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THE IMPOTENCE OF RETICENCE†

PHILIP B. KURLAND*

The difficult national problems which have focused around the presidency in this election year have created renewed interest in theories of presidential power. In this article the author reviews the gravitation of power from the legislative to the executive branch, and, through an institutional analysis, discusses the difficulties created by the shift in balance. The conclusion is reached that rejuvenation of congressional authority is a prerequisite to the continuance of a free and stable American government.—Ed.

LAST SUMMER, the Under Secretary of State appeared before the Foreign Relations Committee of the United States Senate.¹ In essence, he told the Senators that the President's actions in Viet Nam were authorized by the Tonkin Bay Resolution² and implicitly challenged Congress to withdraw the resolution.³ He went on to say that if the resolution were withdrawn, it would in no way inhibit the President's powers to carry on the undeclared war.⁴ There were a few protestations.⁵ McCarthy moaned and Fulbright fulminated.⁶ But, as usual, neither the Congress, nor the

† The subject matter of this article was presented by Professor Kurland as the second annual Brainerd Currie Lecture at Duke University School of Law, March 19, 1968.

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¹ *Hearings on S. Res. 151 Before the Senate Comm. on Foreign Relations*, 90th Cong., 1st Sess., 71-110, 128-88 (1967).

² *See id.* at 129-40, 161-62, 174-75.

³ *See id.*

⁴ *Id.* at 141-44, 147.

⁵ Senator Symington stated in the Foreign Relations Committee Hearings that "it would be questionable" that the President had such power in the absence of the Tonkin Gulf resolution. *Id.* at 144.

⁶ For comments by Senators Case, Fulbright, Gore, McCarthy, Mundt, and Symington, see N.Y. Times, Aug. 22, 1967, at 2, col. 2.

Senate, nor the Committee took any effective action in response to the challenge. The scene epitomized the arrogance of the executive branch and the pusillanimous nature of the legislative branch of our national government.

When this country was founded, a written Constitution was drawn in part as an attempt to prevent the concentration of power in a tyrannical executive, from which the colonies had but recently freed themselves. At the same time, the experience under the Confederation had made it clear that a powerless central government would not be conducive to the creation of a nation. American constitutionalism was born with three distinctive features. First, the national government was to be tethered in such a way as to assure freedom of the individual. This was to be accomplished by giving the national government only limited powers and then by fencing in those powers with a bill of rights. Second, government power was to be divided between the national and state governments in order to prevent the monopoly of authority that the people feared. Federalism, too, rested on a concept of freedom. Third, within the national government itself, power was to be divided among the three branches in such manner as to prevent the hegemony of any of them. This was to be attained by a separation of the executive, legislative, and judicial powers and by affording checks on the powers that each of these branches was to exercise. Separation of powers and checks and balances were also concerned with freedom.

I do not intend here to discuss the limitation on governmental authority afforded by the Bill of Rights or the theory of the limited role of government. Of federalism as a viable constitutional principle, I would say only two things. First, that federalism is moribund if it is not dead. Second, that federalism is beginning to be mourned, with all the regrets that mourners usually have about not having treated the deceased better during his lifetime.

Governor Terry Sanford, in his recent book, spells out a prospectus for the further use of state governments.⁷ With all due respect, however, he is no longer talking about federalism, but rather about the proper utilization of state governments as agencies for helping to make and to carry out national policy. A recent report of the Advisory Commission on Intergovernmental Relations came to the shocked conclusion that the great American population centers are threatened by total domination by the

⁷ T. SANFORD, *STORM OVER THE STATES* (1967).

national government.⁸ In fact, there no longer is any question of the power that the national government has over state and local government. The sole question that remains is when that power will be exercised. And that choice rests in the national capital and nowhere else.

Why did federalism succumb? There were many contributing factors. One was the nationalization of our economic and social life. Another was the abuse of the doctrine by reactionaries who would put it to their own nefarious ends. A third was the pressure by liberals to place power where they thought they could control it. And, not the least important, was the unwillingness of the states and their people to assume the responsibilities that have always been the necessary concomitants of power. Power moved to Washington in part because Washington was prepared to exercise it for the solution of the problems that the American people faced. The states were not.

Here I would take you with me on a visit to the sickbed of another constitutional concept—the notion of separation of powers. It is an unpleasant duty to describe to you the pathology of the disease, not least because it would appear to be terminal. But, at least, we are not yet ready to perform the autopsy and perhaps a cure might be discovered before it is too late. I am not, however, sanguine about the patient's chances, largely because it has lost the will to live. In any event, it is certainly too late to expect that it will be restored to full health.

