

HARVARD LAW REVIEW

A PRESIDENTIAL LEGAL OPINION

Robert H. Jackson *

THE article by Robert W. Ginnane on *The Control of Federal Administration by Congressional Resolutions and Committees*, in the February number of this *Review*,¹ recalls an unpublished legal opinion by President Franklin D. Roosevelt relevant to that subject, which I was requested some day to make known. I can think of no more appropriate occasion to discharge my trust than to supplement Mr. Ginnane's excellent discussion with the President's views.

The document probably is the only one of its kind in our history — it is extraordinary for the President to render a legal opinion to the Attorney General. The occasion for this unusual procedure was a provision of the Lend-Lease Act which the President thought constitutionally objectionable but politically necessary. It reads:

After June 30, 1943, or after the passage of a concurrent resolution of the two Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any department or agency shall exercise any of the powers conferred by or pursuant to subsection (a).²

The Bill drafted by joint efforts of several executive departments and proposed by the President contained no such provision. I do not recall, if I ever knew, whether during the congressional consideration the President personally agreed to it.³ Mr. Stettinius

* Associate Justice, Supreme Court of the United States.

¹ 66 HARV. L. REV. 569 (1953).

² 55 STAT. 32 (1941).

³ Senator Bailey, in support of the bill, urged the constitutionality of the concurrent resolution provision and said: "The President might have insisted upon less by way of restraint. So far as I know, he has fallen in with these measures of restraint without protest, and quite freely . . ." 87 CONG. REC. 1164 (1941).

mentions it, however, as an amendment that administration forces in Congress accepted as not damaging to the essential principles of the Bill and designed to meet criticism from the opposition that the Bill gave too much power to the Executive.⁴ As thus passed, the President approved it on March 11, 1941. Two days later Senator Murdock, who had argued in debate that the provision was unconstitutional, wrote to the President recounting objections to the provision. The President discussed with me his concern about it and later sent me the following note:

The White House
March 17, 1941

Memorandum for the Attorney General:

I should like to file with the Attorney General an official memorandum placing me on record in regard to that provision of the Lend-Lease Bill which seeks to repeal legislation by concurrent resolution of the two houses of Congress.

Would you try your hand at drafting such a memorandum? I should say in it, of course, that the emergency was so great that I signed the bill in spite of a clearly unconstitutional provision contained in it.

I enclose letter from Senator Murdock, together with marked passages relating to the debate and relating to legislative rules and precedents.

F. D. R.

This reached me the day before I was to leave Washington as a guest of the President, who, weary from the Lend-Lease battle, had arranged a fishing trip to the Bahamas. I passed the memorandum and letter to Alexander Holtzoff, Special Assistant to the Attorney General, to formulate the statement requested.

While we were at sea, Congress passed the bill making appropriations to carry Lend-Lease into execution.⁵ It was brought to the ship by air and our log for March 27 recites:

At 10:50 a.m., E.S.T., the President signed H.R. 4050, an Act of Congress making supplemental appropriations for the national defense and to provide aid to the government of any country whose defense the President deems vital to the defense of the United States. The total amount of this bill is seven billion dollars, to remain available until June 30, 1943. Present in the cabin of the POTOMAC when the President affixed his signature to this most important measure were Attorney

⁴ STETTINIUS, LEND-LEASE, WEAPON FOR VICTORY 82 (1944). He sets forth the history of drafting the Bill by Treasury, War, Navy, State, and Justice Department officials and others, including congressional leaders. *Id.* at 67-69.

⁵ 55 STAT. 53 (1941).

General Jackson, Secretary Ickes, Mr. Stephen Early, General Watson, Admiral McIntire and Mr. Harry Hopkins. The President presented to Mr. Hopkins the pen with which he had approved the bill.

This event brought about renewed discussion of the obnoxious clause of the Lend-Lease Act. It did no immediate harm, of course, and, because of the large majorities by which the Bill had passed, it appeared quite likely to remain innocuous. Any course of events which might arouse enough opposition in Congress to put concurrent resolutions through would be likely to require a change of administration policy in any event. I really regarded the question as interesting but rather academic.

But the President feared the long-range effect of the precedent on the balance of power between Congress and the Executive. Obviously it was a device to evade the veto which the Constitution gave to the President. It enabled a bare majority of a quorum in each of the two Houses to terminate his powers. But for the provision, they could not be cut off before the fixed date of expiration except by passing a repealing Act, which would be subject to veto. He could thus preserve his powers, unless two-thirds of each House voted to override his veto. The scheme of the Act he had felt forced to approve took this powerful weapon away from the Executive. And the President was impressed by the question which Senator Murdock asked in the debates: "could we not attach the same clause, or a similar clause, to every piece of legislation which leaves the Congress, and by so doing destroy the veto power of the President?"⁶ It was a stratagem, as the President pointed out, never useful to the administration but only useful to increase the leverage of the opposition.

