

CONGRESS AND THE PRESIDENCY
OR
NOW, WHAT SHALL WE DO WITH CONGRESS?

The broad Constitutional powers of the Federal legislature have remained essentially unchallenged and unmodified since the founding of the Republic. The Congress of the United States does today--on a broader scale--what it did 200 years ago.

The Executive Branch of the Federal Government today bears little resemblance to the structure first established to execute the laws of the United States. With each passing decade the Executive structure has steadily expanded both the scope of its operations and the size of its programs. Its expansion has mirrored the growth of the Nation, with extraordinary acceleration in times of emergency.

Through^{out} our history there has been a persistent struggle between the Congress and the President over the control of national policy. At times the contest is hardly noticeable, when the President and Congress appear to be joined together in pursuit of common objectives, such as in the wake of a landslide Presidential election or when the nation is faced with a serious threat from abroad. At other times, particularly when the chief executive is at odds with the majority party in one or both houses of Congress, the struggle is clearly evident in all transactions between the two branches.

Our subject today does not embrace the role of the Federal Judiciary, so I shall mention that branch only by way of saying that--whatever we may think of specific Supreme Court decisions or

the manner in which the judiciary appears to be intruding into our day-to-day lives--the relations between the Congress and the President have been little affected by the Federal Judiciary. The Court has indeed served to clarify Constitutional questions, some of major importance, but generally the President and the Congress have managed to carry on their battles with remarkably few encounters in court.

One of the most fascinating recent exceptions, of course, was the spectacular confrontation over the White House Watergate tapes in which case the President's claim of executive privilege was denied by the Supreme Court. Even in this case, however, it was not the Congress bringing the action, but rather the Special Prosecutor Congressional interest in the matter was held in abeyance pending the outcome of the criminal investigation.

To insure that neither the executive nor the legislative power would go unchecked, the founding fathers established a system requiring a substantial degree of cooperation on both sides. Specific devices were created to compel cooperation if either branch hoped to function effectively.

- Congress can only enact the laws, not administer them
- The President makes all appointments to executive agencies, but only under specific conditions prescribed by Congress, including the requirement of Senate confirmation in some cases.
- The President is Commander-in-Chief of the armed forces,

but Congress is empowered to raise and support the armed forces as well as to establish rules and regulations to govern them.

The President conducts foreign policy, but subject to Congressional approval of diplomatic appointments and fiscal controls as well as the power to declare war.

The President appoints federal judges but only with the approval of the Senate; and the full Congress controls the establishment and composition and jurisdiction of federal courts other than the Supreme Court.

Interestingly, the President has the sole power of pardon for Federal crimes; except in the case of impeachment. (Presumably, if President Nixon had been impeached, instead of resigning from office before impeachment was voted, President Ford could not have pardoned him.)

One of the most widely advertised ~~presidential~~ powers ^{of the Pres} today is that of withholding his signature from legislative enactments, thus requiring a two-thirds majority approval in each House of Congress before such enactments can become law. This "veto" power is one of the chief sources of Executive influence in the shaping of legislation, and is especially important to a President whose party does not control the Congress.

These so-called "checking" devices all contribute to the effective

balancing of powers between the Congress and the President. And this balancing effect is the real genius of the American system of Constitutional democracy.

By far the most important balancing ingredient over the years has been the explicit and sweeping Constitutional power of the legislature to authorize almost all operations of the executive branch and to maintain absolute control of all money appropriated from the public treasury. As a practical matter, the powers of the chief executive are largely subject to the will of the legislature with the exception of certain emergency powers vested in the President by the Constitution, largely relating to the conduct of war and the exercise of his duties as Commander in Chief. Sometimes these are referred to as "inherent war powers." There is another form of Executive emergency authority which might be termed "extra Constitutional," or even "unconstitutional," which comes under the heading of martial law. This area is fraught with difficulties from a Constitutional standpoint because Constitutional authorities have failed to reach agreement on any precise definition of martial law and court cases generally have been inclusive.

The President also has been vested with a wide range of emergency powers through Legislative enactments. Among the most notable presently operative are the National Security Act of 1949, as amended the Defense Production Act of 1950, and the Federal Civil Defense Act of 1950, as amended.

Generally, a healthy Legislative-Executive balance has been maintained in the United States except for a few wartime excesses

on each side. There have been occasions when the President has exercised powers not granted by either the Constitution or by the Congress. These would include such things as President Lincoln's Emancipation Proclamation and President Roosevelt's actions in aiding the British against the Germans prior to the formal entry of the United States into World War II, notably the exchange of fifty U.S. destroyers for the use of British bases in the British West Indies. Many others could be cited.

