Department of Justice

THE TURNER MEMORIAL LECTURE

BY

THE HONORABLE GRIFFIN B. BELL
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE THE

UNIVERSITY OF TASMANIA

2:30 P.M.
FRIDAY, JULY 21, 1978

HOBART, TASMANIA
AUSTRALIA

Some observations on the operation of the Doctrine of the Separation of Powers in Australia and the United States of America

I am greatly honored for the invitation to deliver the Turner Memorial Lecture at your Law School. Dean Roebuck was kind enough to send me copies of the two earlier lectures given by Professor Sawer and Solicitor General Byers. I hope to maintain the level of thoughtful discourse established by those two previous speakers.

As I read their papers I was struck by how much of the discussion rang a very familiar note to me, and how much of it was utterly strange. This reminded me of George Bernard Shaw's statement that Great Britain and the United States are two people separated by a common language.

The English-speaking members of the British Commonwealth of Nations and the United States have much in common. Because of our shared traditions, we take each other for granted and do not give much thought to the differences. Yet illuminating the differences between our two sister societies may reveal their most fascinating and enriching features. This is as true for our law as our language.

Occasionally those very real linguistic and legal dissimilarities are brought home to us. When American soldiers were sent to Great Britain during World War II prior to the invasion of the Continent, they received a not so thin dictionary of the American and English languages. They learned to their amazement that what they knew as thumbtacks and freight cars went in England under the name of drawing pins and goodswagons.

Your High Court, too, has appreciated frequently and fully the close relationship between the governmental systems of the English-speaking nations while never losing sight of the important differences between them. Thus, when the court explained in the Baxter case[1/] why section 74 of your Constitution places limitations on the right to appeal to the Queen in Council on certain constitutional questions, it relied in part on the premise that the Privy Council was not sufficiently familiar with the concept of federalism borrowed from the Constitution of the United States. Conversely, in the Engineers Case,[2/] the Court observed that the principle of responsible government so radically distinguished the Australian Constitution from its United States counterpart that no more profound error could be made than to try to

1/ Baxter v. Commissioner of Taxation (NSW) (1907) (4 CLR 1087, 1111-1112).

2/ Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd. (1920), 28 CLR 129.

interpret the former by the borrowed light of American decisions and dicta. Superficially those two decisions may sound inconsistent. But in fact they stand for the truism that your Constitution has both borrowed and custom tailored the British principle of responsible government and our idea of federalism.

The topic I have chosen for this lecture is also one on which our two legal systems have reached different conclusions. It is the question whether our Congress, or a single House of Congress, may adopt resolutions, not presented to the President, which disapprove regulations issued by the Executive branch in implementation of federal legislation. This is a constitutional problem which has arisen fairly recently in the United States. The Supreme Court characterized this device, known most commonly as the legislative veto, two years ago in Buckley v. Valeo[3/] as "the most recent episode in a long tug of war between the Executive and Legislative Branches of the Federal Government." Indeed, the issue is so timely that the President, exactly a month ago, sent a message on the subject to the Congress, and I held a press conference dealing with it. I have chosen to discuss this question with you today not only because of its current attention and my personal involvement

3/ 426 U.S. 1, 140 fn.176.

but also because it cuts across many areas of constitutional law and illustrates some of the differences between our constitutional systems.

It may surprise you to discover that the legislative veto, what you call delegated legislation or subordinate legislation, by Congress or one of its Houses presents a serious constitutional problem in the United States. It is my understanding that in Australia, as in the United Kingdom, regulations must be laid before both Houses of Parliament which have the power to annul them.

One of the committees of our House of Representatives in preparing legislation which contained a legislative veto device was aware of your rule and stated in its report that the authority to annul regulations issued by the Executive "was retained by its (legislative) brethren in other free Parliaments."[4/] However, to paraphrase the opinion of your High Court in the Engineers case, it would be a profound error to interpret the Constitution of the United States on the basis of a constitutional practice prevailing in countries such as Australia which have adopted instead the principle of "responsible government." Of course, I should not be understood as saying that the Government of the

4/ House Report No. 93-805, p. 3 (1974).

