

President *AND CONGRESS*


B Y

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WENDELL, LOWELL,
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PREFACE

I AM convinced that we can never make any sense out of the perplexing problems of the presidency and its relation to the Congress unless we first ascertain precisely what our experience has been with these governmental institutions.

Surely now after more than a century and a half of experience with the functioning of the federal government the time has arrived for a comprehensive survey of the presidency and a frank appraisal of that great office in its relation to the Congress. This ought to dispel some popular delusions and put to rest a great deal of loose chatter as to what is what and what is not constitutional, as well as what the fathers did or did not establish as to the presidency.

I had not suspected before I began the investigation of this subject the remarkable extent to which our major political parties have aligned themselves on opposite sides of the controversy regarding presidential leadership. No sooner had universal, white manhood suffrage been established and Jackson elected President than the masses turned to the President as a tribune of the people. The party that attracts the underprivileged has maintained this tradition now for more than a century.

Meanwhile Whig and Republican leaders have been only a little more critical of Democratic "tribunes" than of Presidents of their own party who essayed that role. Historically Republican party philosophy stresses the Congressional check of the Executive and views with jealous eye any pronounced shift of the center of gravity in the government to the President. Republican Congresses have been almost, if not altogether as severe in denouncing the "usurpations" of Abraham Lincoln and Theodore Roosevelt as they were in decrying Grover Cleveland, Woodrow Wilson, and Franklin Roosevelt, indeed any Chief Executive who essays vigorous leadership.

This book is a revision of my *Powers of the President* that

extends to every chapter. Clarifying passages have been introduced at changes of administrations, at the beginning of major movements in American history, and indeed wherever they might help the reader to understand the setting of presidential or congressional developments in our political history. New interpretations of the theme of this work are included, and errors have been corrected. The years since the first edition have been covered, and a chapter on the presidency in the Second World War added.

I always considered the title of the first edition, *The Powers of the President*, a misnomer. Typographical considerations had led to its substitution for a longer but more accurate title of my own. It is gratifying to have this new and revised edition published under a more appropriate title.

WILFRED E. BINKLEY

A NOTE ON THE TYPE

The text of this book is set in Caledonia, a Linotype face which belongs to the family of printing types called "modern face" by printers — a term used to mark the change in style of type-letters that occurred about 1800. Caledonia borders on the general design of Scotch Modern, but is more freely drawn than that letter.

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CHAPTER I
THE PROBLEM IN THE CONSTITUTIONAL
CONVENTION



How Shall the Executive Be Related to the Legislature?

How to adjust the relationship of the Executive to the legislature was an old American problem when the Fathers convened at Philadelphia in 1787. The framers of the Constitution did not have to cross the sea to find models for a national government. These were close at hand in the governments of the thirteen states that had so recently made the transition from colonies. John Adams, who knew more about such matters than any of his contemporaries, even went so far as to say that it was from the constitutions of Massachusetts, New York, and Maryland that the Constitution of the United States was afterwards almost entirely drawn. Most of the others, of course, contributed something and none of them represented a sharp break with the government of the colony from which it had evolved.

The Executive had got off to a bad start in our earliest history. Except in the charter colonies of Rhode Island and Connecticut, where the governor was the choice of the electorate, it was impossible for the office to be a popular one. The position of the royal governor was consequently particularly trying. An agent of the Crown, he was under almost constant pressure from the landed and commercial groups in England to prevent colonial action deemed disadvantageous to their interests. For one thing, the persistent scarcity of a circulating medium in the colonies and the consequent low price of produce made inflationists out of a majority of the colonists. Their demands for paper money were urged with the intense feel-

ing which has characterized monetary controversies in every age. This pressure was resisted by the Crown authorities, and the royal governor, being in the Crown's first line of defense, bore the brunt of battle and incurred the odium of frustrating the desires of the colonists.¹ The fact that the governor almost always was from England, that he frequently did not even come to America, that he seldom had a sympathetic understanding of the problems of the colonists and was, moreover, often a court favorite, ill adapted for the duties of his office and mostly concerned with the feathering of his nest, all contributed to the bringing of the executive branch of the colonial government into pronounced disrepute almost from the very beginning.

The legislature, on the other hand, from the earliest times, had been cast for a popular role. The assemblyman, chosen by popular election as a representative of his neighborhood, which was in most cases strictly agrarian, set forth to the provincial capital, commissioned, as he believed, to fight the people's battle against the governor. He was encouraged to go as far as possible in checking the Executive and thereby exalting the people's organ, the legislature. What if the governor did veto enactments? They were frequently put into effect pending the obtaining of the assent of the Crown authority in England, and if the governor was sustained, sometimes the legislation was re-enacted, perhaps in a slightly altered form, England, and if the governor was sustained, sometimes the requirement of the charters that *their acts* of the legislature be submitted to the assent of Crown was circumvented by the use of "votes or orders even to the repealing the effects of acts, suspending the establishment of pay, paying services, doing chancery and other judicatory business."² Thus the Crown was ignored and the colonial executive disregarded.

The colonial legislature went to great lengths to curb the colonial executive by the creation of commissions for the per-

¹ See E. B. Green, *The Provincial Governor*, Harvard Historical Studies, VIII, p. 163.