Because I have already touched on the subject, let me turn first to the problem of separation of powers in the field of foreign affairs. For here, if anywhere, the power of the executive branch is believed to be justified in constitutional terms.⁹ And yet a look at the Constitution hardly affords an answer to the question of where the foreign affairs power is properly to be located. Certainly the Constitution speaks about the Presidential authority to make treaties, but only with the advice and consent of two-thirds of the Senate.¹⁰ The chief executive has the power to appoint ambassadors, other public ministers, and consuls, but only with the consent of the Senate.¹¹ And he was given the power to receive ambassadors

⁸ U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, EIGHTH ANNUAL REPORT 9 (Jan. 31, 1967).

⁹ See generally E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 199-254 (1940); E. CORWIN & L. KOENIG, *THE PRESIDENCY TODAY* 49-52 (1956).

¹⁰ U.S. CONST. art. II, § 2.

¹¹ *Id.* at cl. 2.

and other public ministers.¹² A general grant of executive power¹³ and the power as commander-in-chief were also to be exercised by the President.¹⁴

On the other hand, it was left to Congress to regulate commerce with foreign nations,¹⁵ to define and punish offenses against the law of nations,¹⁶ to declare war,¹⁷ to raise and support armies,¹⁸ to provide and maintain a navy,¹⁹ to control the purse strings,²⁰ and "To make all Law which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²¹

It remained for Mr. Justice Sutherland and the Supreme Court to "discover" that the presidential powers over foreign affairs derived not at all from the Constitution but rather from the Crown of England.²² Intrinsically there is little merit in this decision. The rationalizations in support of the power of the President to control the conduct of foreign relations—empty rhetoric aside—are two. First, that only the President can speak as the chosen voice of all the American people and it must be the whole American people that speaks when addressing foreign countries. Second, that only the President of the United States has access to all the information necessary to fashion an appropriate foreign policy.

The first rationalization, that the President must be the sole spokesman for all the American people, is difficult to justify. It rests, in part, on the theory that the election or re-election of the American President depends on his announced foreign policy. And yet it is hard to find elections in American history that have turned on such matters. If the 1964 election rested on conflicts over foreign policy it must be recognized that the American people chose a President to de-escalate the undeclared war to which he had fallen heir, not to expand it. In fact, slogans to one side, in the 1968 election it will be difficult indeed to choose between expressed foreign policies. The truth of the matter, of course, is that the United States has no foreign policy or alternative foreign policies that

¹² *Id.* at § 3.

¹³ *Id.* at § 1, cl. 1.

¹⁴ *Id.* at § 2, cl. 1.

¹⁵ *Id.* at art. I, § 8, cl. 3.

¹⁶ *Id.* at cl. 10.

¹⁷ *Id.* at cl. 11.

¹⁸ *Id.* at cl. 12.

¹⁹ *Id.* at cl. 13.

²⁰ *Id.* at cl. 1.

²¹ *Id.* at cl. 18 (emphasis added).

²² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

might be offered to the people for them to choose. And none of the possible 1968 candidates has framed such a policy.

However devoutly to be wished, removal of our presence from Viet Nam does not constitute a foreign policy. Having succeeded to Great Britain's role as "the leader of the democratic forces of the free world," this country has also followed the British policy of muddling through. Our policy is to react rather than to act. The success of such an approach is, therefore, dependent largely on the capacity of the individual charged with reacting to the problems that the world presents to us. The mess we are in speaks for itself in revealing how well those individuals have done their jobs. And I am not speaking only of the Viet Nam war. Offering to assume the role of "Big Brother" to those who will affiliate with us—and even those who will not—hardly defines a foreign policy. Especially when Big Brother must choose among his adopted siblings as to which he will protect and which he will forsake when the crisis comes.

Moreover, the rationale that the President is the only proper voice for all the people would justify his power not only in the field of foreign affairs but in all national governmental enterprise. It is the second argument that creates more of a difficulty for Congressional participation in the conduct of foreign affairs—the argument that only the President has access to the necessary data on which to base a judgment. But I submit that this is a statement of fact rather than a reason for action or inaction. If the executive branch alone is privy to the appropriate information, it is largely due to the fact that it is unwilling to share its information with Congress. And, in part, it is due to the fact that Congress is unprepared to set up the machinery necessary to keep itself informed. Both facts are true. Neither is necessary.