United States is not responsible, even if at times in our history it may have appeared so to you.

To understand the difference between Australian and United States constitutional law in this respect, we must examine first the theory in the United States under which the Executive Branch issues regulations.

Regulations, of course, look very much like legislation, at least like minor legislation; hence, you call it subordinate legislation. In the United States, however, our constitutional theory holds that the power to legislate is vested exclusively in Congress. Accordingly, it is argued that Congress does not have the authority to delegate the legislative power and that the Executive branch cannot receive it. Nevertheless, our Executive does issue regulations, and indeed they have reached such astronomical dimensions that this Administration is striving to reduce their number. How then can this reality be reconciled with the theory that Congress cannot delegate its legislative power?

This problem came before the Supreme Court of the United States in 1825 in a case[5/] which involved the provision of our Judiciary Act authorizing the courts to issue rules governing their procedure. I may add that this statute was first enacted in 1790, the second year the United States operated under our Constitution.

5/ Wayman v. Southard, 10 Wheat. (23 U.S.) 1.

The opinion of the Supreme Court was written by Chief Justice Marshall, called the great Chief Justice, because he fashioned the form within which our organic Constitution developed. The Court upheld the power of Congress to empower the other two branches to issue rules or regulations. The Court began with the proposition that the legislature makes the laws, the executive executes the laws, and the judiciary interprets the laws, and that Congress cannot delegate to the other two branches powers which are strictly and exclusively legislative. But the Court went on to hold that nevertheless Congress may commit some things to the discretion of the other two branches, and give to those who are to act under general statutory provisions the power to fill in the details.

Justice Cardozo described this notion in statutory construction by courts as "filling the interstices." The Court conceded that it was not easy to draw the line which separates the important subjects which must be regulated exclusively by the legislature itself from those details which may be entrusted to the discretion of those charged with the execution of the laws. However, the Court refused to enter unnecessarily into that "delicate and difficult" inquiry.

As I shall point out later, Chief Justice Marshall's analysis is crucial from our constitutional point of view,

because it establishes that when the Executive Branch exercises statutory authority to issue regulations, it does not act as the agent or delegate of Congress but rather exercises its own constitutional function of executing the law.

The Supreme Court has never attempted to determine the delicate question of the boundary between the "important subjects" which Congress must regulate itself and the "details" which may be filled in through regulation by the other branches. In a 1928 case, Hampton v. United States,[6/] the Supreme Court articulated a rule that it was sufficient if Congress laid down in the statute an "intelligible principle" to which an agency implementing the statute must conform.

In two famous constitutional cases in the New Deal Period of the 1930s, the Hot Oil and NRA cases,[7/] the Supreme Court held two statutes unconstitutional for their utter lack of any intelligible principle designed to guide the discretion of the President in implementing them. In the words of Mr. Justice Cardozo, the rulemaking power conferred by those statutes "ran riot" and was "not canalized within banks that keep it from overflowing."

6/ 275 U.S. 394, 409 (1928).
7/ Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); and Schechter Co. v. United States, 295 U.S. 495 (1935).

Those two cases, however, represented the high water mark of judicial disapproval of statutes authorizing the Executive to issue regulations, and also the low water mark in legislative draftsmanship. Since then, legislation has normally contained or referred to a modicum of an "intelligible principle," while at the same time judicial requirements in this area have not been overly exacting.

This naturally leads us to the question whether, in exchange for a grant of broad discretionary or rulemaking powers to the Executive Branch, Congress can reserve to itself the power to control the exercise of that authority by the device of resolutions of disapproval adopted by one or both Houses of Congress, but not subject to the President's constitutional veto power. Of course, Congress quite naturally favors that procedure. In our view, however, the procedure is unconstitutional for two reasons: First, because it violates the principle of the separation of powers, basic to our Constitution; and second, because it conflicts with two specific clauses of our Constitution (Article I, section 7, clauses 2 and 3), clauses designed to protect the veto power of the President.

