

REMARKS OF CONGRESSMAN BOB DOLE
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EROSION OF CONGRESSIONAL POWERS AND PREROGATIVES

In framing the Federal Constitution at Philadelphia in 1787 the Founding Fathers set up a system of government that provided for legislative, executive, and judicial powers and assigned their exercise to separate branches of the government in Washington. Each branch was given some checks on the other two, so that we have a system of separated branches and shared powers. The framers deliberately intermingled the powers of the three departments to the extent necessary, in their judgment, to enable each to defend itself against the others. The result is better described as a system of checks and balances as well as a system of separated powers.

This system of checks and balances has caused rivalry, suspicion, and hostility between Congress and the President at intervals throughout our national history. Conflict is a built-in feature of the American system of government. The respective spheres of the executive and legislative powers are only vaguely defined in the Constitution. The result of the uncertain contours of the two branches has been that allegations of "encroachments" and "usurpations" by the executive on the legislative and vice versa have frequently been made over the years. Dramatic episodes of this character occurred during the Administrations of Presidents Jackson and Lincoln, and Theodore and Franklin Roosevelt, among others. But the instances in which the courts have determined that one branch has encroached upon the constitutional authority of the other have been rare.

In my remarks here today I would like to give you some specific examples of the erosion of congressional powers and prerogatives in recent times.

MAR 12 1965

-2-

Personally, I feel very strongly that Congress has lost its co-equal place with the other two branches in our scheme of government, and that appropriate steps should be taken to enable it to regain its rightful place and to resist further encroachment by either the Executive or Judicial Branch.

The loss of congressional control has been most marked in the fields of foreign policy and national defense since World War II. During the past quarter century presidential power has been enhanced by recurring crises abroad and by the dominance of foreign policy problems. As the nation has become exposed to military attack, Congress perforce has granted extraordinary powers to the President. The application of science and technology to military weapons and the advent of the Space Age have deprived Congress of the initiative in decisions as to war and peace, despite the clear language of the Constitution.

Examples of this trend are seen in the increasing use of executive agreements in lieu of formal treaties. Thus, in 1940 President Roosevelt, without consulting the Congress, negotiated an agreement with Prime Minister Churchill for the exchange of certain "over-age" vessels and obsolescent military materials in return for certain rights in British territory. In his report to the Congress after the exchange he stated that his disclosures were merely "for the information of Congress," and not to secure the approval of the Senate. The President also bypassed the Senate in making executive agreements at Yalta, Tehran, and Potsdam.

Further examples are found in the use of our armed forces in peacetime. There have been scores of instances in which the President, sometimes

MAR 12 1965

-3-

without prior congressional action, has sent United States forces to foreign countries. The occupation of Iceland in 1941, and President Truman's action in sending troops to Korea, were condemned in Congress as unconstitutional usurpations of authority. Our present participation in an undeclared war in South Vietnam is a current example of such action.

Another area of erosion is seen in the impounding of appropriations. On occasion the President has impounded funds appropriated by the Congress for specific programs. For example, in October, 1949, President Truman ordered that funds should be spent for only 48 air groups instead of the 58 for which Congress had appropriated money. This action was protested on Capitol Hill as an invasion of congressional authority. In July, 1955, President Eisenhower was accused by several Senators of acting, or threatening to act, with regard to already appropriated funds for public works in a manner contrary to the wishes and intentions of Congress. In 1961 Congress appropriated \$514.5 million for the procurement of long-range bombers which the Administration declined to use. Recent history affords many other examples of military directives of the Congress not followed by the Defense Department.

The President's use of the veto power has occasionally been challenged, as impairing the constitutional prerogatives of Congress. In 1944, for example, President Roosevelt's veto of a major revenue bill was followed by strong congressional protest. It was conceded that the President had the authority under the Constitution to veto. The protest was directed in part against the breaking of the tradition that Presidents do not exercise

MAR 12 1965

-4-

the veto in connection with revenue measures, and in part against the language and tenor of the President's veto message.

In many instances allegations have been made that the Executive has overstepped its proper role in attempting, in one way or another, to influence legislation. For example, in 1921 President Harding appeared before the Senate to urge postponement of action on a Soldiers' Bonus bill. His action was sharply criticized in the Senate. A similar protest was made in 1944 when President Roosevelt sent a message to Congress urging enactment of soldier vote legislation with a federal-controlled ballot. The message was read in the Senate while that body was still in the process of considering the legislation. Senator Taft said that it was "most unfortunate that the President of the United States has seen fit again to intervene in a legislative matter."