The fact of the matter is that Congress has the power to be informed if it would only exercise the authority that it has. So long as it appropriates funds on the say-so of the executive; so long as it remains silent while the executive carries on a war that only Congress is authorized to declare; so long as the executive is permitted to enter into secret agreements with foreign countries, just so long will Congress continue its decline and fall as an essential element in our national government.

Let me make clear that I am not referring to a condition that is peculiar to the present administration. Roosevelt's destroyer deal with Great Britain was recognized as an illegal act of war several years before the Japanese bombed Pearl Harbor. Truman's use of American troops in Korea, ultimately blessed by the United Nations, was a commit-

ment to war without Congressional approval. The martyred President Kennedy almost blew us to bits by sanctioning an invasion of Cuba, only at the last moment withdrawing American air power and thus assuring the failure of the action. Nor should it be forgotten that our military commitments in Viet Nam were initiated by Kennedy under a guise that could hardly fool the Communist world since they make such great use of it themselves, *i.e.*, the guise of "military advisers." We tend to forget the Marine invasion of Lebanon even while we recall the use of troops in the Dominican Republic. And those who shudder at the episode of the *Pueblo*, might recall the incident of the shooting down of the U-2 over Russian airspace.

Nor is the problem of the "credibility gap" limited to the present administration. I would remind you of the falsehoods that issued from the White House about the U-2 incident, the lies that Adlai Stevenson was forced to place before the world at the time of the Cuban crisis.

Essentially, our difficulty derives from the fact that we are unconcerned about institutional problems. We are prepared, according to our loyalties, to back a President that we admire and condemn the one that we dislike, when what we should be doing is to recognize the wisdom of the Constitutional provisions that would preclude the unlimited exercise of power that we have witnessed by each of our recent chief executives and the unalloyed cowardice of the Congress in allowing such arrogation of power to the executive branch.

Let me make it clear that I am not attempting to rehearse the conflict between the doves and the hawks. I am trying to do what the American public is not being called on to do: to reconsider the institutional rather than the personal elements involved in leaving the sole control over foreign relations in the hands of the executive. When Secretary Rusk appeared before the Senate Foreign Relations Committee earlier this year, he told the members and the world that American foreign policy—such as it is—would continue to be made without the essential participation of Congress.²³ Little of the furied controversy that has swirled around that appearance has been concerned with that issue except in terms of whether the doves or the hawks should prevail. And outside the halls of government, the people are talking in terms of personalities rather than the insti-

²³ See *Hearings on S. 3091 Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess. 133-49 (1967); N.Y. Times, March 13, 1968, at 1, col. 1; 14, cols. 1-8; 15, cols. 1-4.

tutional issue. Although the question of escalation or de-escalation of the Viet Nam war may be resolved by a change of Presidents, as Mr. Reston of the *New York Times* has told us,²⁴ it will leave unchanged the fundamental problem that makes it possible to have events like the Bay of Pigs and the Viet Nam war.

Senator Fulbright made this point in his testimony before the Senate Judiciary Subcommittee on the Separation of Powers:

The error of those of us who piloted [the Tonkin Bay] resolution through the Senate with such undeliberate speed was in making a personal judgment when we should have made an institutional judgment. Figuratively speaking, we did not deal with the resolution in terms of what it said and in terms of the power it would vest in the Presidency; we dealt with it in terms of how we thought it would be used by the man who occupied the Presidency The war power is vested by the Constitution in Congress, and if it is to be transferred to the Executive, the transfer can be legitimately effected only by constitutional amendment, not by inadvertency of Congress.

The Congress has lost the power to declare war as it was written in the Constitution. It has not been so much usurped as given away, and it is by no means certain that it will soon be recovered.²⁵

In his recent testimony before the Senate Foreign Relations Committee, Secretary Rusk very politely but firmly told Senator Fulbright that in the future as in the past, the President would make the decisions.²⁶

Professor Robert A. Dahl in his admirable book, *Congress and Foreign Policy*, published in 1950, states the three possibilities for administering our foreign affairs.²⁷ Only one of them is consistent with our constitutional precepts. And yet, it is that one that seems to have been rejected by the office of the chief executive, even if with the silent advice and consent of the Congress. Dahl put the choices this way:

The first is a frank dictatorship of the modern type: one based upon mass support and employing every technique of manipulating attitudes and personalities of the mass so as to achieve a society unified around a small range of common purposes, including war. Provided it has leadership of a high degree of rationality (as with the Politburo, for example) the dictatorship is a formidable enemy in international politics. For it then combines with its relatively high competence in selecting means a large measure of unity over ends and a very considerable capacity for intensive mobilization in behalf of a given policy.

