1973, 5 U.S.C. (Supp. III) 905(b).

The proliferation of the one-House disapproval clause is a fairly recent phenomenon.

Second, although a generally accepted practice may give conclusive content to a vague or ambiguous constitutional provision, it cannot overcome the explicit language of the text. McPherson v. Blacker, 146 U.S. 1, 27 (1892), cited in United States v. Midwest Oil Co., 236 U.S. 459, 473 (1918); Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940). Here the pertinent text (Article I, section 7 of the Constitution) is unambiguous. Every Congressional action which is to have legislative effect must be concurred in by both Houses of Congress and be presented to the President.

This is particularly the case where the historical practice of Congress itself prior to 1949 supports the clear text of the Constitution. I have already referred to the 1897 report of the Senate Judiciary Committee (S. Rept. 1335, supra), which concluded, on the basis of the constitutional practices extending from the First Congress to the end of the nineteenth century, that the

only Congressional action which need not be presented to the President is that in which "the President has no concern" (p. 6), and that the requirement of presentation hinges on the fact whether the matter "is properly to be regarded as legislative in character and effect." (p. 8.) I have also mentioned Congressman Mann's statement to the effect that Congressional resolutions not presented to the President are of "no force beyond the confines of the Capitol."

Moreover, the significance of usage as an indication of interpretation depends substantially upon how voluntary and unconstrained that usage has been. There are many indications that Presidential acceptance of a one-House clause has not been based on the recognition of its constitutionality but rather has been the price reluctantly paid for legislation deemed vital. For recent examples, see the following signing statements: President Nixon, Congressional Budget and Impoundment Control Act of 1974, Public Law 93-344, Weekly Compilation of Presidential

Documents, Vol. 10, p. 800; President Ford, Trade Act of 1974, Public Law 93-618, id., vol. 11, p. 10; and AMTRAK Improvement Act of 1975, Public Law 84-25, id., vol. 11, p. 560.

In sum, if any credit is to be given to the efficacy of constitutional practice, the balance weighs heavily against the validity of one-House disapproval clauses. The tradition requiring presentation to the President of all Congressional action which is of concern to him and legislative in character and effect which began with the adoption of the Constitution and remained generally recognized until relatively recent years is entitled to far greater weight than a disputed practice of recent origin.

Assuming arguendo that modern governmental practices involving the grant of broader discretionary powers to the Executive branch require closer supervision by the Congress, the nature of that supervision must nonetheless comply with the Constitution. McPherson v. Blacker, supra, at 36.

II.

Having concluded that the one-House disapproval provision in subsection (c)(2) violates Article I, section 7 of the Constitution, the question arises whether and to what extent the remainder of the statute is viable. Even where a statute, such as the Pay Comparability Act, does not contain a separability clause, the unconstituionality of one of its provisions does not necessarily invalidate the whole. United States v. Jackson, 390 U.S. 570, 585 (1968). As said in Champlin Mfg. Co. v. Commission, 286 U.S. 210, 234 (1932), quoted with approval in Jackson:

> "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (Emphasis added.)

My predecessors have made use of this principle in the past to excise similar encroachment provisions. See 37 Op. A.G. 56, 66 (1933); 41 Op. A.G. 230, 235 (1955).

The complex legislative history of the Federal Pay Comparability Act reveals no discussion of the constitutional impact of subsection (c)(2) on the remainder of the act

prior to the debate on the conference report. H.R. 13000, 91st Cong., 1st Sess., the bill which ultimately emerged as the Pay Comparability Act, passed the House of Representatives in October 1969. It provided in essence for a permanent method of pay adjustment by a commission, subject to a one-House disapproval. The Senate passed the bill in an amended form in December 1969, providing basically only for a single flat pay increase. The bill then remained in conference for approximately a year. In July 1970 the House Committee on Post Office and Civil Service held hearings on two bills, H.R. 18403, introduced by Congressman Udall, which provided for a method of pay adjustment similar to the one contained in H.R. 13000, and H.R. 18603, introduced by Congressman Corbett, the ranking Republican member of the House Committee on Post Office and Civil Service. 116 Cong. Rec. 44284 (Udall) and 44290 (Dulski). H.R. 18603 had been prepared by the Civil Service Commission and contained the basis of the present legislation, including the provision for the President's alternative plan and the one-House disapproval

clause. During the hearings Chairman Hampton of the Civil Service Commission and Associate Director Weber of the Office of Management and Budget, testified on H.R. 18603 and compared it with H.R. 18403. Their testimony, however, does not shed any light on the specific question as to whether the President's alternative plan and the one-House disapproval provision constituted an indispensable part of the statutory plan proposed by the Administration.—/ The conference report on H.R. 13000 (H. Rept. 91-1685), dated December 9, 1970, examined the substantial differences between H.R. 18603 and the bill ultimately agreed upon. The report briefly mentions the one-House disapproval provision of 5 U.S.C. 5305(c) but does not elaborate.

It was not until consideration of the conference report by the House and the Senate that the alternative plan provisions were discussed. The debates indicate

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—/See Compensation in the Federal Classified Salary System, Hearings before the Subcommittee on Compensation of the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess., on H.R. 18403 and H.R. 18603, Serial No. 91-26, pp. 53-79. H.R. 18603 is printed at pp. 40-46.

that the President's authority to submit an alternative plan and the one-House disapproval provision are inextricably intertwined. Thus, Congressman Udall, the House floor manager of the bill, explained:

> "If that [statutory comparability] policy is carried out, that is the end of it. There is no point in coming back to the Congress, ...
>
> "If, however, the President . . . makes any decision other than to achieve the comparability policy, then it will have to come back to us, and the bill guarantees that we will have a vote on it." 116 Cong. Rec. 44284.

and further (at 44285):

> "Part and parcel to the alternate (sic) plan procedure is the congressional review procedure."

Senator McGee, who was in charge of the bill in the Senate, similarly observed (at 44104):

> "In cases where the President may have thought otherwise [i.e., where he submits an alternative plan], it is necessary for the Senate and the House to determine.—/

—/See also Senator McGee's statement at p. 44099:

> "Mr. McGEE. If the recommendation is that there should be a 5-percent adjustment because of rising costs, whatever it is, this becomes the automatic increase for those Federal employees on October 1 of that year. If the President decides that is too much because of the times or because of some national emergency that it should not be allowed at all, and he so decides, in that case it has to be bucked back to Congress for both Houses for judgment, and either House can decide to take it."

Hence, in the language of the Supreme Court, it is "evident" that Congress would not have given the President the power to submit an alternative plan under subsection (c)(1) without reserving to itself the concomitant power to control such Presidential action. I conclude that the constitutional invalidity of subsection (c)(2) carries with it the invalidity of the entire subsection.

It is, however, not equally "evident" that Congress would not have enacted, nor the President disapproved, the Pay Comparability Act without the alternative plan provision of subsection (c). As indicated above, the committee hearings and the Conference Report were silent on this point, as were the Congressional debates on the Conference report. I am aware of the colloquy on the floor of the House of Representatives between the Minority Leader and Congressman Udall, which indicated that the President had opposed the original version of the bill because it gave him no role whatsoever in the pay adjustment procedure, but that the bill as reported by the Conference Committee met the President's objections. 116 Cong. Rec. 44283.

In my estimation, the role allotted to the President under subsection (a) was sufficient to comply with the desires of the Executive branch. While the President may have believed that the alternative plan provision was desirable, there is nothing to indicate that he considered it indispensable.

I therefore conclude that it would be inappropriate for you to submit an alternative plan pursuant to subsection (c). If you believe that because of a national emergency or of economic conditions affecting the general welfare it would be inappropriate to make the full pay adjustments required by the Act, the proper procedure is to ask Congress for remedial legislation.

Respectfully,

One House Veto

2 U.S.C. § 190A. Committee Meetings
Subsection (f)(2)(B)
"Legislative Reorganization Act of 1970"
Pub. L. 91-510, § 108(a), 84 Stat. 1143-1149
91st Cong., 2d Sess., 10/26/70
Congressional and Committee procedure
Any executive decision, determination, or action effective unless disapproved or otherwise invalidated by one or both Houses of Congress.

2 U.S.C. § 359. Recommendations of the President to Congress - Effective Date
Section (1)(B)
"Postal Revenue and Federal Salary Act of 1967"
Pub. L. 90-206, title II, § 225(i), 81 Stat. 644
90th Cong., 1st Sess., 12/16/67
Recommendations transmitted to Congress in the budget under section 358 of title 2 shall be effective if neither House has enacted legislation which specifically disapproves.