But was it unconstitutional? That was a different question, which we discussed over and over. The question on which my doubts were not fully satisfied never bothered the President in the least. It seemed to me to depend on whether the provision was to be considered as a reservation or limitation by which the granted power would expire or terminate on the contingency of a concurrent resolution or was to be regarded as authorizing a repeal by concurrent resolution. Senator Connally, in support of the President on the Lend-Lease Bill, had argued:

If we may terminate this bill by its terms on June 30, 1943, then we may terminate it upon any other happening or any other event which

⁶ 87 CONG. REC. 1596 (1941).

may transpire in the future.

The reason for that is that it is in the act itself; it is a limitation upon the length of time and the length of operation of the act itself, and in no sense a repeal or modification of an existing act. The provision is written in the heart of the measure that the bill shall not last longer than June 30, 1943, and, prior to that date, it shall not last beyond any time after the Congress shall pass a concurrent resolution.

So far as the legal concept of the proposition is concerned, the concurrent resolution might be wholly void; it might have no legal effect whatever; but, treated purely as an event, it would terminate operations under this bill; and the Supreme Court of the United States has held that Congress in enacting legislation has the right to hinge its operation either upon some antecedent event or upon some subsequent event, and that upon the happening of that event, such as a proclamation by the President, if that is provided in the law, the act shall either terminate or shall become operative, as the case may be, as provided in the legislation.⁷

The President, however, invariably referred to the offending procedure as a repeal. His reasoning was that so well put on the floor by Senator Murdock:

When you bring the measure back to the Congress and invoke the legislative will to terminate legislation, in my opinion you violate the Constitution, unless you follow the procedure set forth in the Constitution.⁸

Then why should the President not say so, publicly and at once, by a press release, a speech, or in answer to a question planted at press conference? Why withhold his opinion for disclosure by someone else at some future time? The reason was political. His views, strangely enough, were those used by the opponents of the Lend-Lease Bill, some of whom were his consistent political enemies, to justify their opposition to the Bill. They argued that the device for recalling their grant of power was unconstitutional and therefore illusory.⁹ His loyal supporters, on the other hand, had argued that the provision was valid and therefore effective as a check on any runaway executive action. For the President

⁷ *Id.* at 1155.

⁸ *Id.* at 1597. Senator Murdock opposed the acceptance of the provision by administration forces as appeasement and reviewed the precedents and arguments at length. *Id.* at 2073.

⁹ Senator Wheeler, *id.* at 1596; Senator Gillette, *id.* at 1246, 2064; Senator Clark of Missouri, *id.* at 1269; Senator McCarran, *ibid.*

to make public his views at that time would confirm and delight his opposition and let down his friends. It might seriously alienate some of his congressional support at a time when he would need to call on it frequently. It would also strengthen fear in the country that he was seeking to increase his personal power.

Why, then, not drop the matter entirely? He had to reckon on the possibility, even if remote, of an attempt to invoke the provision. If he then challenged its constitutionality, he would be confronted with his own signature to the Act he was contesting. Therefore, he wanted a record that his constitutional scruples did not arise only after the shoe began to pinch, and, so far as possible, to excuse his approval and counteract its effect. He did not want the precedent created by his yielding to ripen into a custom which would impair the powers which properly appertained to his great office. Only a statement of his own could do that. All of these considerations he thought would be served by an undisclosed written declaration to be made known when it would not embarrass his followers or give comfort to his adversaries.

Returning to Washington on April 1, I received from Mr. Holtzoff the memorandum he had prepared. He, like the President, assumed — what seemed the debatable point — that concurrent resolutions under the provision would be the same as repealing legislation. But it stated faithfully the President's position, and that was what mattered and what was requested. I forwarded it to the President on April 3. Without further discussion with me and without change, he signed it on the date it bears. It reads:

THE WHITE HOUSE

WASHINGTON

April 7, 1941

MEMORANDUM FOR THE ATTORNEY GENERAL

On March 11, 1941, I attached my approval to the bill (H.R. 1776) entitled "An Act to Promote the Defense of the United States." The bill was an outstanding measure which sought to meet a momentous emergency of great magnitude in world affairs. In view of this impelling consideration, I felt constrained to sign the measure, in spite of the fact that it contained a provision which, in my opinion, is clearly unconstitutional. I have reference to the clause of Section 3(c) of the Act, providing that after the passage of a concurrent resolution by the two

Houses before June 30, 1943, which declares that the powers conferred by or pursuant to subsection (a) are no longer necessary to promote the defense of the United States, neither the President nor the head of any Department or agency shall exercise any of the powers conferred by or pursuant to subsection (a), with certain specified exceptions. In effect, this provision is an attempt by Congress to authorize a repeal by means of a concurrent resolution of the two Houses, of certain provisions of an Act of Congress.