²⁴ N.Y. Times, March 13, 1968, at 46, col. 5.

²⁵ *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 47 (1967).

²⁶ *Hearings on S. 3091 Before the Senate Comm. on Foreign Relations*, 90th Cong., 2d Sess., 134 (1967); N.Y. Times, March 13, 1968, at 14, col. 1.

²⁷ R. DAHL, *CONGRESS AND FOREIGN POLICY* 264 (1950).

The second alternative is a "democratic" regime with extensive executive discretion. One thinks here of the Weimar Republic in its final stages, of the proposals of General de Gaulle's followers for reforming the constitution of the Fourth Republic, and so on. In the United States, this solution would imply the broadest sort of presidential control over foreign policy.

The third alternative is a democratic regime under which executive policy rests upon the confidence of the legislative branch. In the United States this would imply a high degree of collaboration between executive and Congress in the formulation and conduct of foreign policy.

It is the recurrent theme of this book that the second of these alternatives — presidential supremacy — inevitably runs afoul of a number of difficulties that are eliminated or mitigated by executive-Congressional collaboration. And to the extent that the executive is capable of solving its problems without accepting Congressional collaboration, it must inescapably become more and more the democratic shadow of that first grim alternative.²⁸

Before leaving the area of foreign relations, let me get away for a moment from the hotly, if not wisely, debated Viet Nam issue, to point out the executive usurpation of Congressional authority in working out secret—or at least unapproved—agreements with foreign countries. The Constitution, it will be recalled, provides that treaties with foreign countries should be subjected to the advice and consent of the Senate, not merely a majority of the Senate but of two-thirds of the Senate.²⁹ Let me put aside the argument that action by a majority of both Houses of Congress is equivalent to approval by two-thirds of the Senate. That is not what the Constitution says, but for some reason or other we are always reminded that because it is a Constitution we are expounding we need not be concerned with what it says. The fact is that there are an untold number of what purport to be agreements between this country and foreign countries that have the approval neither of two-thirds of the Senate nor of a majority of both Houses of Congress.³⁰ Should the Constitution really be read to mean that by calling an agreement an executive agreement rather than a treaty, the obligation to secure Senate approval is dissolved? Maybe that would be wise policy. Henry Cabot Lodge and the League of Nations is always used to demonstrate the undesirability of the need for Senate approval of Presidential agreements. But if the safeguard of Senate approval is to be eliminated, let us have it eliminated by the only authority with power to do so. I would remind those who are concerned about a repetition of the rejection of Woodrow Wilson's League policy

²⁸ *Id.*

²⁹ U.S. CONST. art. II, § 2.

³⁰ See generally W. McCURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941).

that the same President had asserted it in connection with a principle of "open covenants openly arrived at."

What is true in the field of foreign relations, which for some at least has special qualities calling for executive power, happens also to be true these days in those other areas in which Congress was charged with responsibility by the Constitution. "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."³¹ So says the Constitution. And it also provided, as I have already stated, that "The Congress shall have Power . . . to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."³² The limitations on this power, insofar as they are explicit, are contained in the grant of a veto authority to the President—a grant made, incidentally, in article I, not article II;³³ in the restraints in the ninth and tenth amendments; and in the implicit, if dubious, power of judicial review vested in the courts of the United States.³⁴

When Woodrow Wilson wrote his book *Congressional Government* in 1895,³⁵ "he supposed," to quote Walter Lippmann, "that Congress was necessarily the central and predominant power in the American system."³⁶ By 1908 when Wilson wrote his *Constitutional Government in the United States*,³⁷ "the center of power had moved from one end of Pennsylvania Avenue to the other."³⁸ According to Lippmann, "[t]he fact is that at times the system works as he describes it in [the first] . . . book and at other times it works as he describes it in the second book."³⁹ Taking issue with Walter Lippmann is an audacious and probably erroneous step, as Presidents of the United States have been told by no less an authority than Lippmann himself. I would suggest, nevertheless, that the time has long since passed when the government of the United States could be described by the adjective "congressional." At least since 1932, the United States has been a "presidential government." It is so described by

³¹ U.S. CONST. art I, § 1.

³² *Id.* at § 8, cl. 18.

³³ *Id.* at § 7, cl. 2.

³⁴ See L. HAND, *THE BILL OF RIGHTS* (1958).