² Governor Pownall, "The Administration of the Colonies," p. 47, quoted in Allen Johnson, *Readings in American Constitutional History*, p. 29.

formance of administrative functions. Through the jealous guardianship of the colonial purse it decisively reduced the governor's control of administration. Appropriations were often made in minute detail with the most meticulous provisions as to the purposes for which expenditures were to be made and executive discretion was reduced to a minimum. By 1757 it could be said of Massachusetts that "almost every act of executive and legislative power, whether it be political, judicial, or military, is ordered and directed by the votes and resolves of the General Court (the Legislature) in most cases originating in the House of Representatives."³ When a governor of New York asked for fixed revenue for five years the legislature demanded the right to appoint every officer to be paid from the appropriation. Proroguing the legislature, the governor wrote home that the members had taken to themselves "the sole power of rewarding all services and in effect the nomination to all offices, by granting the salary annually, not to the office, but by name to the person in office."⁴

Even before the American Revolution had reached the stage of an appeal to arms the legislature had attained a position of practical sovereignty and had reduced the colonial governor to the necessity of begging at its door for needed appropriations. The last few years of the Colonial Era found the governors engaged in the hopeless task of attempting to maintain the authority of the Crown in the face of the rising tide of colonial discontent. When at last their offices had become utterly untenable and they were forced to flee we may say that the executive as a branch of government in America had reached its nadir. The popularly-elected assemblies, however, remained in triumphant control of the governments of the thirteen emerging states. No wonder Locke's political philosophy, with its doctrine of legislative supremacy, was widely read and implicitly accepted by the Revolutionary patriots. Here were the doctrines by which they rationalized the accomplished facts of government in America.

³ "Board of Trade to Gov. Pownall," cited by E. B. Green, *op. cit.*, VIII, p. 194.

⁴ Quoted in Beard and Beard, *Rise of American Civilization*, I, p. 117.

Thus the evolution of the independent American state began at a time when the executive branch was suffering from the deepest degradation and the very word "governor" had become almost an expression of reproach. One Massachusetts town during the Revolution voted, "that it is Our Opininn that we do not want any Goviner but the Guiviner of the universe and under him a States General to Consult with the wrest of the united stats for the good of the whole."⁵ Several of the states even abandoned the term "governor" as the title of the chief executive and introduced instead that of "President." It might have been expected that the opprobrium attaching to the office would have been readily attributed to the fact that the officer had been a representative of the Crown and now that the executive had become an agent of the people he would be regarded differently. Mere words, however, gradually accumulate the power to evoke powerful emotional reactions and do not suddenly lose it. There was no reasoning about the matter. The governor was reduced to a titular head, a mere "cipher," in most states during the Revolutionary period. Accordingly by most state constitutions he was permitted no veto power and was chosen by the legislature, whose obedient servant he then necessarily became. It was no mere accident that in the government of the Union by the Continental Congress and under the Articles of Confederation there was no executive organ established distinct from the Congress. The colonial merchants who had sought freedom of trade, and had combined with the agrarian inflationists for the purpose of revolution, had achieved their heart's desire in one respect but, alas, they had lost it in another. Now the authority of the Crown was gone and there was no executive power anywhere to exercise the desired check on the issue of paper money, the enactment of bankruptcy laws, and the declaring of moratoria on the payment of debts. No power now could deny legislation facilitating the sale and settlement of Western land. Interstate and foreign trade were even under the control of the state legislatures.

The treaty of peace negotiated at the end of the Revolu-

⁵ Quoted in W. M. West, *American History and Government*, p. 228n.

tionary War had not yet been signed when it became apparent to many patriots that the long-sought-for consummation of independence now attained was in reality not proving to be an altogether happy one. There were marked disadvantages in omnipotent state legislatures. The central governments of the Continental Congress and the Congress of the Confederation had turned out to be scarcely governments at all. They were little more than makeshifts for obtaining collective action among the states, somewhat effective during the war but utterly inadequate in a period of peace. The Articles of Confederation, indeed, did little if any more than convert the *de facto* government of the Continental Congress into a *de jure* government. It is difficult to find in the Articles of Confederation a single power Congress had not already been exercising for years. These powers, however, did not consist of the making of laws in the sense that a law is a rule of conduct commanding what is right and forbidding what is wrong. Congress could enact no statute that any private person was thereby obligated to obey. Consequently no separate Executive was ever set up under the Articles. It fell to the lot of the Philadelphia Constitutional Convention to create a national executive *de novo*.