3 U.S.C. § 301. General Authorization to Delegate functions - Publication of Delegations
"An Act to amend certain titles of U.S. Code, and for other purposes."
Pub. L. 248, ch. 655, § 10, 65 Stat. 712
82d Cong., 1st Sess., 10/31/51
Senate confirmation requirement.

5 U.S.C. § 906(a)*
Pub. L. 89-554, 80 Stat. 396, 89th Cong., 2d Sess., 9/6/66
codified in revised title 5, U.S.C., the "Reorganization Act of 1949," 5 U.S.C. §§ 1332-4, Act of June 20, 1949, ch. 226, § 6, 63 Stat. 205, 81st Cong., 1st Sess.

5 U.S.C. § 5305(c)(2) and § 5305(m)
"Annual Pay Reports and Adjustments"
Pub. L. 91-656, 84 Stat. 1946, § 3(a)
91st Cong., 2d Sess., 1/8/71
Either House may adopt resolution disapproving an alternative plan submitted by President.

5 U.S.C. App. 520
Reorg. Plan No. 1, 1947
12 F.R. 4534, 61 Stat. 951, 80th Cong., 1st Sess.
5/1/47 - effective date July 1, 1947
Provides for an associate war assets administrator - needs Presidential and Senate approval.

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* No longer in effect.

5 U.S.C. App. p. 544
Reorganization Plan No. 26 of 1950
15 F.R. 4935, 64 Stat. 1280, 81st Cong., 2d Sess.
5/31/50 - effective 7/31/50

5 U.S.C. App. p. 545
Reorganization Plan No. 1 of 1951
16 F.R. 3690, 65 Stat. 773, 82d Cong., 1st Sess.
2/19/51 - effective 5/1/51
5/11/51 - disapproved by the Senate

5 U.S.C. App. p. 587
Reorganization Plan No. 2 of 1967
32 F.R. 7049, 81 Stat. 947, 90th Cong., 1st Sess.
2/27/67 - effective May 9, 1967
Disapproved by Senate

10 U.S.C.§562. Warrant officers: Disapproval of Promotion by Secretary, President, or the Senate
Subsection (a)
"Warrant Officer Act of 1954"
Act of Aug. 10, 1956, ch. 1041, 70A Stat. 22
84th Cong., 2d Sess.
May 29, 1954, ch. 249, §§ 10(c), 11(c), 68 Stat. 161
83rd Cong., 2d Sess.
Ability to cause denial of promotion

10 U.S.C. § 2307
"Department of Defense Appropriation Authorization Act of 1974"
Pub. L. 93-155, 87 Stat. 605, 93rd Cong., 1st Sess. 11/16/73
Sec. 807(c) - adding to 10 U S.C. § 2307 the requirement that before there can be an obligation of the U.S. in an amount in excess of $25,000,000, there must be notice given to named Committees, a delay of 60 days, and no House or Senate resolution disapproving the plan.

10 U.S.C. § 4333. Superintendent-Faculty: Appointment and Detail
Subsection (c)
Pub. L. 85-600, § 1(9)(B), 72 Stat. 522
85th Cong., 2d Sess., 8/6/58
"An act to amend title 10, U.S. Code, to authorize at the U.S. Military Academy and the U.S. Air Force Academy, and for other purposes." appointment - advice and consent of the Senate.

10 U.S.C. § 5777. Removal from Promotion List
Act of Aug. 10, 1956, ch. 1041, 70A Stat. 361
84th Cong., 2d Sess.
"An act to revise, codify, and enact into law, title 10 of U.S. Code, entitled 'Armed Forces.'"
Senate rejects appointment - obstructs promotion.

10 U.S.C. § 5905. Removal from Promotion List
"An Act to amend titles, 10, 14, and 32, U.S. Code, to codify recent military law, and to improve the Code"
Pub. L. 85-861, § 1 (133), 72 Stat. 1505
85th Cong., 2d Sess. 9/2/58
Senate disapproves appointment.

10 U.S.C. § 9333. Superintendent-Faculty: Appointment and Detail
Subsections (b), (c)
"An Act to revise, codify, and enact into law, title 10 of U.S. Code, entitled 'Armed Forces.'"
(b) Act of Aug. 10, 1956, ch. 1041, 70A Stat. 562
84th Cong., 2d Sess.
"An Act to amend title 10, U.S.C., to authorize a registrar at U.S. Military Academy and the U.S. Air Force Academy, and for other purposes."
(c) Pub. L. 85-600, § 1(20), 72 Stat. 523
85th Cong., 2d Sess. 8/6/58.
Air Force academy; advice and consent of the Senate

14 U.S.C. § 788. Effect of Removal by the President or failure of consent of Senate
"An act to amend titles 10, 14, and 32, U.S.C., to codify recent military law, and to improve the Code."
Pub. L. 85-861, § 5(2), 72 Stat. 1553
85th Cong., 2d Sess. 9/2/58
Rejection of appointment by Senate - loss of promotion.

15 U.S.C. § 640. Voluntary Agreements among small-business concerns.
Subsection (c) Delegation of authority; consultation; approval of requests
"Small Business Act" of 1958
Pub. L. 85-536, § 2 (11), 72 Stat. 394
85th Cong., 2d Sess. 7/18/58
Advice and consent of Senate required.

15 U.S.C. § 753
Section 4(g)(2)- President may decide to exempt oil or product from regulation for a period of not more than 90 days.
Emergency Petroleum Allocation Act of 1973
Pub. L. 93-159; 87 Stat. 627
93rd Cong., 1st Sess., 11/27/73
Effective date of amendment voided if either House disapproves it by resolution.

16 U.S.C. § 513. National Forest Reservation Commission - Annual Report to Congress.
"An Act to enable any State to cooperate with any other State or States, or with the U.S., for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers."
Act of Mar. 1, 1911, ch. 186, §§ 4, 5, 36 Stat. 962
61st Cong., 3rd Sess.
Memberships on the National Forest Reservation Commission.

16 U.S.C. § 791a note
Section 404 - Director of the Energy Policy Office
"Trans-Alaska Pipeline Authorization Act"
Pub. L. 93-153, 87 Stat. 576
93rd Cong., 1st Sess. 11/16/73
Presidential appointment with advice and consent of the Senate. Can serve until his nomination has been disapproved by the Senate.

16 U.S.C. § 1606
Sec. 7 (a) National Participation
President must submit to House and Senate after Congress convenes in 1976 Budget Assessment Program, and Policy Statement which he must follow, together with any Congressionally approved amendments unless either House disapproves Program and Policy.
"Forest and Rangeland Renewable Resources Planning Act of 1974"
Pub. L. 93-378, 88 Stat. 476
93rd Cong., 2d Sess. 8/17/74

19 U.S.C. § 1303(e),
Section 331(e)(2), amending § 303(e) of the Tariff Act of 1930
88 Stat. 2051-2052.
"Trade Act of 1974"
Pub. L. 93-618, 88 Stat. 1978, 93rd Cong., 2d Sess. 1/3/75
Either House by resolution can disapprove action taken under 19 U.S.C. § 303(d)(2) and cause imposition of countervailing duties that had been suspended under that subsection.

19 U.S.C. § 1361. Same; action by President; reports to Congress
"Trade Agreements Expansion Act of 1951"
Act of June 16, 1951, Ch. 141, § 4, 65 Stat. 73
82d Cong., 1st Sess.
Must notify both Houses of Congress of trade agreement

19 U.S.C. § 1846. Transmission of agreements to Congress
"Trade Expansion Act of 1962"
Pub. L. 87-794, title II, § 226, 76 Stat. 876
87th Cong., 2d Sess. 10/11/62
Notification requirement.

19 U.S.C. § 1871(a) Special Rep. for Trade Negotiations
advice and consent of Senate.
"Trade Expansion Act of 1962"
Pub. L. 87-794, title II, § 241, 76 Stat. 878
87th Cong., 2d Sess. 10/11/62

19 U.S.C. § 1873. Congressional delegates to negotiations.
"Trade Expansion Act of 1962"
Pub. L. 87-794, title II, § 243, 76 Stat. 878,
87th Cong., 2d Sess. 10/11/62

20 U.S.C. § 1070A. Basic Educational Opportunity Grants -
Amounts and Determinations - Applications
Subsection (a)(3)(A)(ii)
"Education Amendment of 1972"
"Higher Education Resources and Student Assistance Act of
1972"
Pub. L. 89-329, title IV, § 411 as added Pub. L. 92-318,
title I, § 131(b)(1), 86 Stat. 248 6/23/72 92d Cong., 2d Sess.
Resolution of disapproval by either House before May 1
will require Commissioner to publish a new schedule of
expected family contributions.