Congress for its part from time to time has overstepped the bounds by interfering with the Commander-in-Chief's functions. The most notorious example of this probably was the creation of the Select Committee on the Conduct of the War, which attempted to dictate military strategy and tactics during the Civil War.

Occasionally both the Executive and the Legislature have joined forces in the performance of unconstitutional actions. An example being the internment of Japanese-Americans living on the West Coast at the outbreak of World War II.

But aside from these general exceptions to the rule, the American system has functioned remarkably well in carrying out essential emergency or wartime activities without destroying the essence of the Constitutional system, which is democratic control. Perhaps the most challenging aspect of emergency functions of government is the need for secrecy. In fact, national security is the only justification Americans have been willing to accept for the imposition of secrecy in the conduct of public affairs. Even the secrecy accepted in international diplomacy derives from the fact that such diplomacy relates to the military security of the United States.

The requirements of democratic control of Executive branch activities, even in areas involving sensitive national security matters, have generally been met by an absolute assurance that all Executive branch activities have been open to the scrutiny of Congress in one form or another. It has been assumed that the popularly elected members of the Legislature would function as the agents of the people in areas where activities are shielded from the public-at-large. The system thus far has had a remarkable degree of success. Even the Central Intelligence Agency has had a Congressional Watchdog Committee in each house of Congress. Moreover, all secret agencies of the government; both military and civilian, have been subject to review by the Appropriations subcommittees in each House. In spite of the immunity which J. Edgar Hoover acquired for the FBI, even that agency theoretically has been subject to review by the Judiciary and Appropriations Committees in both Houses.

The breakdown of controls which we have learned of only recently should not be taken to mean that the system in general has not been remarkably successful. The first rupture in the Watergate cover-up came when the President had difficulty in controlling the CIA for illegal purposes. The fact that Congress eventually discovered the wrongdoings in the CIA as well as the misdeeds of the FBI serves to underscore the importance of the Congressional oversight function.

It is still up to the Congress to prescribe by law the functions of all secret agencies of the Government and it is up to the Congress to establish the appropriate safeguards for the operations of these agencies.

If time permits, perhaps you would want to talk about these later in the meeting. There are very interesting matters relating to the appropriation of funds to support secret operations and the hiding of operating funds within the budgets of non-secret agencies of the government. The Congress has ways of monitoring these activities through ad-hoc arrangements.

For approximately three quarters of our history Congress and the President carried out their balancing act under essentially unchanged ground rules. In fact, until fairly recent years the Congress has attempted to function largely as it did in the early years of the republic. While the executive bureaucracy grew steadily larger and vastly more complex, the Congress tended to cling to its traditional methods and procedures. Until about 50 years ago the Congress was practically the same as the original version, and only during the past thirty years has Congress undergone any major adjustments in its way of conducting its affairs.

The first major step taken by the Congress to equip itself to deal with the complexities of modern government was the enactment of the Budget and Accounting Act of 1921, which centralized the appropriation powers in each House and established a Budget Bureau (initially placed in the Treasury Department) as a means of coordinating the budget process for the entire Federal Government.

Other changes in Congressional organization have come about since World War II, most of these coming just in the past few years.

The Legislative Reorganization Act of 1946 rearranged and streamlined the committees of both Houses, established a Legislative

Research Service (now known as the Congressional Research Office), and strengthened the investigative and oversight operations of the Congress, including the operations of the General Accounting Office.

More recently established instruments of Congressional policy control deal with technology (the Office of Technology Assessment in 1972) and budgetary matters (the Senate and House Budget Committees and the Congressional Budget office in 1974).

For most of its history Congress has been content to rely on the Executive bureaucracy for technical assistance and advice as it has carried on its struggle with the President for the control of national policy. Its late move toward self-sufficiency in this respect has come at a time when the President has transformed the budget review process into an instrument of close presidential policy control. Accidentally or otherwise the conversion of the former Budget Bureau into the key Office of Management and Budget has led to a progressive insulation of Congress from budget initiatives and policy planning in the Executive Branch. Although the Congress has lost none of its power to approve the use of Federal money, it simply does not have the easy access to executive information which it enjoyed under previous informal arrangements.

In this connection, it is significant that the major Congressional budgetary machinery has been created just during the past two years, and the size of Congressional staffing has more than doubled during the past seven years while the Congress and the Presidency have been controlled by different political parties. In the past fiscal year the budget for the legislative branch reached approximately a billion

dollars, compared with \$330 million in 1970 and only 200 million in 1960.

On the Executive side, the President has relied heavily on established "checking" devices in recent years. In addition, since the election of a Republican president and a Democratic Congress in 1968, the President has sought to insulate himself from Congressional control by blunting some of the legislative checks.

Explain.