The Constitution of the United States, Article I, Section 7, prescribes the mode in which laws shall be enacted. It provides that "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." It is thereupon provided that if after reconsideration two-thirds of each House shall agree to pass the bill, it shall become law. The Constitution contains no provision whereby the Congress may legislate by concurrent resolution without the approval of the President. The only instance in which a bill may become law without the approval of the President is when the President vetoes a bill and it is then repassed by two-thirds vote in each House.

It is too clear for argument that action repealing an existing Act itself constitutes an Act of Congress and, therefore, is subject to the foregoing requirements. A repeal of existing provisions of law, in whole or in part, therefore, may not be accomplished by a concurrent resolution of the two Houses.

In order that I may be on record as indicating my opinion that the foregoing provision of the so-called Lend-Lease Act is unconstitutional, and in order that my approval of the bill, due to the existing exigencies of the world situation, may not be construed as a tacit acquiescence in any contrary view, I am requesting you to place this memorandum in the official files of the Department of Justice. I am desirous of having this done for the further reason that I should not wish my action in approving the bill which includes this invalid clause, to be used as a precedent for any future legislation comprising provisions of a similar nature.

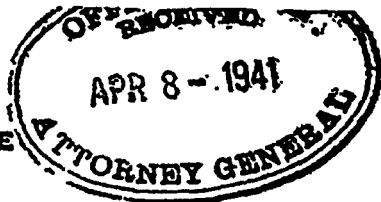
In conclusion, I may refer to the following pertinent remarks of President Andrew Jackson:

"I deem it an imperative duty to maintain the supremacy of that sacred instrument (the Constitution) and the immunities of the Department entrusted to my care."

/s/ Franklin D. Roosevelt

The following note, however, accompanied the return of the opinion to me:

THE WHITE HOUSE
WASHINGTON



April 7, 1941.

MEMORANDUM FOR

THE ATTORNEY GENERAL

Dear Mr. Attorney General

I enclose herewith the formal memorandum placing me on record in regard to the unconstitutionality of that provision of Section 3 (c) of the Lend-Lease Act, Public No. 11, 77th Congress, which authorizes repeal by a concurrent resolution of the Congress.

I think that this formal memorandum from me to you should be published some day as an official document, and I leave the method thereof to your discretion.

Franklin D. Roosevelt

~~F. D. R.~~

[Handwritten initials]

It evidently was dictated by the President and, after the custom of those days, his initials were typed at its end. These he had crossed out and had signed the same initials in longhand. Then he struck those out and signed his full name. Also, he penned in the salutation.

This letter highlighted the unconventionality of the President's method of dealing with the question and for the first time brought me really to face the problem of its custody and publication. While it was referred to as an "official" opinion, it neither required nor prohibited any departmental official action, and bound no one officially. Despite the high official position of its author, it was not an official act but a personal explanation and opinion of Franklin D. Roosevelt on a smouldering issue between the Executive and Congress. It had not, and it was hard to see how it could, become a litigated issue, but it was very likely to become a political one. Why he did not consider his own files appropriate for it I never learned.¹⁰ If put in the open files of the Department of Justice, there was no assurance and little probability that so unique and politically explosive a document would not promptly "leak," to his embarrassment. If sealed and put in a confidential and secret file, who, in the mutations of office, would know of it and decide when it should be brought to light? And, anyway, there was no established routine for publication of documents of the kind other than official opinions of the Attorney General.

I took both documents to the next Cabinet meeting and, after its close, put the problem back to him. As often he did with questions for which he had no ready answer, he took refuge in pleasantries — such as, was not an opinion rendered by the President to the Attorney General as much entitled to publication as those rendered by the Attorney General to the President? When he finally settled down to the problem, it was only to give me responsibility but not guidance. He was hard pressed by much more immediate and important matters; how this should be handled was a matter of detail, and he brushed it aside by saying that he left it entirely to me to keep it so that it would not get out to embarrass him in the running controversy over his emergency powers but when I thought it ought to be made known to put it out in some appropriate way.

As Mr. Ginnane has pointed out,¹¹ thereafter President Roosevelt approved a series of acts containing, in substance, the provision which he had thus pronounced unconstitutional. Its accept-

¹⁰ His files contain the memorandum of March 17, 1941, requesting preparation of the opinion which has now been published. 2 F. D. R., HIS PERSONAL LETTERS, 1928-1945 1133 (Roosevelt ed. 1950). Absence from that publication of the later opinion and memorandum indicates, I assume, that they are not in his files.

¹¹ Ginnane, *supra* note 1, at 589-90.

ance no doubt eased the path to enactment of his wartime legislation. But from his earnestness in discussing this practice with me, I know he regarded it as a triumph of expediency over principle. When Mr. Ginnane's article evidenced serious, scholarly, and nonpolitical interest in the validity of this device and its effect on the balance of power between Congress and the Executive, I was confident President Roosevelt would have expected me to contribute to its consideration the lesson he drew from an unparalleled experience with the functioning of our constitutional institutions.