20 U.S.C. § 1224. Annual Evaluation Reports to Congressional
Committees - Penultimate fiscal year reports - contingent
extension of expiring appropriation authority.
Subsection (c)(2)
"General Education Provisions Act"
Pub. L. 91-230, § 401(a)(6)(B), 84 Stat. 165, Apr. 13, 1970,
91st Cong., 2d Sess.
Prior to July 1, 1973 Either House resolution of approval
stating that this subsection shall no longer apply, such
authorization shall be automatically extended.

22 U.S.C. § 276E. Appropriations - Disbursements.
Joint Resolution
Canada-United States Interparliamentary Groups authorization
to participate in parliamentary conferences with Canada.
U.S. group of the Canada-United States Interparliamentary
group.
Appropriations_available through vouchers approved by Chairmen
Of House and Senate delegations.
Pub. L. 86-42, § 2, 73 Stat. 72
86th Cong., 1st Sess. 6/11/59

22 U.S.C. 276I. Appropriations - Disbursements
Joint Resolution
Mexico-United States Interparliamentary Group - to authorize participation by U.S. in parliamentary conferences with Mexico
Pub. L. 86-420, § 2, 74 Stat 40
86th Cong., 2d Sess. 4/9/60
Appropriations disbursed on vouchers approved by chairmen of Senate and House delegations.

22 U.S.C. 1928B. North Atlantic Treaty Parliamentary Conference - Appropriations
"NATO Parliamentary Conference, U.S. Group. An act to authorize participation by the U.S. in parliamentary conferences of the North Atlantic Treaty Organization."
Act of July 11, 1956, ch. 562, § 2, 70 Stat. 523
84th Cong., 2d Sess.
Appropriations to be dispersed on voucher approved by Chairmen of House and Senate delegations.

25 U.S.C. § 25. Superintendent For Five Civilized Tribes.
"An Act making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes for the fiscal year ending June thirteenth, nineteen hundred and fifteen."
Act of Aug. 1, 1914, ch. 222, § 17, 38 Stat. 598
63rd Cong., 2d Sess.
Advice and consent of the Senate.

25 U.S.C. 903d
Section (6)(B)
plan for the assumption of the assets of corporation, Menominee Enterprises, Inc.
Menominee Restoration Act
Pub. L. 93-197; 87 Stat. 770
93rd Cong., 1st Sess. 12/22/73
Plan effective within 60 days unless either House disapproves by resolution.

25 U.S.C. § 1405
Sec. 5 (A) provides for 1 House veto
"An Act to provide for the use or distribution of funds appropriated in satisfaction of certain judgments of the Indian Claims Commission and the Court of Claims, and for other purposes."
Pub. L. 93-134; 87 Stat. 466
93rd Cong., 1st Sess. 10/19/73
Delay of effective date of plan for use of judgment funds.

28 U.S.C. § 2076
Pub. L. 93-595, 88 Stat. 1926, 93rd Cong., 2d Sess. 1/2/75
Federal Rules of Evidence.
Pub. L. 93-595, §2(a)(1), 88 Stat. 1948, 28 U.S.C. § 2076
Rules of Evidence.
No amendment effective if either House disapproves -
date of effectiveness may be deferred by either House.

31 U.S.C. § 1403.
"Congressional Budget and Impoundment Control Act of 1974"
Pub. L. 93-344, 88 Stat. 297, 93rd Cong., 2d Sess. 7/12/74
Part B - Congressional Consideration of Proposed Rescissions, Reservations, and Deferrals of Budget Authority.
Sec. 1013 - notification requirement in subsection (a) to House and Senate - President must submit a special message fully disclosing (a)(1) - (6) the circumstances surrounding a proposal to defer budget authority.
Sec. 1017 - Procedure in House and Senate [once a special message or impoundment resolution has been transmitted] sets forth procedural means for reconsideration of budget authorization of appropriations, the subject of the proposed budget deferral.

43 U.S.C. § 1456a
"Trans-Alaska Pipeline Authorization Act"
Pub. L. 93-153, 87 Stat. 576, 93rd Cong., 1st Sess. 11/16/73
§ 405 - Head of Mining Enforcement and Safety Administration. Position requires nomination and Senate confirmation but one already in office may serve until his nomination has been disapproved by the Senate.

45 U.S.C. § 564
"AMTRAK IMPROVEMENT ACT of 1975" amending "Rail Passenger Service Act of 1970" (45 U.S.C. § 501 et seq.) Pub. L. 91-518, title IV, § 404, 84 Stat. 1336, 45 U.S.C. § 564, 91st Cong. 2d Sess. 10/30/70.
Pub. L. 94-25, 89 Stat. 94th Cong., 1st Sess., 5/26/75.
Sec. 8 - amends 45 U.S.C. § 564 by adding subsection (c) "(c)(3)" criteria and procedures set forth in final proposal, developed under (c)(1) and (c)(2) will be effective at end of first period of 60 calendar days of continuous session of Congress after date of its submission unless either House during that period disapproves.

45 U.S.C. § 718
Regional Rail Reorganization Act of 1973 (Titles I-II)
Pub. L. 93-236; 87 Stat. 985
93rd Cong., 1st Sess. 1/2/74
Subsections (A), (B) of Section 208. Review by Congress 208(A)(B)
House resolution of disapproval will defeat the final system plan.

50 U.S.C. § 1431
"Department of Defense Appropriation Authorization Act of 1974"
Pub. L. 93-155, 87 Stat. 605, 93rd Cong., 1st Sess 11/16/73
Sec. 807(a)-amends 50 U.S.C. § 1431, 72 Stat. 972
Cannot obligate U.S. to amount in excess of $25,000,000 unless (besides giving Committee notice and waiting 60 days) neither House disapproves plan.

50 U.S.C. § 2158(C)(1): Voluntary agreements and programs - Exemptions from Antitrust laws and Fed. Trade Commission Act - Services and Reports to Congress - Termination
"The Defense Production Act of 1950"
Act of Sept. 8, 1950, ch. 932, title VII, § 708, 64 Stat. 818, 81st Cong., 2d Sess.
Officials only appointed with advice and consent of Senate.

50 App. U.S.C. 468
"Department of Defense Appropriation Authorization Act of 1974"
Pub. L. 93-155, 87 Stat. 605, 93rd Cong., 1st Sess. 11/16/73
Sec. 807(d)(1) amends §18(a) of the Military Service Act requiring notification delay of 60 days, and no resolution of disapproval by either House regarding orders requiring payment in excess of $25,000,000.

50 U.S.C. App. § 1941g Report of recommended disposal by Commission to Congress
"Rubber Producing Facilities Disposal Act of 1953"
Subsection (b)
Act of Aug. 7, 1953, ch. 338, § 9, 67 Stat. 412
83rd Cong., 1st Sess.
After 60 days, may proceed to carry out contracts and proposals to the extent they have not been disapproved by either House during the 60 days.

50 U.S.C. App. 1941v. Rejection of Recommended Sales Contract - Right to Review of Purchasers of Other facilities - Minimum annual production necessary to sustain disposal report.
"Rubber Producing Facilities Disposal Act of 1953"
Act of Aug. 7, 1953, ch. 338, § 24, 67 Stat. 416
83rd Cong., 1st Sess.
Effect of disapproval of any recommended sale of any facility by either House.

50 U.S.C. App. 1941w. Disposal of Rubber-Producing Facility at Baytown, Texas. Subsection (c).
"An Act to amend the Rubber Producing Facilities Act of 1953, so as to permit the disposal thereunder of Plancor Numbered 877 at Baytown, Texas, and certain tank cars."
Act of Aug. 7, 1953, ch. 338, § 25, as added by Act of Mar. 31, 1955, ch. 19, § 1, 69 Stat. 15, 84th Cong., 1st Sess.
Contract effective unless either House has disapproved within 30 days from submission of the report.