The cleavage of economic interests presently became apparent between the proponents and opponents of the government of the Confederation. The grain-growing agrarians and the frontiersmen were usually relatively well satisfied with the Confederation and the "sovereign" state legislatures that gave them what they wanted, such as legislation acceptable to the debtor classes. Merchants, however, were becoming deeply distressed over the difficulty of collecting obligations due them, the chaos of conflicting trade regulations among the states, and the serious need of a commercial treaty with England. That country was refusing to negotiate with the feeble Confederation and threatened to open diplomatic relations with the separate thirteen states. Holders of Continental securities were dissatisfied with the slowly disintegrating and utterly insolvent government of the Confederation, as were also the unpaid officers and soldiers of the now dis-

banded Revolutionary army. Speculators wanted an opportunity at Western lands. Here was a powerful array of interests soon to be welded into a compact group and destined in time to make a determined drive against the omnipotent state legislatures. There were those among them who must have recalled almost fondly the time when creditors were protected by Parliament and Crown against the reprisals of the debtor class in control of the provincial assemblies. British authority was, of course, now gone forever, but might not a somewhat similar central authority be established in America, capable of protecting their interests against the agrarians? A central American government, sufficiently strong, might yet hold in check the state legislatures and make the country safe for business.

By and large it was these interests bent upon strengthening the central government that provided most of the delegates from the dozen states represented at Philadelphia. Exceptionally significant is the fact that thirty-five of the thirty-nine signers of the finished Constitution were to be found living adjacent to salt water. Lesser agrarians and frontiersmen were conspicuously absent from the delegations, which meant that the protests of the chief opponents of a strong Executive would not be heard in the debates of the Convention. To these earnest men the very term "Executive" conjured up a specter of tyranny incarnate in the person of King George. Only somewhat less odious was a central legislature endowed with broad specific powers in marked contrast with the provisions of the Articles of Confederation. So when the publication of the new Constitution eventually revealed that such powers were to be vested in the new federal legislature the cry arose, "We did not dethrone King George only to enthrone King Congress." Such were their phobias of power wherever it might be lodged.

It would be difficult to discover a more striking example of the irony of history than is to be found in the chief structural problem of the Constitutional Convention. The delegates were groping in the dark to discover a solution of the old problem of the relation of the Executive to the legislature.

Unfortunately they were not aware that a workable solution — one that has proved permanent — had emerged from the parliamentary conflicts of the very decade in which they sat at Philadelphia. Their deliberations show that they were influenced by the British constitution as they understood it, but the silence of their debates concerning the meaning of the younger Pitt's recent struggle with Parliament indicates that they could not have been aware, any more than the English themselves then were, of the most significant constitutional development of that generation. They missed one answer to their question that experience was just revealing.

The problem of a workable adjustment of the relation of Parliament to the Ministry had puzzled English statesmen particularly since the days of the Restoration and the Revolution of 1688. From the point of view of Parliament the questions were: How can the organ of government, now recognized as possessing the power over the nation's purse, control the agents who spend what Parliament supplies? How can the Legislature which Locke declared to be sovereign exert its power? The ministers were the king's by appointment and by ancient custom; but unless the power of Parliament were to remain a mere shadow that body must be able to exercise some control over the Ministry. How could it be compelled to obey its master? There was also the problem of the ministers themselves. Unless they enjoyed the confidence of Parliament they could not hope to obtain the supply necessary to maintain the functions of the state.

The ministers of Charles II had sought to come to a working understanding with the parliamentary leaders through informal conferences, but Parliament bristled with suspicion of intrigue and treachery against them. Yet they were helpless to provide a remedy.⁶ They were deeply concerned, some years later, when William III accidentally discovered that a workable government could be obtained by selecting all his ministers from the majority in Parliament. How could these ministers be held responsible to Parliament? Impeachment,

⁶ G. B. Adams, *An Outline Sketch of English Constitutional History*, pp. 154, 155.

the old device, seemed absurd under the circumstances. But the conferences of King William with a select group of parliamentary leaders smacked of intrigue and cabal.⁷ Was Parliament to be subordinated once more to the king and the fruits of the "Glorious Revolution" to be lost?

Presently a supposed remedy was devised. In 1692 Parliament passed what is commonly known as the Place Bill. It provided for the exclusion from seats in the House of Commons of all persons holding offices or pensions from the Crown. This would prevent a group of the king's friends, that is the ministers, from sitting in their midst, and through royal prestige and patronage exerting pressure to impose the king's will upon Parliament. William refused his assent to the measure.⁸ Again in the Act of Settlement (1700) it was provided that after the accession of the House of Hanover any person who held an office or a place of profit under the king was to be excluded from the House of Commons. Once more the opportunity for the development of the ministerial system was saved, this time by the repeal of this provision in the Act of Settlement before it went into effect.⁹ Almost a century later the Philadelphia Convention succeeded, after considerable debate, in putting just this kind of provision in the federal Constitution.¹⁰ Thus did the delegates unwittingly preclude the solution left open to the English by royal veto and parliamentary repeal of provisions that would have prevented the development of a ministerial system.

William III fulfilled his days and was gathered to the fathers. Queen Anne reigned out her years and then came the four Georges. During the reign of the first two Georges Prime Minister Walpole was giving the evolving cabinet government something of its modern form and procedure at the same time that he was perfecting his technique for the control of elections through patronage and slush funds. The indifference of George I to affairs of state gave Walpole a free hand.

⁷ *Ibid.*, pp. 157-58.

⁸ Edward Jenks, *Parliamentary England*, p. 82.

⁹ F. W. Maitland, *The Constitutional History of England*, p. 292.

¹⁰ *Documents Illustrative of the Formation of the Union*, p. 261.