As an American, when I refer to the doctrine of the separation of powers I do not refer to some vague theory of political science but to a fundamental, concrete, and living constitutional principle. According to the

tradition, every member of our Constitutional Convention carried with him his volume of Montesquieu's Esprit des Lois, a book of which the most influential theme was the separation of powers theory. And the Record of the Convention contains numerous references to the "celebrated Montesquieu." Our Constitution, it is true, does not refer expressly to the separation of powers. But this is because the Founding Fathers firmly believed that the principle was clearly embodied in the first three Articles of the Constitution defining the powers of the three branches of government. The Committee on Style therefore deleted from the final draft of the Constitution a section previously adopted by the Constitutional Convention which specifically provided that the "Government shall consist of supreme legislative, executive and judicial powers."

Two years after the Constitutional Convention, during the First Session of the First Congress, the question arose whether under the Constitution the President alone had the power to remove officers who had been appointed by him by and with the advice and consent of the Senate. This question was finally settled in 1926 when the Supreme Court held that the President alone had that power. 8/

8/ Myers v. United States, 272 U.S.

But some ramifications of that issue still pose troublesome questions. During the legislative debate, which has been called the Great Debate of 1789, James Madison observed:

> "[I]f there is a principle in our Constitution, indeed any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers."9/

Now I want you to realize that James Madison was not a run-of-the-mill, orotund politician. As the result of his untiring and influential activities during the Constitutional Convention, he was called the "Father of the Constitution" and he became the fourth President of the United States.

I believe Madison's statement discloses the importance attributed to the doctrine of the Separation of Powers by the men who drafted our Constitution. One of the principal precepts of the separation of powers under the Constitution is that Congress makes the laws, but it is the President who "shall take Care that the Laws be faithfully executed."10/ Thus, when a law is enacted it is the Executive Branch which enforces it and the Judicial Branch which interprets it. In other words, upon the enactment of a statute, Congress loses control over it in favor of the other two branches, except, of course,

---

9/ Annals of Congress, First Congress, First Sess., col. 581.
10/ U.S. Constitution, Article II, §3.

the power to amend or repeal it by plenary legislation, which has to be presented to the President for his approval or disapproval. The fact that Congress has passed a law therefore does not confer upon it the power to direct its administration.

During the Great Debate of 1789, to which I just referred, Madison formulated this concept in relation to the appointment power:

> "The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done the Legislative power ceases."11/

The appointment power then shifts to the appointing authority which under our Constitution is the President, by and with the advice and consent of the Senate.12/

The principle was stated more generally in 1866 by Senator Davis:

> "When Congress has passed a law, their jurisdiction over the subject matter of the law is functus officio. It then passes into the hands of another department of the Government, and it becomes a function of the President, or the Chief Executive of the Government of the United States to see that the law is executed."13/

11/ Annals of Congress, First Congress, 1st Sess., col. 582.
12/ U.S. Constitution, Art. II, §2, cl. 2. In the case of inferior officers Congress may authorize the appointment of officers by the President alone, the courts of law, or the heads of departments.
13/ Cong. Globe, 39th Cong., 1st Sess., p. 186.

The importance of this view of the Separation of Powers becomes evident if we remember that when the Executive Branch issues regulations it enforces the law by "filling up details." It does not act as an agent in the exercise of powers delegated to it by Congress. It follows that when Congress grants the authority to and impose the duty upon the Executive to promulgate implementing regulations, Congress lacks the power to act further other than by way of plenary legislation.

The endeavors of Congress to annul regulations by resolution of one or both Houses violate, however, not only the doctrine of the separation of powers but also the clauses in our Constitution specifically designed to protect the President's veto power to disapprove Congressional action.