50 U.S.C. App. § 1941x. Disposal of Rubber-Producing Facility At Institute, West Virginia.
Subsection (c)
"An Act to amend the Rubber Producing Disposal Act of 1953, as heretofore amended, so as to permit the disposal thereunder of Plancor Numbered 980 at Institute, West Virginia"
Aug. 7, 1953, ch. 338, § 26, as added by Act of Aug. 9, 1955, ch. 696, § 1, 69 Stat. 628, 84th Cong., 1st Sess.
Contract effective unless either House has disapproved within 30 days of Congress having received the report.

50 U.S.C. App. 1941y - Disposal of Rubber-Producing Facility at Louisville, Kentucky
Subsection (c)
"An Act to amend the Rubber Producing Facilities Act of 1953, as heretofore amended, so as to permit the disposal thereunder of Plancor Numbered 1207 at Louisville, Ky."
Aug. 7, 1953, ch. 338, § 27, as added by Act of Mar. 21, 1956, ch. 89, § 1, 70 Stat. 51, 84th Cong., 2d Sess.
Contract is effective unless either House has disapproved within 30 days of having received the report.

50 U.S.C. App. 2092
"Department of Defense Appropriation Authorization Act of 1974"
Pub. L. 93-155, 87 Stat. 605, 93rd Cong., 1st Sess. 11/16/73
Sec. 807(b)(1) - amends § 302 of the Defense Production Act of 1950
No loan in excess of $25,000,000 unless expressed Committees have been notified, 60 days have elapsed, and neither House has disapproved such proposed loan.

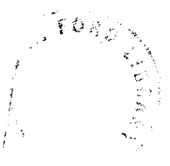
Addendum

5 U.S.C. App. p. 546. Reorganization Plan No. 1 of 1952
17 F.R. 2243, 66 Stat. 823 (1/14/52) eff. 3/14/52
82nd Cong., 2d Sess.

8 U.S.C. § 1254. Suspension of deportation.
subsection (c)(2), (3)
"Immigration and Nationality Act of 1952"
Act of June 27, 1952, ch. 477, title II, ch. 5, § 244,
66 Stat. 214, 82d Cong., 2d Sess., amended by
Pub. L. 87-885, § 4, 76 Stat. 1247, 87th Cong., 2d Sess.
10/24/62, "An act to facilitate the entry of alien
skilled specialists and certain relatives of United States
citizens, and for other purposes."
subsection (c)(2) provides that if either House passes a
resolution stating in substance that it does not favor
the suspension of deportation, the Attorney General shall
deport the individual.

8 U.S.C. § 1255b(c). Report to the Congress; resolution not
favoring adjustment of status; reduction of quota.
"An act to amend the Immigration and Nationality Act, and
for other purposes."
Pub. L. 85-316, § 13, 71 Stat. 642, 85th Cong., 1st Sess. 9/11/57
(c) adjustment of status of certain nonimmigrants to that
of persons admitted for permanent residence.
Either House passes resolution stating in substance that
it does not favor the readjustment of status of such alien,
the Attorney General shall thereupon require the departure
of such alien in the manner provided by law.

22 U.S.C. § 2587(b). Transfer of activities and facilities
to Agency; report to Congress; approval
"Arms Control and Disarmament Act of 1961"
Pub. L. 87-297, 75 Stat. 638, title IV, § 47, 87th Cong., 1st
Sess. 9/26/61
no transfer shall be made to the United States Arms Control
and Disarmament Agency unless after 60 days of regular
session of Congress following the date of the receipt of the
report neither House has adopted a resolution disfavoring
such proposed transfer.

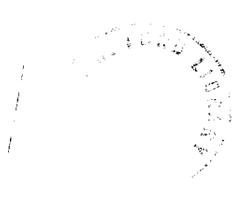


No Code Citation

District of Columbia Self-Government and Governmental Reorganization Act (Titles V - VII)
Sec. 602 - in Title VI - Reservation of Congressional Author-
(c)(2) ity - Limitations on the Council
Pub. L. 93-198, 87 Stat. 774
93rd Cong., 1st Sess. 12/24/73
Any act codified in titles 22, 23, 24 of D.C. Code will be effective only if during 30-day delay period one House doesn't disapprove by resolution.

Treasury, Postal Service, and General Government Appropriation Act of 1975
Title VI - General Provisions - Section 604
Pub. L. 93-381, 88 Stat. 613, 93rd Cong., 2d Sess. 8/21/74
No money available as salary to anyone disapproved by the Senate.

Military Construction and Reserve Forces Facilities Authorization Acts, 1975
Section 613(a)(3)
Pub. L. 93-552, 88 Stat. 1745, 93rd Cong., 2d Sess. 12/26/74
Construction project at Diego Garcia
Project approved unless disapproved by a House resolution within 60 days.



CONCURRENT RESOLUTION

1. 8 U.S.C. 1254(c) — Immigration and Nationality Act of 1952 section 244(c)

   Attorney General's suspension of deportation subject to veto by concurrent resolution.

2. 8 U.S.C. 1256(a) — section 246(a)

   Rescission of adjustment of status by Attorney General becomes effective by adoption of concurrent resolution.

3. 8 U.S.C. 1442(d) — section 331(d)

   Alien enemy status terminates upon determination of end of hostilities by Presidential proclamation or concurrent resolution.

4. 10 U.S.C. 2733(b)

   Allowance of claim for property loss. Beginning and termination of hostilities established by President or concurrent resolution.

5. 10 U.S C. 7308

   Transfer or gift of obsolete, condemned, or captured vessel subject to veto by concurrent resolution.

6. 10 U.S.C. 7545

   Loan or gift of obsolete material and articles of historical value subject to veto by concurrent resolution.

7. 15 U.S C. 1410B(b) — National Traffic & Motor Vehicle Safety Act of 1966. section 125 (added by Pub. L. 93-492) (b) to (d)

   Certain regulations permitted to depart from statutory prohibition if they follow a procedure which provides for disapproval by concurrent resolution.

8. 16 U.S.C. 831c(f) — Tennessee Valley Authority Act of 1933 section 4(f)

   Member of board of directors of TVA may be removed by concurrent resolution.

9. 18 U.S C. 798

Applicability of 18 U.S.C. 794 (Gathering and delivering of defense information) during national emergency declared on December 16, 1950, may be terminated by concurrent resolution.

10. 18 U.S.C. 2157

Applicability of 18 U.S.C. 2153 and 2154 (Sabotage) during national emergency declared on December 16, 1950, may be terminated by concurrent resolution.

11. 18 U.S.C. 2391

Applicability of 18 U.S.C. 2388 (Activities affecting armed forces during national emergency declared on December 16, 1950, may be terminated by concurrent resolution.

12. 18 U.S.C. 3287

Criminal statute of limitations in certain areas suspended until 3 years after termination of hostilities as proclaimed by President or concurrent resolution.

13. 19 U.S.C. 1356(a) International Coffee Agreement Act of 1965 section 2(a)

President's authority to carry out Coffee Agreement may be terminated by concurrent resolution.

14. 19 U.S.C. 1981(a) Trade Expansion Act of 1962 section 351(a)

Probably obsolete as result of Trade Act of 1974 but not expressly repealed, see sec. 203(c) of Trade Act of 1974, 19 U.S.C. 2253(c).
In case of disagreement between President and Tariff Commission, concurrent resolution may overrule President.

15. 19 U.S.C. 2012(d) Automotive Products Trade Act of 1965 section 202(d)

Concurrent resolution may disapprove agreement entered into under Automotive Products Trade Act.

16. 19 U.S.C. 2253(c) Trade Act of 1974 section 203(c)

In case of disagreement between International Trade Commission and President, concurrent resolution may overrule President.

17. 19 U.S.C. 2412 — Trade Act of 1974 section 302

Concurrent resolution may disapprove action taken by President to counteract unfair trade practices by foreign countries.

18. 19 U.S.C. 2432(d) — section 402(d)

Various types of concurrent resolution granting and terminating Presidential waivers in connection with East-West Trade.

19. 19 U.S.C. 2435(c) — section 405(c)

Approval of new bilateral commercial agreements with Iron Curtain countries and disapproval of earlier agreements by concurrent resolution.

20. 19 U.S.C. 2437 — section 407

Approval by concurrent resolution of Presidential proclamation extending nondiscriminatory treatment to foreign country.