³⁵ W. WILSON, *CONGRESSIONAL GOVERNMENT* (Meridian ed. 1956) (introduction by Walter Lippmann).

³⁶ *Id.*, Introduction, at 1.

³⁷ W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908).

³⁸ WILSON, note 35 *supra*, Introduction, at 1.

³⁹ *Id.*, Introduction, at 8.

Professor Burns in his book of that title⁴⁰ and by Professor Koenig in *The Chief Executive*.⁴¹ It has been benignly described by Clinton Rossiter as a "constitutional dictatorship."⁴² And this permanent transfer of power has been applauded by Louis Heren (the *Times* of London correspondent who sees himself as a modern Lord Bryce) in his *The New American Commonwealth*, in these terms:

If a President cannot take his authority for granted, its bounds have been extended beyond the most improbable dreams of any early monarch. . . . [T]he main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than a diminution of his power. In comparative historical terms the United States has been moving steadily backward.

Indeed, the imperative of solving nationwide problems at the national level demands Presidential activism. It is the new kind of politics for the United States, and it is largely Presidential politics. Every problem seen, discovered, or rediscovered seems to require a further extension of Presidential power. It was no doubt historically inevitable because of the American political system. Only the comparatively sudden emergence of the King-President was a surprise, perhaps because of factors no less real because they are intangible.

If I have emphasized the recent extensions of Presidential power, it is not to suggest omnipotence. That, to say the least, would be misleading. What I do believe is that congressional government, as it flourished with occasional fluctuation from President Andrew Johnson to President Hoover, has had its day.⁴³

Even during the heyday of its powers, the period described by Woodrow Wilson in his first book, there was complaint that Congress limited itself to its legislative function. Thus, Wilson wrote:

It is not surprising, therefore, that the enacting, revising, tinkering, repealing of laws should engross the attention and engage the entire energy of such a body as Congress. It is, however, easy to see how it might be better employed; or, at least, how it might add others to this overshadowing function, to the infinite advantage of the government. Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion. There is no similar legislature in existence which is so shut up to the one business of law-making as is our Congress. As I have said, it in a way superintends administration by the exercise of semi-judicial powers of the investigation, whose limitations and insufficiency are manifest. But other national legislatures command administration and verify their name of "parli-

⁴⁰ J. BURNS, *PRESIDENTIAL GOVERNMENT* (1965).

⁴¹ L. KOENIG, *THE CHIEF EXECUTIVE* (1964).

⁴² See C. ROSSITER, *THE AMERICAN PRESIDENCY* 13 (1956).

⁴³ L. HEREN, *THE NEW AMERICAN COMMONWEALTH* 6, 19 (1968).

ments" by taking official acts into notoriety. Our extra-constitutional party conventions, short-lived and poor in power as they are, constitute our only machinery for that sort of control of the executive which consists in the award of personal rewards and punishments. This is the cardinal fact which differentiates Congress from the Chamber of Deputies and from Parliament, and which puts it beyond the reach of those eminently useful functions whose exercise would so raise it in usefulness and in dignity.⁴⁴

Instead of adding to its powers, however, Congress has forfeited its authority even over the legislative process that was once its primary function. The initiation of legislation has been surrendered by Congress to the executive. In fact, almost all that it retains is a veto power, a power to refuse to enact that which the President demands of it. Thus, the roles assigned by the Constitution with regard to legislation have been essentially reversed.

Let me show by example what I may not have been able to convey by simple statement. In the early days of the 90th Congress the country was plagued by what appeared to be an unresolvable transportation strike. There were many who believed that the solution was to be found in legislation. The problem of what that legislation should contain was indeed difficult, one that should have been a serious challenge to the Congress' legislative prowess. How then did Congress approach the problem? More or less the way Senator Javits—not a member of the President's party it should be noted—approached it, by complaining about the President's failure to submit promised legislation for Congressional action. When Javits spoke on the floor of the Senate he said this:

It is my considered judgment that the reason why we are where we are — to wit, without any adequate remedy in the law — as my beloved friend and colleague, the Senator from Oregon [Mr. Morse] has said, is that, in the opinion of the Attorney General there is no statute to take care of it. This is attributable to the fact that the President of the United States, notwithstanding that he promised it 2 years ago, has not to this hour submitted legislation which would give permanent protection to the public interest in the event of a work stoppage in a major industry.

No one appreciates more than I do the dilemma that faces the President of the United States. He has a very hard nut to crack.

. . . We have all found ourselves in a position where we have had to bail out the President from a situation in which he had placed himself, and us, by not recommending definitive legislation.