- o Expansion of top policy position not subject to Senate confirmation.
- o Decision making inside the White House and other Executive Office agencies.
- o White House lobbying staff; 250 public relations personnel.
- o Impoundment of appropriated funds. (Common-sense reasons for not spending all money appropriated.) FDR and Truman selectively. Nixon on wholesale scale. 74 cases in court in 1973.
- o In foreign policy: Presidential "agreements" instead of formal treaties requiring Senate ratification.

Congress has responded with counter moves of its own:

- o Legislative vetoes: Requiring certain regulations or actions of Executive to be reviewed by one or more Houses or committees. A few vetoes established between 1932 to 1968. Now 295 in effect.

- o Enactment of Congressional Budget and Impoundment Control Act of 1974.
- o Reduced funds for unauthorized White House staff positions. Last June \$22.5 million was knocked out on House floor on point of order (Rep. Dingell).
- o Revocation of emergency Presidential Powers (2-year limitation imposed).

Today we have a struggle going on between a highly organized White House staff and associated agencies on the one hand, and ^{or the other} a Congress with vastly expanded Committee staffs and enlarged staff agencies, the most recently created ones being those directly involved in the budget making and appropriations process.

Generally speaking this new legislative machinery has not yet been involved in a complete budget cycle, so it is too early to measure its value or meaning. The creation of this machinery, however, appears to signify that the legislative branch intends to establish its own independent capability to deal with the key budget issues and related policy matters.

Note: The functions of Congress have not changed: Authorization
Appropriation
Investigation

But the staff support system appears to have been fundamentally overhauled. Only time will tell whether the old adage, "The President proposes and the Congress disposes" still applies, or whether the

Congress has now organized and equipped itself to take the initiative in domestic policy formulation.

CONCLUSION

What of the future? Are we to conclude that Legislative-Executive deadlock is inevitable? Does such a possibility pose a threat to our system of government or our ability to govern ourselves?

In general, I believe that Congress and the President will always be in competition with each other and that the struggle will be moderated by the commitment of the American people to the democratic process. The Constitutional framework and American public opinion together will shape the future relationship of Congress and the President.

It is clear that the framers of our Constitution never envisioned the kind of national government which we have today. Indeed, it is a fair assumption that the Founding Fathers never even agreed among themselves as to the kind of government we should have. At most, they appear to have reached agreement only on the kind of government they did not want. To their credit--and our continuing benefit--they had the genius to establish a system which would enable both the legislative and executive powers to be effectively exercised within the constraints of democratic control and with assurance that neither power could escape the influence and control of the other. Thus far, in my judgment, this has been our nation's chief contribution to the survival and growth of constitutional democracy.

Summary

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NOW, WHAT SHALL WE DO WITH CONGRESS?

The speaker reviewed the broad Constitutional powers of the U.S. Congress and the President and noted that throughout our history there has been a persistent struggle between the two for the control of national policy. He noted that the struggle may take different forms from time to time depending upon political conditions, but that the contest continues regardless of political parties and other considerations.

He noted that except for isolated instances the Federal Judiciary generally does not become involved in the main contest between the President and the Congress.

The Constitutional system of checks and balances was outlined briefly, noting that the system works because each branch requires the cooperation of the other in order to function properly. For example, Congress enacts the laws, but cannot execute them. The President makes appointments to executive agencies, but only under conditions prescribed by Congress and sometimes with the requirement of Senate confirmation. The President is Commander-in-Chief of the armed forces, but Congress is empowered to raise and support the armed forces as well as to establish rules and regulations to govern them. Various other checks and balances were enumerated.

Several examples of either the President or the Congress carrying out functions not authorized by the Constitution were cited and generally noted as exceptions to the rule and possible only under extraordinary circumstances. The subject of emergency Presidential powers was touched upon as was the issue of national security, secrecy requirements and the problems posed thereby.

The speaker described the ways in which the Congress and the President have attempted to gain a degree of independence from each other and the counter moves prompted by each successful effort. It was noted that the bureaucracy of the Legislative branch has grown rather substantially in the past twenty-five years and especially in the past eight years during which time the White House and Congress were controlled by different political parties. During this period Congress has attempted to develop its own machinery for the consideration of fiscal as well as technological matters whereas in prior years Congress relied upon the Executive Branch to furnish whatever information of this type it might require.

The speaker expressed his belief that Congress and the President will always be in competition with each other and the struggle will be moderated by the commitment of the people to the democratic process. The Constitutional framework and American public opinion together will shape the future relationship of Congress and the President. He noted that the Founding Fathers had the genius to establish a system which would enable both the Legislative and Executive powers to be effectively exercised within the constraints of democratic control and with assurance

that neither power could escape the influence and control of the other.