21. 20 U.S.C. 246 — Education Amendments of 1974 section 842

Guidelines for program of financial assistance to local educational agencies for free public education are subject to disapproval by one House veto or concurrent resolution.

22. 20 U.S.C. 1232(d-e) — section 509(d-e)

Standards, rules, regulations, etc. in area over which Commissioner of Education has responsibility are subject to disapproval by concurrent resolution on ground that they are inconsistent with authorizing legislation.

23. 22 U.S.C. 441 — Neutrality Act of 1939 section 1

Congress may find existence of State of War between foreign nations by concurrent resolution.

24. 22 U.S.C. 1354 — Philippine Trade Act of 1946 section 504

Concurrent resolution may require International Trade Commission to make an investigation with respect to imports from Philippines.

25. 22 U.S.C. 1965 — Middle East Resolution of 1957 section 6

Resolution may be terminated by concurrent resolution.

26. 22 U.S.C. 2355(a) — Foreign Assistance Act of 1961 section 605(a)

Retention of certain articles may be required by concurrent resolution.

27. 22 U.S.C. 2367 — section 617

Assistance may be terminated by concurrent resolution.

28. 23 U.S.C. 104(b)(3) — Federal Aid Highways Act

Approval of biennial estimates, originally by Congress by concurrent resolution; since 1963 approved by Congress.

29. 25 U.S.C. 386(a) — Adjustment of Reimbursable Debts of Indians Act of 1932

Adjustment of reimbursable claims against Indians may be approved or disapproved by concurrent resolution.

30. 29 U.S.C. 1306(a)(2) — Employee Retirement Income Security Act of 1974 section 4006(a)(2)

Revised Coverage Schedules of Pensions Benefit Guaranty Corporation must be approved by concurrent resolution.

31. 30 U.S.C. 185(u) — Trans-Alaska Pipeline Authorization Act of 1973 section 101

Presidential finding authorizing exports of Alaska crude oil subject to disapproval by concurrent resolution.

32. 31 U.S.C. 241(d) — Military Personnel and Civilian Employees Claims Act of 1964 section 3(d)

Beginning and termination of armed conflict established by concurrent resolution.

33. 32 U.S.C. 715(b)

Beginning or end of armed conflict may be established by concurrent resolution.

34. 38 U.S.C. 101

(11) Period of future war may be terminated by concurrent resolution.

(29) Vietnam era may be terminated by concurrent resolution.

35. 42 U.S.C. 1477 — Housing Act of 1949, section 507, as amended

Preference for servicemen, etc. Termination of period beginning on June 27, 1950 may be effectuated by concurrent resolution.

36. 42 U.S.C. 2153(d) — Atomic Energy Act of 1954, section 123(d)

Agreement for cooperation with other nations in the field of nuclear energy subject to veto by concurrent resolution. (Note amendments by Pub. Law 93-377 and 93-485.)

37. 42 U.S.C. 2074 — section 54

Foreign distribution of special nuclear materials subject to disapproval by concurrent resolution.

38. 42 U.S.C. 2453(c) — National Aeronautics and Space Act of 1958, section 303(c)

Transfer of functions to NASA subject to disapproval by concurrent resolution.

39. 43 U.S.C. 279 — Homestead Rights for Certain Veterans Act of September 27, 1944, section 1

Termination of Korean conflict may be determined by concurrent resolution.

40. 43 U.S.C. 1598 — Colorado River Salinity Control Act of 1974, section 208

Secretary may modify project, but if he does so action is subject to 60-day waiting period plus committee veto which in turn may be defeated by concurrent resolution.

41. 46 U.S.C. 1241(b) — Cargo Preference Act of 1954

Requirements of Cargo Preference Act may be waived by concurrent resolution declaring existence of emergency justifying such waiver.

42. 47 U.S C. 606(d) — Federal Communications Act of 1934, section 606(d)

Certain war powers of the President under Federal Communications Act may be terminated by concurrent resolution.

43. 50 U.S.C. 1435 — National Defense Contracts Act of August 28, 1958 section 5

Act becomes effective during national emergency declared by Congress; termination of effectiveness may be designated by concurrent resolution.

44. 50 U.S C. 1544 — War Powers Resolution of 1973 section 5(c)

Concurrent resolution may require President to remove troops engaged in hostilities outside the United States.

45. 50 U.S.C. App. 38 — Trading with the Enemy Act section 38

For purposes of this section cessation of hostilities may be date specified by concurrent resolution.

46. 50 U.S.C. App. 454(k) — Selective Service Act section 4(k)

Concurrent resolution may decrease or eliminate period of active service under Selective Service Act.

47. 50 U.S.C. App. 645(c) — Second War Powers Act of 1942 section 1501(c), as amended

Authority under section 2(a) of the War Defense Contracts Act of 1940, 50 U.S.C. App. 1152(a) may be terminated by concurrent resolution.

48. 50 U.S C. App. 1736(f) — Merchant Ship Sales Act of 1946 section 3(f)

Cessation of hostilities defined as date specified by President or concurrent resolution.

49. 50 U.S.C. App. 1917 — Stabilization of Commodity Prices, Joint Resolution of December 30, 1947 section 7

Projects to produce food in Non-European Foreign Countries subject to disapproval by concurrent resolution.

50. 50 U.S.C. App. 2004(i)(1)(A) — War Claims Act of 1948 section 5(i)(1)(A)

For purpose of entitlement to benefits by civilian internees, Vietnam conflict defined as period which may be terminated by concurrent resolution.

51. 50 U.S.C. App. 2005(f) — section 6(f)

For purposes of entitlement to benefits by prisoners of war, Vietnam conflict defined as period which may be terminated by concurrent resolution.

52. 50 U.S.C. App. 2166 (b) Defense Production Act of 1950 section 717(b)

Defense Production Act may be terminated by concurrent resolution. Any authority under Defense Production Act may be terminated by concurrent resolution.

53. 50 U.S.C. App. 2281(g) Federal Civil Defense Act of 1950 section 201(g)

Interstate Civil Defense Compacts may be disapproved by concurrent resolution.

54. 50 U.S.C. App. 2291 section 302

Provisions relating to Civil Defense Emergency Authority come into being and may be terminated by Presidential proclamation or concurrent resolution. Obsolete. See: sec. 307, 50 U.S.C. App. 2297.

55. 50 U.S.C. App. 2413 Export Administration Act of 1969 section 14

Act may be terminated by concurrent resolution.

Committee Veto

Codified Provisions

1. 7 U.S.C. 1011. "Powers of the Secretary of Agriculture."

§1011(e): Authority to make loans to State and local agencies for land conservation and utilization not to be utilized for single loan greater than $250,000 unless it is approved by resolutions of Committee on Agriculture and Forestry of the Senate and Committee on Agriculture of House.

2. 15 U.S.C. 1431. "Facilities for research and testing in traffic safety."

No appropriation for planning, designing or construction of facilities for research, development and compliance, and other testing in traffic safety if expenditure is greater than $100,000 and the planning, designing or constructing is not approved by resolutions adopted in substantially the same form by the Committees on Commerce and on Public Works of the Senate.

3. 15 U.S.C. 2081. "Authorization of appropriations."

§2081(b)(1): No appropriation of more than $100,000 to Consumer Product Safety Commission for research, development and testing facilities for consumer products unless planning or construction of them is first approved by resolutions adopted in substantially the same form by the Committee on Interstate and Foreign Commerce of the House and the Committee on Commerce of the Senate.

4. 16 U.S.C. 590p. "Limitation on obligations incurred; Great Plains conservation program."

590p(e)(6): Re Agreements by Secretary of Agriculture with State and local agencies and other Federal agencies to share costs re practices or uses which will establish, protect, and conserve open spaces, natural beauty, wildlife or recreational resources, or prevent air or water pollution, no appropriation for agreement involving Federal expenditure greater than $250,000 unless approved by resolution of Committee on Agriculture of the House and Committee on Agriculture and Forestry of the Senate.

5. 16 U.S.C. 1002. "Definitions."

Re plans for conservation and flood prevention developed by the Secretary of Agriculture, no appropriation involving Federal contribution to construction costs greater than $250,000 or which includes any structure which provides more than 2500 acre-feet of total capacity unless plan approved by resolutions adopted by the appropriate committees of the Senate and House.

In case of plan involving no single structure providing more than 4000 acre-feet of total capacity, the appropriate committees are the Committee on Agriculture and Forestry of the Senate and the Committee on Agriculture of the House.