Before expanding on this constitutional significance of our Presidential veto power, I think it would be enlightening to discuss briefly the distinctively different constitutional practice of our countries in this area. Your Constitution provides for the disallowance of legislation,[14/] but I understand that these provisions have become a dead letter. You may therefore wonder why under our law the protection of the Presidential veto power is

14/ Australian Constitution, §§58,59.

a matter of importance, and not merely a formality without substance. Since the Presidential veto power is a vital institution in our country, it may be worth spending a few minutes to consider why the living Constitutions of our two countries have grown so far apart.

The disuse of the Crown's power to disapprove legislation passed by Parliament appears to me to be closely connected with the operation of responsible government. The Crown and I assume the Governor General can disallow a bill passed by Parliament only on the advice of its Ministers. Those Ministers, however, are in effect a committee of Parliament responsible to it, and therefore not likely to recommend disapproval of the legislation. Conversely, it is a result of responsible government that Parliament will not often pass legislation against the wishes of the Ministers. The Ministers are, of course, responsible to Parliament, but they are also the leaders of the ruling party, and have some disciplinary power over its membership. I do not know whether it is possible to go so far as to say that the members of Parliament are responsible to the Ministers in their capacity as party leaders, but it would seem that as a practical matter there is a certain degree of reciprocal relationship. Moreover, differences between the Ministers and Parliament can be resolved by methods other than the disapproval of

legislation. Your Governor-General may dissolve the House of Representatives on the advice of his Ministers,[15] and while your Constitution apparently does not expressly require that the Ministers have the confidence of the majority of the House of Representatives, as a practical matter section 64 of your Constitution seems to require this.

This situation in the United States is quite different. There is neither a formal nor a necessary linkage between the Executive and Congress. During the sixteen years of the Administrations of the Republican Presidents Eisenhower, Nixon and Ford, the Republicans controlled Congress only for two years. And even when the same party is in control of the White House and of the Capitol, the influence of the White House over legislation is limited by the extreme independence of the Congressional leadership.

This means in effect that in Australia the Executive has the means of preventing legislation from being passed by Parliament, but it cannot or does not disapprove legislation once it has been adopted by Parliament. In the United States we have the converse situation. The President has only limited powers to prevent the adoption by Congress of legislation he considers

15/ Australian Constitution §5.

undesireable, but once it has been adopted by Congress he can disapprove it. If such a Presidential veto occurs, Congress may nevertheless adopt the bill by a two-thirds majority vote. Thus, the practical difference between our two countries appears to be that your Constitution results in a system of prior restraint, while in our country Executive restraint on legislation comes into play only after it has been passed by Congress.

One of the most important instances of prior restraint is § 56 of your Constitution pursuant to which

> "[a] vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated."

This is a matter of your constitutional law, and I need not remind you that this provision is derived from resolutions and standing orders of the British Parliament going back to the beginning of the Eighteenth Century. This practice, of course, was known to the Congress of the United States during its first sessions. It was, however, rejected as early as 1790 during the debates on the second appropriation act, on the ground that if the House of Representatives had no right to add to the appropriations proposed by the Secretary of the Treasury, "the whole business of Legislation may as well be submitted

to him, so that in fact the House would not be the Representatives of their constituents but of the Secretary."[16/]

If you examine an historical list of Presidential vetoes you will notice that an extremely high percentage -- possibly 90 percent -- have involved bills concerning the appropriation of funds, usually for the relief of private individuals. Hence, section 56 of your Constitution serves as a prior restraint on the very type of legislation which constitutes the bulk of the legislation vetoed under our constitutional system. Indeed it is well possible, that if it had not been for the exercise of the Presidential veto over private relief bills, the veto power under our Constitution would have been so rarely invoked during certain periods of our history that it would have fallen into disuetude. Conversely, it may well be that the veto power would not have become a dead letter under your Constitution, if the safeguard of Section 56 had been omitted.

With that explanation, I will now explain why the annulment of regulations by the vote of one House or both Houses of Congress violates the provisions of our Constitution designed to protect the exercise of the President's veto power. Article I, Section 7, cl. 2, of our Constitution directs that all bills must be concurred

16/ Annals of Congress, First Cong., 2d Sess., cols. 1449-1450

in by both Houses of Congress and be presented to the President. If he approves them they become law; if he disapproves them they must be approved by a majority of two-thirds in both Houses of Congress.