On September 7, 1942, President Roosevelt requested the Congress to amend the Emergency Price Control Act. "I ask the Congress," he said, "to take this action by the first of October. Inaction on your part by that date will leave me with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos. In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act." This statement aroused strong congressional protest. Representative Reed of New York denounced it as a "threatened usurpation of the legislative function of government by the President...Naturally, as one who believes in a government of laws instead of men, I hope the time

MAR 12 1965

-5-

will never come when a free people will see the independence of 'the greatest legislative body in the world' crumble under the threat of Executive reprisal and usurpation if and when his demand for emergency powers is not granted."

During the 78th Congress the House of Representatives set up a Select Committee to Investigate Executive Agencies. In one of its reports this committee protested against the practice of enacting legislation drafted in the Executive Branch. And in March, 1945, Representative Howard W. Smith, chairman of the Select Committee, appeared before the Joint Committee on the Organization of Congress and said:

...Under our Constitution legislation is supposed to be enacted by the Congress. I want to call your attention to what I assert to be a fact, that we now have not only legislation by the Congress, but we have four other types of legislation...We have legislation by sanctions; we have legislation by subsidies; we have legislation by executive regulations, under authority of acts of Congress; and we have legislation by interpretation - interpretations that Congress never dreamed of when we enacted the law.

In the examples so far given, it has been alleged that the President was either acting unconstitutionally, or was using his constitutional authority in such a way as to interfere unduly with the legislative power. One of the most common complaints concerning the growth of executive authority, however, has been the extent to which the Congress itself has delegated to the President and other executive agencies authority which, it is argued, it ought to exercise itself. This is not a charge of "usurpation" of legislative power by the executive, but rather a charge

MAR 12 1965

-6-

of "surrender" of power on the part of the Congress.^{1/}

In this connection, however, executive action is frequently challenged as going beyond the authority delegated. The issue is basically one of statutory construction, but Congress itself has often protested. From 1943 through 1945 the Smith Committee issued several reports highly critical of executive action, especially on the part of the Office of Price Administration and the War Labor Board.

The decline of Congress as a policy-making body in recent decades has been widely noted, ~~in many books and articles~~. Writers vary in approving or condemning, as well as in their estimates of the extent of the decline. Some regard the trend with resignation; other believe it can be reversed. But all agree that the stature of Congress has diminished, that its power has deteriorated, and that it has become subordinate in significance to the President in many important respects.

The emergence of the President as Chief Legislator is traced back to the two Roosevelts and Woodrow Wilson. Wilson brought to the presidency a positive theory of executive power in which the President was regarded as a kind of prime minister whose duty it was to exercise leadership of Congress in working to carry through his legislative program.

With the coming of the New Deal, Congress became merely a junior partner of the executive. The deterioration of legislative power proceeded

^{1/} See remarks of Representative Usher L. Burdick, "Congress Itself Gives Away its Powers," Congressional Record, April 2, 1951, Appendix, pp. A1782-3.

MAR 12 1965

-7-

along several fronts under the aggressive leadership of Franklin D. Roosevelt. The President assumed primacy as the author of the legislative agenda. The party leaders in Congress became spokesmen for the President's program. Numerous independent regulatory commissions were set up, with quasi-legislative as well as quasi-judicial functions. The administration of the appropriations passed by the legislature became further and further removed from congressional scrutiny and control. And foreign policy, marked by the increased use of the executive agreement to circumvent Congress' prerogatives in treaty-making, became more completely than ever a province of the executive branch. The crisis of World War II reinforced these trends, after the temporary revolt of Congress during the second Roosevelt administration.

Since World War II Congress has made a number of efforts to regain some of its former stature in the governmental power system. But it has been hindered by its deficiencies in a period in which foreign policy has overshadowed all other issues on the American political horizon.

A sketchy survey of the ebb and flow of power between Congress and the President in American history suggests some tentative conclusions. First, the prime opponent of Congress in the power struggle is the President. But he is not the only opponent. The independent regulatory agencies, the Supreme Court, and the bureaucracy have also nibbled away at the legislature's former prerogatives. But it is the presidency which, historically, has posed the most massive threat and which has in fact acquired the largest slice of the policy-making pie.