In case of plan involving any single structure with more than 4000 acre-feet of total capacity, the appropriate committees shall be Committee on Public Works of the Senate and the Committee on Public Works of the House.

6. 20 U.S.C. 1853. "Education Amendments of 1974."

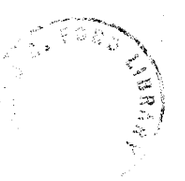
Funds appropriated for Commissioner of Education to make contracts to carry out special projects to experiment with new educational and administrative methods, techniques, and practices; to meet special or unique educational needs or problems; and to place special emphasis on national education priorities shall be spent pursuant to plan submitted to Committees on Education and Labor of the House and Labor and Public Works of the Senate unless within 60 days of the plan's submission, either committee adopts a resolution disapproving the plan.

7. 25 U.S.C. 1402. "Plan for use or distribution of funds - Preparation and submission to Congress by Secretary of the Interior.

§1402(b): 180 day period for Secretary of Interior to prepare and submit plan re use and distribution of funds adjudged due to any Indian may be extended upon approval of both the Senate and House Committees on Interior and Insular Affairs.

8. 33 U.S.C. 1252a. "Reservoir projects, water storage; modification: storage for other than for water quality, opinion of Federal agency, committee resolutions of approval; provisions inapplicable to projects with certain prescribed water quality benefits in relation to total project benefits."

Reservoir projects may be modified when Administrator of EPA determines that storage in the project for regulation of steamflow for water quality is not needed or is needed in a different amount. Any modification where the benefits attributable to water quality are more than 15% but less than 25% of the total benefits shall



take effect only upon adoption of resolutions approving it by the appropriate committees of the Senate and House.

9. 40 U.S.C. 356. "Lease-purchase contracts - Authority to procure space; terms; limitation on amount."

§356(e): No appropriations for GSA purchase contract projects which have not been approved by resolutions adopted by the Committees on Public Works of the Senate and House.

10. 40 U.S.C. 606. "Approval of proposed projects by Congress - Limitations of funds; transmission to Congress of prospectus of proposed project."

§606(a): Re Administrator of GSA, no appropriation to construct, alter, purchase, or acquire any building where expenditure exceeds $500,000 unless approved by resolutions of Committees on Public Works of Senate and House.

No appropriation to lease space at average rental exceeding $500,000 if lease not approved by resolutions adopted by Committees on Public Works of both houses.

11. 40 U.S.C. 616. "Dwight D. Eisenhower Memorial Bicentennial Civic Center - Development, construction, operation, and maintenance of facilities for conventions, exhibitions, meetings, and other social, cultural, and business activities; location."

§616(d)(4): No purchase contract for construction of the center may be entered into by the Commissioner (Mayor) of D.C. until 30 legislative days after approval by Senate and House Committees for the District of Columbia and House and Senate Committees on Appropriations of the design, plans, and specifications, including detailed cost estimates of such civic center.

12. 42 U.S.C. 1962d-5. "Water resources development projects involving navigation, flood control, and shore protection - construction, operation, and maintenance; limitation on estimated Federal first cost of construction; Congressional committee approval of projects."

§1962d-5(a): Secretary of Army may construct, operate, and maintain any water resource development project if the estimated Federal first cost of constructing it is less than $10,000,000. No appropriation if such project not approved by resolutions of House and Senate Committees on Public Works.

13. 43 U.S.C. 422d. "Contents of proposals - Plans and estimates; review by States; allocation of capital costs."

§422d(d): Re proposal for small reclamation or irrigation projects, no appropriation for Federal financial participation unless neither the House nor Senate Interior and Insular Affairs Committees disapproves the project proposal by committee resolution.

14. 43 U.S.C. 1598(a). "Modification of projects; contract authority; authorization of appropriations."

Secretary of Interior may modify projects to improve the quality of water in the Colorado River but no funds for a modification may be expended until 60 days after the modification has been submitted to the appropriate committees of the Congress and not then if disapproved by said committees, except that the funds may be expended prior to the expiration of the 60 days if Congress approves of it by concurrent resolution.

15. 50 U.S.C. 502. "Acquisition of Land."

Re authority of Secretary of Air Force to establish a long-range proving ground for missiles and other weapons. Before he acquires lands and rights or other interests pertaining thereto, he shall come into agreement with the Armed Services Committees of the Senate and House.

Noncodified Provisions

A. Pub. L. 93-66, July 9, 1973, 87 Stat. 152. "To extend the Renegotiation Act of 1951 for one year and for other purposes."

§220(a): Promulgation of regulations re Social Security Act by Secretary of HEW not effective unless approved previously by House Ways and Means and Senate Committs on Finance.

B. Pub. L. 93-98, Aug. 16, 1973, 87 Stat. 329. "Dept. of Transportation and Related Agencies Appropriations Act of 1974."

§315: DOT appropriations may not be utilized to collect fees, charges or prices for approvals, tests, authorizations, certificates, permits, registrations and ratings above levels in effect Jan. 1, 1973 or not in existence at the time unless they are approved by the appropriate committees of the Congress.

C. Pub. L. 93-120, Oct. 4, 1973, 87 Stat. 429. "Department of the Interior and Related Agencies Appropriation Act of 1974."

87 Stat. 443: No funds made available under this Act may be used to change the boundaries of any region, to abolish any region, to move or close any regional office for research, State and private forestry, and National Forest System administration of the Forest Service without consent of Committee on Appropriations and Committee on Agriculture Forestry of the Senate and House.

D. Pub. L. 93-143, Oct. 30, 1973, 87 Stat. 510. "Treasury, Postal Service, and General Government Appropriations Act of 1974."

87 Stat. 522: No appropriation under this Act for GSA shall be made available for administrative expenses in connection with the execution of a purchase contract under section 5 of the Public Buildings Amendment of 1972 (re purchase contracts by GSA) if the Congress has not within 60 days passed an appropriation for the acquisition of equivalent space or the contract was approved by the Appropriations Committees of the House and Senate.

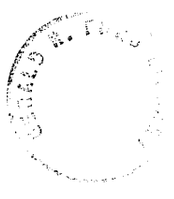
E. Pub. L. 93-391, Aug. 28, 1974, 88 Stat. 768. "Department of Transportation and Related Agencies Appropriations Act of 1975."

§313: No funds under this Act to be used for any program in DOT to collect fees, charges or prices for approvals, tests, authorizations, certificates, permits, registrations and ratings at levels greater than those in effect or not in existence on Jan. 1, 1973 until such program is reviewed and approved by the appropriate

committees of the Congress.

F. Pub. L. 93-404, Aug. 31, 1974, 88 Stat. 803. "Department of Interior and Related Agencies Appropriations Act of 1975."

88 Stat. 817-818: No funds made available under this Act may be used to change the boundaries of any region, to abolish any region, to move or close any regional office for research, State and private forestry, and National Forest System administration of the Forest Service without consent of Committee on Appropriations and Committee on Agriculture and Forestry of the Senate and House.



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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 22, 1975

MEMORANDUM FOR RODERICK HILLS

Subject: Severability of Legislative Vetoes

The attached memorandum responds to your request for an analysis of the most significant Federal statutes containing legislative veto provisions in order to determine whether such provisions are severable from their related grants of authority to the Executive Branch.

Regrettably, the memorandum raises more questions than it answers. Perhaps its principal value is to illustrate that this is a field in which legal predictions are extremely speculative.

William M. Nichols
Acting General Counsel

Attachment

August 22, 1975

Severability of Congressional Vetoes

I. Introduction

The so-called "legislative veto", in any of its several forms, is a statutory limitation imposed by Congress on the exercise of authority delegated to the Executive Branch. The issue of the constitutionality of the veto has been analyzed at length and will not be reviewed here. The present analysis seeks to evaluate the effect a judicial finding that the legislative veto provision is unconstitutional would have on the remainder of the statute containing that provision.* The answer will depend on whether a court finds the delegation of authority "severable" (some commentators use "separable") from the invalid veto provision.

This memo will discuss the criteria utilized to determine whether a statute is severable and will then analyze, utilizing these criteria, a number of the major statutes containing the legislative veto.

II. Criteria for Determining Severability

If, after finding part of a statute unconstitutional, a court considers the validity of the remainder of a statute, it will ordinarily hold that the remainder is valid if (1) the remainder has legal effect standing alone, and (2) the court is of the opinion that the legislature probably would have enacted the remainder of the statute without the unconstitutional provision. If these two conditions are met, the court declares that the invalid portion is "severable" from the rest of the statute, which remains valid.