The Presidential veto power was not designed merely to guard against bad or ill-conceived laws. One of its main purposes was, and still is, to safeguard the separation of powers and to protect the Executive and Judicial branches from legislative encroachment, or what James Madison called the tendency of the Legislative Branch of "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[17/]

During the debates in the Constitutional Convention on the veto power, delegates pointed out that "an important purpose of the veto power was to guard of encroachments by the popular branch."[18/] James Wilson, who was to become a Justice of the Supreme Court, stressed that the Executive and Judiciary Departments needed a sufficient self-defensive power against the type of "pure and unmixed parliamentary tyranny" which, in his view, then prevailed in Great Britain.[19/] Madison finally stated that "the purpose of the veto power was twofold:

17/ The Federalist No. 48; see also Farrand, Records of the Federal Convention Vol. II, p. 74.
18/ Gouverneur Morris, Farrand, op. cit. Vol. II, p. 299.
19/ Op. cit. at 300-301.

First, to defend the Executive Rights. Second, to prevent popular or factious injustice. It was an important principle . . . to check legislative injustice and encroachments."[20/] In The Federalist No. 73, Alexander Hamilton explained the purpose of the Presidential veto:

> "Without the one or the other [an absolute or qualified veto] the [President] would be unable to defend himself against the depravations of the [Congress]. He might be gradually stripped of his authorities by successive resolutions and annihilated by a single vote."

Thus, it is clear that our Founding Fathers intended the President's veto power to be used to protect the constitutional system of the separation of powers; indeed, this was its prime purpose. You may say this may all be true, but a resolution to annul a regulation is not a law and therefore not subject to the President's veto power under Article I, § 7, cl. 2 of the Constitution.

Madison anticipated that objection and warned that, if the President's veto power were confined to bills, it would be evaded by acts under the form of resolutions, votes, etc. According to the Records of the Convention, this proposal resulted at first in "a short and rather confused conversation" in the Convention. But on the following day a third clause was added to what is now Article I, §7, providing that not only bills but also

---

20/ Op. cit. at 587.

"[e]very Order, Resolution, or Vote to which the Concurrence of the Senate or House of Representatives may be necessary" has to be presented to the President and thus is subject to his veto power.[21/] I note that §§ 56 of your Constitution also uses the words "vote, resolution or proposed law," and thus prevents its evasion by the use of legislative devices other than bills.

This brings up the rather technical issue of what are the orders, resolutions or votes to which the concurrence of the two Houses of Congress is necessary. That question was discussed at length in a Senate Report submitted in 1897,[22/] on the basis of the practice of the preceding century. According to that report, the test is whether the resolution contains matter "which is properly to be regarded as legislative in its character or effect," or whether it is concerned only with matters of internal Congressional administration. In the former case it must be presented to the President; in the latter, presentation is not required (at p. 8). In 1908, Congressman Mann coined the felicitous phrase that a resolution need not be presented to the President if it has "no force beyond the confines of the Capitol."[23/]

21/ Op. cit., pp. 301-305.
22/ Senate Rept. No. 1335, 54th Cong., 2d Sess.
23/ 42 Cong. Rec. 2661.

A resolution annulling a regulation issued by the Executive Branch modifies the law and thus is clearly legislative in character. In any event it does not involve a matter of internal Congressional administration, and its effect is not confined to the Capitol. Article I, §7, cl. 3, of the Constitution therefore requires that it be presented to the President.

As I mentioned at the outset, provisions of this type have been relatively rare until recently. Consequently, our courts are only now beginning to be concerned with them. A few cases are being litigated at present, and I trust that the courts will accept our analysis of the law that such legislative vetoes are unconstitutional.

I have reached the end of my statement. I believe that I have been somewhat shorter than my predecessors in this series of lectures. On the other hand, many of you have been unfamiliar with much of the detail of my discussion and I hope that I have not by now exhausted your patience.

####