MAR 12 1965

-8-

Secondly, the power position of Congress vis-a-vis the President is mostly, but not entirely, relative. One could say that there is just so much power available within the bounds of the Constitution. The aggrandizement of one branch would, therefore, necessitate the lopping off of power from another branch. It is true, of course, that the power boundaries imposed by the Constitution have been considerably expanded; there is more power to divide, as the Constitution has been interpreted than there was, say, in Madison's day. But there is, nevertheless, at least a theoretical, and probably a practical, limit to the amount of policy-making power available. And when the President, or any other part of the government, appropriates to itself a share of that power, the relative position of Congress must inevitably decline.

Thirdly, history would seem to indicate that the personal ability of the President is the most important factor in the increase of presidential power and the consequent decline of the legislature. By ability I mean personality, leadership qualities, popularity, personal force. The office of the President has a natural advantage over Congress in that its limits are less explicitly confined. Once elect~~d~~ to that office a man with the ability and the will, and the power of the office can be expanded almost as far as his ability will permit. As Woodrow Wilson put it:

The President's is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily overpower him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people.

MAR 12 1965

-9-

Finally, circumstances may be contributory, but not necessarily controlling factors in the acquisition of the policy-making power. Certainly, circumstances are important; war crises and depressions have helped foster presidential leadership. The cold war and the primacy of foreign affairs in our own day, together with other factors, naturally enhance the possibilities of executive growth and congressional decline. A strong, popular, and determined personality in the White House, has usually been accompanied in our history by a decline in the relative status of Congress.

The erosion of the powers and prerogatives of Congress dates back only forty-five years. Of course, the President's role in legislation stems from the Constitution which gave him the veto power and the right to recommend. But his modern initiative in legislation received its initial impetus from the Budget and Accounting Act of 1921 which imposed upon the President the duty to propose an executive budget. By 1939 the central clearance of all agency proposals and reports on pending measures, monetary or otherwise, had been established in the Budget Bureau. And by 1949 it had become customary for the President to set forth his "legislative program" in annual and special messages to Congress each session. Both budgeting and program-asking have become the prerogatives of the presidency. The President's initiative in legislation, challenged in the Senate in 1908, is now accepted as standard practice on the Hill. One historian has described this forty-five-year development as "among the quietest pragmatic innovations in our constitutional history."

MAR 12 1965

-10-

Ironically, it was set in motion by an act of Congress itself. Its sponsors "got more than they bargained for."

A basic factor in the decline of Congress has been the nature of its internal organization. In the performance of its legislative and oversight functions Congress operates through its standing committees; in actual practice, the prerogatives of Congress belong to and are exercised by its committees. Jurisdiction over the entire legislative domain is divided among the standing committees; the voice of the committees is the voice of the House. Because the power structure of Congress is widely dispersed among many committees, Congress acts on public problems in piecemeal fashion. Only in the White House can a coordinated, over-all view be found and action programs be devised. In the formulation and implementation of public policies at home and abroad, Congress is handicapped by its diffuse structure and by the specialized interests of particular committees and members.

In these rather sketchy remarks I have tried to give you some specific examples of the erosion of the powers of Congress in recent decades. We have seen that its treaty-making power has often been bypassed by expanded use of executive agreements. That the power of the purse, the constitutional birthright of Congress, has been eroded by executive impounding of appropriated funds, by its incurring of coercive deficiencies, and by "back-door" spending" devices. That the power of the sword has been weakened by executive refusals to enforce congressional military directives and by presidential participation in foreign wars without

MAR 12 1965

-11-

formal congressional declarations. That, by creating regulatory agencies and delegating to them authority to issue rules and regulations, legislative power has been surrendered to the rule-makers on a grand scale. Furthermore, since 1939 Congress has passed a series of Executive Reorganization Acts in which the power to reorganize executive departments and agencies has been surrendered to the President, subject only to legislative veto. No wonder Congressmen feel frustrated.

We have ample grounds for frustration. As Richard Neustadt sums it up:^{2/}

When Congressmen compare their nominal administrative powers with the actualities of who-does-what in Washington, the fact that their committees can assert control of relatively marginal affairs is little comfort. When they look down the Avenue toward the White House and perceive the Presidency, with its own officialdom, asserting the prerogatives of central management - as Presidents have done for nearly thirty years - their comfort grows the less. And when they add what they are bound to see, and so to feel, that policy initiatives are centered in the White House too, the pain in their position grows severe. Constituents rub salt into the wound. So does a proper pride in the traditions of a parliamentary body.

^{2/} David B. Truman, editor. The Congress and America's Future (1964), pp. 108-9.