*In practical terms the problem is more subtle: if the veto provision of one statute is declared void, the effect on all other statutes with vetoes is difficult to gauge. Depending upon the particular type of veto involved, the context in which the case arises, the level of court making the ruling, the scope of the ruling, and other factors, a decision on one statute might not affect others. Even if the Supreme Court ruled definitively that all forms of legislative veto were unconstitutional in any statute, this would still leave open the question of the impact of the ruling on the delegated powers associated with the veto in each particular statute. Such problems must be reserved for subsequent analysis.

It is basically a matter of common sense to determine whether the first condition is met, that is, whether a portion of a statute has legal effect standing alone. An unconstitutional provision of a statute may be so integrated with the remainder that the statute would be virtually meaningless without the unconstitutional provision. For example, if a delegation of authority were held unconstitutional, a provision for a legislative veto of the voided authority would also fall. (See, e.g., Lynch v. U.S., 292 U.S. 571 (1934); Electric Bond Co. v. Commissioner, 303 U.S. 419 (1938).) Since nearly any delegation of authority can stand legally independently of the legislative veto (assuming it is not so broad as to provide no guidance whatsoever to the Executive), this first condition rarely presents any obstacle.

The second condition of severability, that is, whether Congress would have enacted the statute (i.e., the delegation) without the veto had it been unavailable, is more difficult to determine. The statute is not severable if, "the invalid part being eliminated, the legislature would not have been satisfied with what remains." Williams v. Standard Oil Co., 278 U.S. 235, 241 (1929). Courts attempt to ascertain (or, if necessary, invent) congressional intent using the criteria listed below. These are used by the courts as a rough guide but are not considered controlling. A finding of severability may be based on the following:

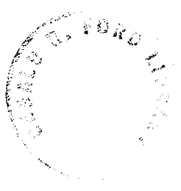
1. The statute contains a severability clause. This clause creates a presumption that the legislature intended, in the event of partial invalidity, that remaining portions of the statute should stand. The absence of a severability clause raises a contrary presumption. Either presumption is easily rebutted by evidence of a contrary intent. (See,

e.g., Carter v. Carter Coal Co., 298 U.S. 238, 312-316 (1936). Regulation of labor practices was found unconstitutional. Because Congress intended to regulate labor practices and prices in mining industry and would not have regulated either independently, the presumption of severability based on the severability clause in the statute was rebutted and the entire statute declared unconstitutional.)

2. The voided portion was not essential to passage of the statute. (See, e.g., U.S. v. Jackson, 390 U.S. 570, 589 (1968). Where death penalty provision in Federal kidnapping statute was struck down, remainder of statute was held to be severable and valid because it was "clear that Congress would have made interstate kidnapping a Federal crime even if the death penalty provision has been ruled out from the beginning.")

3. The invalid portion was an amendment to a previously enacted statute. (See, e.g., Buckley v. Valeo, C.A.D.C., Slip Opinion p. 1560, August 15, 1975. "The basic disclosure provisions [of the 1974 Act in question] derive from the 1971 Federal Election Campaign Act, and were in effect three years before [an invalid section] was added by the 1974 Amendments ... We accordingly hold Section 437 invalid, but severable, and the rest of the statute stands ...")

4. Severing does not result in a statutory purpose substantially different from that of the statute as originally enacted. (See, e.g., Railroad Retirement Board v. Alton R.R., 295 U.S. 330, 362 (1935). Severability of certain unconstitutional provisions of pension system



was rejected because without the voided provisions the statute had "an effect altogether different from that sought by the measure viewed as a whole".)

The attempt to define legislative intent for the purpose of determining whether a statute is severable contains a heavy dose of sheer guesswork or instinct. One cannot find intent per se because one is not interpreting the statute. Rather, one seeks to determine whether Congress would have approved the statute in question, independent of the constitutionally infirm provision. Ascertaining what Congress would have done under different circumstances is inherently and highly conjectural. As each of the indicia of intent listed above is applied, it is found to be ambiguous or capable of supporting opposing conclusions on the issue of congressional intent.

If the veto provision was an amendment to an existing delegation of authority to the Executive Branch, one could argue that Congress supported the delegation independently of the veto, that the veto clause was not needed for passage or operation of the statute granting the delegation. One could argue, on the other hand, that in passing the amendment Congress clearly expressed its will that the delegation was no longer tolerable without a congressional veto. As to another of the criteria--whether severability will substantially change the purpose of the statute--it is largely a matter of personal opinion whether deletion of a veto clause is a "major" change in purpose.

If a court concludes that the statute is not severable, does the voiding of one clause void the <u>entire</u> statute or only the entire <u>section</u> containing the voided clause? Would the unconstitutional veto taint the entire statute or only the

delegation of authority to the Executive subject to veto? Most legislative vetoes are included in lengthy, multi-purpose statutes, such as appropriation acts, the Trade Act, the Education Amendments of 1974, the Impoundment Control Act, and so on. One would anticipate that provisions in the statute unrelated to the unconstitutional veto will stand. The unconstitutional power to veto certain types of expenditures obviously should not invalidate all unrelated expenditures not subject to veto. (See, e.g., Interior Appropriation Act of 1975.) The unconstitutional veto of decisions on exporting oil should not invalidate the establishment of the Alaska Pipeline (both items authorized in P.L. 93-153). But the greater the proportional significance of the veto in the statutory scheme, the greater the likelihood that the entire statute will fall. Thus for the statute delegating to the President authority to adjust executive, legislative and judicial salaries subject to a one-House veto, if the veto falls the remainder of the statute, establishing a Pay Study Commission, etc., would fall in its entirety. (2 U.S.C. 351 et seq.)

III. Severability of Veto Provisions in Specific Statutes

This section speculates on how a court might rule on the severability of the legislative veto in certain important statutes. As we have noted, courts will conjure up what "would have been" the congressional intent to determine if Congress would have passed the statute absent the availability of the veto. Preliminarily, two points must be made. First, predictions are especially flimsy because of the assorted ambiguities and contradictions discussed above. Good instinct is probably a better guide than analysis of "criteria" or judicial precedent. Second, even if we could reach definitive conclusions, our analysis for many statutes would become academic should there be a ruling on the constitutionality of the veto for the simple reason that Congress, in many cases, will pass new laws either withdrawing or restating the delegation of authority to the Executive.

A. Severability Unlikely

-- 2 U.S.C. 359(1)

President's recommendation of rates of pay for Members of Congress, Judges, Executive Schedule personnel, etc. becomes effective "only to the extent that" neither House disapproves.

Because Congress is "sensitive" about its own pay increases, it is inconceivable that it would grant the President discretion (independent of any comparability or other guidelines) to adjust congressional (as well as executive and judicial) pay without reserving to itself the power to veto his recommendation. Moreover, the statutory language that the President's recommendations take effect "only to extent that" neither House disapproves evinces an intimate tie between his authority to propose and Congress's authority to veto. Consequently, it is highly doubtful that a court would find severability. The remaining provision of the Act, setting up a Pay Study Commission, etc., are intimately tied to the "recommendation-veto" structure and thus would also fall.

-- 1974 Trade Act Provisions

-- 19 U.S.C. 1303 (d)(e) (P.L. 93-618, Section 331)

Under certain conditions the Secretary of Treasury may suspend certain duties otherwise required by the statute unless either House disapproves.

-- 19 U.S.C. 1981(a), 2253 (P.L. 87-794, Section 351, P.L. 93-618, Section 203)

The President's decision to reject recommendations of the International Trade Commission can be vetoed by Congress.

-- 19 U.S.C. 2412 (P.L. 93-618, Section 302)

Congress may disapprove the President's imposition of trade sanctions within 60 days of his submission of a report of his action.

-- 19 U.S.C. 2437 (P.L. 93-618, Section 407)

The President's extension of nondiscriminatory treatment to products of any foreign country is subject to congressional veto: extensions prior to the effective date of the Act are subject to one-House disapproval. Later extensions must be approved by both Houses. Extensions to non-market economy countries are subject to one-House disapproval.