We are here, now, because the President has failed to act. It is somewhat our fault, too, but I think more of the responsibility is on the Presi-

⁴⁴ WILSON, note 35, *supra*, at 195.

dent's shoulders; he promised to send us legislation a long time ago, and he has not done so to this very day. . . .

It is uniquely the kind of situation where we are entitled to a recommendation from the executive department.⁴⁵

In one sense, Senator Javits, in shunting his authority over legislation to the President, was properly describing the world in which we live. Laws passed despite the lack of executive sponsorship, or contrary to executive wishes have little chance of being effected. For example, there has been much and bitter dispute about the way the armed forces of the United States should be equipped. In the famous B-70 controversy, Congress sought to command the expenditure of moneys that it appropriated for the construction of these super-planes. The executive successfully argued that such directions from Congress would be a violation of the separation of powers, the invasion of a presidential prerogative under the Constitution! Similar events occurred with reference to aircraft carriers and helicopters. (The administration didn't see the helicopter as a useful machine for war action.) It is little wonder that when Admiral Rickover came before the Congress to testify on the question of atomic powered ships, he could ask and answer this question:

Does Congress any longer have anything to say about how the defense of this country is run? Apparently the Department of Defense is operating on the basis that you have abdicated that responsibility, that it is now rightfully theirs.⁴⁶

Moreover, when legislation of an important nature is passed, it is generally in such broad terms that its effective meaning will depend on the inclinations of those charged with its enforcement rather than on the will or intent of the Congress of the United States. Just read the major legislative actions of Congress in recent years and, except for a few provisions relating to money, none of the major acts are any less broad in their delegation of responsibility than was the National Industrial Recovery Act that the Supreme Court unanimously condemned in the now forgotten and unlamented *Schechter* case.⁴⁷ (If anyone wonders about the subsequent history of the doctrine established in *Schechter* and *Panama Refining*,⁴⁸ I can authoritatively state that it has been returned to the limbo from which it was drawn.)

⁴⁵ 113 CONG. REC. 6095-96 (1967) (remarks of Senator Javits).

⁴⁶ *Hearings on Naval Nuclear Propulsion Program Before the Joint Comm. on Atomic Energy*, 90th Cong., 1st & 2d Sess., 113 (1967).

⁴⁷ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁴⁸ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

Nor is the executive limited in his legislative powers—nowhere to be found in the Constitution—to the introduction of legislation through Congress. Just as the President can avoid the necessity for Senate approval of treaties by signing documents called executive agreements, so too he may legislate for himself by other devices than Congressional action. Two prime means are the executive order, of ancient lineage, and a more modern device, the promulgation of so-called guidelines.

An examination of the multitude of executive orders will reveal four categories. There are some, essentially those following the original purpose for such orders, that are concerned with internal administration of executive departments. Then there are those that are promulgated pursuant to authorizing legislation. But there are those that purport to be based on legislation that really are not so warranted. And also those that do not have even the pretense of congressional authority. Only if and when these come before the judiciary for examination, as in the famous *Steel Seizure Case*,⁴⁹ do they lack the force of law. An interesting book remains to be written on this form of presidential legislation. The political scientists and academic lawyers have not been prone to launch an attack on rules that, for the most part, they admire.

The more modern and more interesting form of executive legislation are the so-called guidelines. Here again there are different kinds. The first is exemplified by the price-wage guidelines of recent memory,⁵⁰ based on no congressional warrant whatsoever and, indeed, probably in contradiction of congressional decision to leave prices and wages unregulated. The second type is found in the guidelines promulgated by the Department of Health, Education, and Welfare to effect desegregation in the public schools.⁵¹ Congress authorized these to be issued, but only if they were approved by the President himself.⁵² In fact, the evidence reveals that they have been issued by subordinate action of the very kind that Congress sought to preclude. But the most interesting aspect of guidelines is their means of enforcement. For here, what was once regarded as an essentially legislative power is used: the power of the purse. Thus, steel companies that violated the price guidelines suddenly discovered that their product would not be purchased by their biggest customer, the government of the United States, unless and until they conformed with the execu-

⁴⁹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁵⁰ 55 L.R.R.M. 89-93 (1964).

⁵¹ 45 C.F.R. § 180 (1967).

⁵² 42 U.S.C. § 2000d-1 (1964).

tive ukase. Similarly, school systems that fail to toe the HEW guidelines find their federal funds cut off or postponed. The power of the purse here, as elsewhere, is utilized by the executive branch as a means of enforcement of rules that it creates for itself whether with or without congressional sanction.