It is likely that courts would view each of these vetoes as the quid pro quo for delegations of extensive trade authorities to the President. Notably, the Executive Branch acquiesced in or encouraged the inclusion of the vetoes in this Act in order to maximize the authority delegated to it by the Congress; the veto clauses were clearly essential for passage. Therefore, these vetoes surely would not be severable from the corresponding delegations of authority and both would fall. In addition, the authority of the President to override the International Trade Commission

(Section 1981(a), 2253(c)) is especially unlikely to stand alone, because the Commission is an independent establishment. With respect to Section 1303(d)(e), the clear intent of Congress was to impose countervailing duties when foreign countries subsidize exports to the United States. The Secretary was given latitude in negotiating the elimination of these subsidies by allowing him to suspend the duties. If this discretion existed without the veto, the Secretary could flout Congress's intent to restrict subsidized exports.

The severability clause would probably be used to preserve the provisions of the Act unrelated to the veto.

-- 31 U.S.C. 1403 (P.L. 93-344, Section 1013)

The Impoundment Control Act of 1974 provides that the President can defer budget authority but that either House can disapprove. The intent of the law was to prohibit the withholding of funds from expenditure by Executive fiat. The veto was clearly the quid pro quo for the grant of deferral authority. This fact, plus the absense of a severability clause, clearly indicate that the provisions relating to deferrals on grounds of fiscal policy would be found unseverable from the veto and would be nullified.

-- 43 U.S.C. 1598(a) (P.L. 93-320, Section 228)

No funds may be spent for modification of salinity control projects if both substantive committees disapprove within 60 days.

By specifying in the statute the characteristics of the projects, Congress indicated an intent not to delegate unrestricted modification authority to Interior. Therefore,

the veto would not be severable from the delegation and both would probably fall together.* The severability clause would probably be used as support for the preservation of general authority for projects under the Act.

-- 45 U.S.C. 718 (P.L. 93-236, Section 208)

U. S. Railway Association, a Government corporation, shall make detailed plans for reorganizing Midwest and and Northeast railroads subject to disapproval by either House.

The intense interest of Congress in restructuring these railroads, a project of obvious political significance, supports a conclusion that Congress probably would not have directed discretionary reorganization of the railroads without the veto. Notwithstanding the existence of a severability clause, a court probably would hold the provision for submission of the plan not severable from the reorganization authority. And since reorganization is at the heart of the statute, it is likely that the rest of the statute (creating the Rail Corporation, etc.) would fall also.

-- 5 U.S.C. 906

The President's proposed reorganization plans for the Executive Branch are subject to one-House veto within 60 days. (Authority under the Act suspended since 1973.)

The veto is unquestionably not severable since it was clearly the quid pro quo for the grant of reorganization authority.

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*See comments on P.L. 93-404, Section C below.

B. Severability Likely

-- 5 U.S.C. 5305(c)

The President is authorized to adjust General Schedule salaries to provide "comparability." Under certain conditions, the President may submit an alternative plan for pay adjustments different from the comparability proposal of his agents and the Advisory Committee on Federal Pay. If either House disapproves the alternative plan within 30 days, the comparability rate becomes effective.

The clear intent of Congress was to establish a comparability system of "equal pay for equal work". If the veto were voided the alternative plan provision would also fall because otherwise the President's proposed alternative could ignore the comparability requirement. While the unconstitutional veto would not be severable from the alternative plan, both provisions could easily be severed from the basic comparability system. The voided section did not appear to be essential for passage of the Act and severing does not alter the primary statutory purpose.

-- 16 U.S.C. 1606(a) (P.L. 93-378, Section 7)

This statute requires the Secretary of Agriculture to assess and report the status of, and prospects for, the nation's National Forests and to develop a long range

program to manage them. The President is directed to frame budget requests for, and administer Forest Service activities in accordance with, a "Statement of Policy", unless either House disapproves the statement within 60 days of its submission by the President.

It appears that the basic intent of Congress was to require the Secretary to make long range plans for the National Forests and to relate those plans to annual budgeting and administration. While the statute has no severability clause, should a court find no severability it would be voiding the provision calling for long range planning. Severing the veto would leave intact the statute's purpose.

-- 20 U.S.C. 1232(d) (P.L. 93-380, Section 509(a))

Education regulations proposed by HEW may be disapproved by Congress within 45 days.

The authority to issue education regulations is found in the statute containing the veto and, in largely overlapping fashion, in many earlier substantive statutes. Basically, the veto provision was a subsequent limitation on existing authority to write regulations. It is unlikely that a court which voided the veto would nullify HEW's authority (whether found in the statute containing the veto or in earlier statutes) to write education regulations.

Moreover, a severability clause exists in the statute.

-- 20 U.S.C. 1853 (P.L. 93-380, Section 404(a)(1))

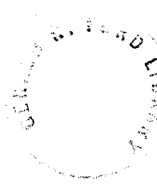
No appropriated funds shall be spent under a plan submitted by the Commissioner of Education for "Special Projects" if either substantive committee disapproves within 60 days.

Because the statute authorizes a program of special projects of relatively small size, and because the authorization already sets forth the general program characteristics, one would expect that, even without an opportunity to veto the plan, Congress would authorize the program rather than require a separate and specific legislative proposal for each project. This factor, and the presence of a severability clause, indicate that the veto would probably be severed and the program authorization would remain effective.

-- 48 U.S.C. 564 (P.L. 94-25, Section 8)

National Railroad Passenger Service Corp., a Government corporation, is authorized to develop criteria and procedures under which the Corporation could discontinue routes or services. The criteria and procedures become effective within 60 days of submission to the Congress unless either House disapproves.

The Act itself sets forth general guidelines for the Corporation to use in establishing its procedures and criteria. Thus the basic purpose of the statute can be effected without including a veto power over the specific procedures and criteria. This factor, along with the inclusion of a severability clause, would probably induce a finding that this authority remains valid without the veto.



C. Severability Uncertain

-- 30 U.S.C. 185(u) (P.L. 93-153, Section 101)

The export of oil transported in the Alaska Pipeline is allowed only if the President makes certain determinations of national interest, but Congress may still disapprove the exports.

On the one hand, the severability clause and explicit restriction of the President's authority apart from the veto suggest that Congress would have granted the authority without the veto. On the other hand, the legislative history supports the contrary conclusion that the veto was a condition for the delegation of export authority.

-- 42 U.S.C. 5911 (P.L. 93-577, Section 12)

The President can order allocation of scarce material for energy research and development subject to disapproval by either House within 30 days.

Numerous statutes grant authority to the President to allocate various scarce resources without subjecting his allocation decisions to veto. From this we can conclude that the veto is not an essential to the purpose of an allocation Act and should be severed. However, we might conclude instead that Congress was clearly stating that this authority was different than others, that the veto was not needed in other cases but was needed here. This latter conclusion is supported by the absence of a severability clause.

-- P.L. 93-404 (88 Stat. 817)(Interior Appropriation Act of 1975)

No funds may be spent by Interior to change the boundaries of, or abolish, any forest region, to move or close any regional office, etc., without the approval of both the Appropriation and Agriculture and Forest Committees of both Houses.

Setting regional boundaries, establishing regional offices, etc. are traditionally administrative functions rather than legislative ones. While Congress wanted a voice in boundary decisions, without the veto option Congress would probably leave boundaries to administrative discretion. Unfortunately, the language of the statute has a "twist" in it which make severability predictions problemmatical. If the veto is severed, the clause which remains is "no funds shall be spent to change boundaries, etc." Does this mean that if the veto clause is severed no administrative discretion remains? Or would the courts find no severability, void the entire provision, and declare that Interior has preexisting administrative authority? Or would the courts rewrite the statute to read "funds may be spent to change boundaries unless Congress disapproves", then sever the veto, leaving the administrative discretion? We cannot make a prediction, but note that several other statutes pose an identical problem.

-- P.L. 93-391 (Transportation Appropriation Act of 1975), Section 313

No funds may be spent to implement any program in DOT to impose or increase licensing, air worthiness and other related fees without approval by appropriate committees.

The statutory language creates ambiguity on the issue of severability for the same reason as the analogous statute (P.L. 93-404) discussed above. Using the other indicia of intent does not clarify matters. On the one hand, severability is not indicated because Congress has repeatedly included this particular veto in the annual appropriation Act, indicating its desire to strictly limit the imposition of fees. And there is no severability clause. On the other hand, imposing such fees is generally an administrative function. Further, to void the authority to impose new fees would mean that some licensing or certification services would be done by DOT gratuitously.