When we turn from the process of legislation itself to the process of Congressional oversight, we find the same sorry spectacle. The essential argument used for the proposition that Congress must legislate in generalities is that government has become too complex to be governed by rigid legislative rules. A corollary of this proposition is that Congress can oversee the administration of the laws to assure that its policies are, in fact, being executed. Again the theories do not square with the facts. Generally, but not universally, Congressional oversight is more a myth than a reality. The best example of effective Congressional oversight is to be found in the annual reviews of tax legislation and the way that it is being enforced by a joint committee of both Houses.⁵³ The staff appears to be competent to the job of scrutinizing administrative rulings and judicial decisions to determine whether the tax laws are being effected in accordance with the purposes behind their enactments. And Congressional revision of the tax code, which may be the bane of tax professors and law students, would suggest, to a non-tax lawyer at least, that the oversight is real.

More typical, unfortunately, was the provision in the Taft-Hartley Act for a joint committee to study and investigate labor-management relations.⁵⁴ The legislation called for a final report of the committee by January 2, 1949.⁵⁵ But, except for the surveillance that the courts impose, since 1949 there has been no realistic legislative review of the administration of this important congressional legislation.⁵⁶ Judicial scrutiny and Congressional scrutiny do not amount to the same thing. Indeed, most important congressional legislation, once it receives presidential approval, is likely to fall totally beyond the ken of Congress except in terms of ap-

⁵³ See 28 U.S.C. §§ 8001-23 (1964).

⁵⁴ Labor-Management Relations Act of 1947, Pub. L. No. 80-101, §§ 401-07, 61 Stat. 160.

⁵⁵ *Final Report on the Joint Congressional Comm. on the Taft Act*, 24 L.R.R.M. 36 (1949); *First Report of the Joint Congressional Comm. on the Taft Act*, 21 L.R.R.M. 35 (1948).

⁵⁶ But see the recent hearings on the NLRB's administration of labor legislation before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 114 CONG. REC. 420 (daily ed. May 10, 1968).

propriations bills. And that mysterious process is not an effective means of control or, rather, it has not been effectively used as a means of control.

Structural changes for congressional oversight are necessary but not sufficient conditions of improvement. Several proposals are pending in Congress including one that calls for a counsel general's office within Congress effectively to supervise the administrative and judicial constructions given congressional legislation.⁵⁷ Judge Henry Friendly has suggested another method:

Is there then nothing that can be accomplished? Ultimately the answer must lie with Congress. As Mr. Justice Jackson wisely said, "We may say that power to legislate . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." Could not Congress be persuaded to amend the Legislative Reorganization Act so that each standing committee would be charged not only with the vague mandate to "exercise continuous watchfulness" but with the obligation to render a comprehensive report every ten or fifteen years on each major piece of legislation subject to its jurisdiction, either with specific proposals for amendment or with a considered statement that none is required? It would be provided or at least understood that any such report would be preceded by a true investigation — not the superficial sort I have depicted, but a thorough and searching inquiry, preferably conducted with the aid of private research organizations, and with publicity withheld at least until tentative conclusions had been formulated.⁵⁸

Of the investigative role of the United States Congress, I shall say little. Essentially it has been perverted by one or two Congressional committees in such a way as to bring the entire process under opprobrium. Congress has not created effective means for pursuing its investigative functions. Until it establishes for all its committees that minimal decency that is of the essence of due process of law, Congress will find that even the best of them fails to persuade the public or, indeed, to enlighten the Congress.

This is the sorry state to which Congress has been reduced. Its legislative power has been all but restricted to a veto function. Its duty of oversight has been mostly ignored. Its obligation to investigate has been destroyed by its own not very amusing spectacles, of which the House Committee on Un-American Activities is the worst example. Congress might well choose to put on the facade of the literally crumbling capitol the

⁵⁷ *E.g.*, H. 5391, 90th Cong., 1st Sess. (1967).

⁵⁸ H. FRIENDLY, BENCHMARKS 131-32 (1967).

words: "The fault, dear Brutus, lies not in the stars, but in ourselves, that we are underlings."⁵⁹

Why has Congress failed? The reasons are too many and too complicated even to catalogue here. Let me suggest a few general observations. First, our legislators are too occupied with unimportant matters to be able to devote their attention fully to important ones. There is the visiting constituent to be seen. There are numerous requests for dispensation of the executive power that Congress has delegated, resulting not only in a loss of time but in the creation of a debt to the particular governmental agency involved. The number of private bills enacted is nothing short of shocking.⁶⁰ For many, especially members of the House of Representatives, the job is only a part-time job. Congress is both understaffed and improperly staffed. While the executive has learned the lesson of securing experts to assist it in its job, Congress but rarely calls to its aid such expertise as is available, except perhaps in the dubious role of a witness before a congressional committee. Certainly Congress is badly organized to perform its task. And yet no reorganization bill of substantial merit has the slightest chance of passing both Houses of Congress. The perquisites of office under the existing system are too great to dissolve them in the absence of Herculean efforts that are not forthcoming.

Most important, perhaps, is the fact that Congress never adequately decides what it really wants. And it is going to have to do so if its legislative and oversight functions are to be effective. In terms of the latter, Professor James Q. Wilson put it this way:

Both the White House and the Congress seem eager to do something about the bureaueracy problem. All too often, however, the problem is described in terms of "digesting" the "glut" of new federal programs — as if solving administrative difficulties had something in common with treating heartburn. Perhaps those seriously concerned with this issue will put themselves on notice that they ought not to begin with the pain and reach for some administrative bicarbonate of soda; they ought instead to begin with what was swallowed and ask whether an emetic is necessary. *Coping with the bureaucracy problem is inseparable from rethinking the objectives of the programs in question.* Administrative reshuffling, budgetary cuts (or budgetary increases), and congressional investigation of lower-level boondoggling will not suffice and are likely, unless there are some happy accidents, to make matters worse. Thinking clearly about goals is a tough assignment for a political system that has been held together in great part by compromise, ambiguity, and contradiction. And if a choice

⁵⁹ SHAKESPEARE, JULIUS CAESAR, Act I, scene 2, lines 140-41.

⁶⁰ In the 89th Congress, 24,003 bills were introduced; 810 public and 473 private bills were enacted. STATISTICAL ABSTRACT 374 (1967).

must be made, any reasonable person would, I think, prefer the system to the clarity. But now that we have decided to intervene in such a wide range of human affairs, perhaps we ought to reassess that particular trade-off.⁶¹

There are reasons, of course, outside the derelictions of Congress itself. The political cartoons recognize that Congress does not have the stature that its constitutionally defined job demands. In part, this is due to the inadequate use of Madison Avenue techniques that are the everyday life of other branches of government. The Presidential Press Secretary and even departmental press officers are intrinsic parts of these governmental offices. Their function, as Pierre Salinger's book documents, is the creation of the proper image of their bosses.⁶² They are not always successful. But it is not for want of effort. Even the Supreme Court has a press relations officer these days. Except for those Senators concerned with establishing themselves as candidates for the Presidency, there is no equivalent effort spent on selling Congress to the people of the United States.

Another reason, especially with regard to the House of Representatives, is that congressmen often run for office as tails to the kite of presidential candidates. And the test for nomination is not so often the special capacities of the individual to do the job as the services that he has rendered and is likely to render to the party organizations.

Ultimately, however, the fault lies with the people: Adlai Stevenson's phrase rings loud and true: the American people get the kind of government they deserve. The essential difficulty is that the people—and each segment of them—tend to be concerned with ends rather than means. Those who suggest a look at institutional values as a method of protection against tyranny are scorned as being concerned with a "literary theory" rather than facts. It is with pained surprise that a group that so blatantly looked upon the presidency as its knight errant suddenly discovered that the man under the iron mask is not really their kind of man at all. And yet, here he is outfitted with all the weapons and powers that they had entrusted to their own champion.

We are at a time when, for good reasons or bad, the primacy of executive power is being questioned even by those who would when their leader held office, have expanded it beyond its present range. Perhaps it is an appropriate time to consider whether these powers should be en-

⁶¹ Wilson, *The Bureaucracy Problem*, THE PUBLIC INTEREST 9 (Winter 1967).

⁶² See P. SALINGER, WITH KENNEDY (1966).

trusted even to the idealized, God-like leader of one's own choice. Perhaps we should be reminded of the words of Mr. Justice Jackson: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."⁶³

Perhaps a new generation will find value in the discredited concept of separation of powers and restore Congress to a vigorous role in an ever-expanding government. And perhaps they will people it, both its membership and its staff, with the kind of person that is adequate to so important a trust. As of now, however, Congress does not have the guts to stand up to its responsibilities. And the American electorate does not have the interest to see that Congress does so. The failure of Congress is the failure of democracy. The alternatives are not pleasant to contemplate.

⁶³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).