

VII

THE PLACE OF
CONGRESS

IN THE TRADITIONAL American system, power has been widely diffused among both private and governmental institutions. Within the complex equilibrium of the governmental structure, power has been divided between central and local governments, and diffracted among legislature, executive, judiciary, and the bureaucracy both civil and military. For this and the next chapter, let us restrict our attention to the three formally designated branches of the central government.

Legislature, executive and judiciary each shares in the total fund of power, and it was the anxious concern of the Fathers that each should have a relative independence or autonomy: that is, that no one of the three should be wholly subject to or dependent on one or both of the others, that each should exercise its share of power in and of its own right. Otherwise the intended diffusion of power would be illusory. There would be only an administrative division of a unitary, centralized power, without the checks, balances and conflicts which the Fathers believed to be the only sure supports of liberty.

If each of several institutions has its own independent quota of power, it does not follow that the shares are of equal weight. My car and yours may each run by its own engine, though yours has the power of three hundred and mine of only fifty horses; my plot of land may be truly my own, and yet the acreage may be smaller and the crops fewer than my neighbor possesses. To decide that the judiciary shall be independent of the legislature, and the executive in-

dependent of both, is not, or not necessarily, to intend that the three should or can be equal in power.

The Founding Fathers believed that in a republican and representative governmental system the preponderating share of power was held and exercised by the legislature. Indeed, for most of the Fathers this was a belief that seemed rather a self-evident axiom than a conclusion to be argued. The two or three who might occasionally question the priority of the legislature were inclined, like Hamilton, toward a monarchic rather than a republican form of government. And even Hamilton's monarchism was more a romantic ideal than a seriously proposed solution for the new nation. When asked in 1780 by James Duane what the trouble was with the American government, then operating under the single-branch direction of the Continental Congress, Hamilton's reply was not to advocate a supreme executive, but: "The fundamental defect is a want of power in Congress." In the series of articles that he published the following year as *The Continentalist*, he proposed a national government consisting of a one-house Congress possessing full power.

In a presidential message to Congress sent May 4, 1822, James Monroe analyzed the nature of the American government:

I will now proceed to examine [he begins one section] the powers of the General Government, which, like the governments of the several States, is divided into three branches—a legislative, executive, and judiciary—each having its appropriate share. Of these the legislative, from the nature of its powers, all laws proceeding from it, and the manner of its appointment, its members being elected immediately by the people, is by far the most important. The whole system of the National Government may be said to rest essentially on the powers granted to this branch. They mark the limit within which, with few exceptions, all the branches must move in the discharge of their respective functions.

Monroe's judgment is a conclusion not of abstract logic but of a lifetime of public experience that comprised the founding of the republic. No one in 1822, or in 1789, would have disagreed with this basic evaluation, though there would have been dispute over the exact proportions.

In a nation that has left the level of automatic custom there must be a man or an institution that makes the laws. The laws (along with surviving customs and accepted moral principles) are the rules according to which the nation exists and operates as an organized community, without which it would not be. Therefore there must be a legislature—even though the legislature may be called a King or a Party Secretary. There does not have to be a separate executive and judiciary. The legislature can itself, directly or through its agents, execute its own laws and judge the issues that arise under them. This, indeed, is the mode of the parliamentary system, before the parliamentary system is transformed into the Cabinet government that prevails in most republican nations today.

The American government that declared independence, fought the war against the world's greatest power, became regularized under the Articles of Confederation, made the peace and launched the nation on its civil career, consisted of a single branch. So exclusive an attention is paid to the defects of the pre-Constitution government that its extraordinary achievements are forgotten; but the one as the other were well known to the Founding Fathers. It carried out executive functions, of course, but through Congress itself, acting in an executive capacity, or through dependent agents of Congress. And in a good proportion of its executive acts the Continental Congress did very well. It made, no one can doubt, the perfect choice for the commander to fight the war for independence, and for the man who, in spite of the fiscal chaos, could somehow finance it. The war was fought to a victory, and the victory sealed, if with wearying delay, by a peace that served to establish the new community as a nation among the world's nations. Never in our subsequent history have we been served by a set of emissaries abroad

averaging so high as those appointed by the Continental Congress: Thomas Jefferson, Benjamin Franklin, John Jay, John Adams among them. Money and military aid, both essential to the victory, were obtained from Europe during the war. Loans and treaties were thereafter negotiated with Europe's major sovereigns.

Legislative supremacy was thus not a novelty for the Fathers, but a starting assumption. John Locke, from whom many of them had learned their formal doctrine of civil government, had traced the origin of a distinct executive power to the merely technical requirement that there had to be someone at hand to carry out the laws when the legislature was adjourned. "But because the laws that are at once and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force. And thus the legislative and executive power come often to be separated."¹

The delegates that came to Philadelphia agreed the central government must be granted more powers than provided by the Articles of Confederation. They all assumed that most of these powers would be assigned to the legislature. Several of the delegates did not have initially in mind the creation of an independent executive or judiciary. In the Virginia Plan, submitted by Randolph and accepted as the basis for discussion, Congress was allotted an even more predominant share in the power than it finally got. Early convention votes gave the Senate the power to negotiate and adopt treaties and to nominate judges. The earlier plans for the executive provided for his (or their)—many wanted a plural executive as less tending to tyranny) election by the legislature for a limited term; and, in some versions, for his legislative removal.² A number of the delegates were gravely apprehensive of an executive veto:

1. *Second Treatise on Civil Government*, Chap. 12.

2. Cf. remarks of John Dickinson and Roger Sherman, *Debates*, June 2.

Mr. [Pierce] Butler [of South Carolina] had been in favor of a single executive magistrate; but could he have entertained an idea that a complete negative on the laws was to be given him, he certainly should have acted very differently. It had been observed, that in all countries the executive power is in a constant course of increase. . . . Gentlemen seemed to think that we had nothing to apprehend from an abuse of the executive power. But why might not a Cataline or a Cromwell arise in this country as well as in others?

Mr. [Gunning] Bedford [of Delaware] was opposed to every check on the Legislature, even the council of revision first proposed.³

On July 20 James Wilson argued for a strengthening of the independence of the executive and the judiciary on the grounds that "the joint weight of the two Departments was necessary to balance the single weight of the Legislature."

"But it is not possible," observes *Federalist* No. 51,⁴ "to give to each department an equal power of self-defence. In republican government, the legislative authority necessarily predominates." The final paragraph of *Federalist* No. 44 (Madison) declares: "We have now in papers No. 23-44 reviewed, in detail, all the articles composing the sum or quantity of power delegated by the proposed Constitution to the Federal government." But at this point in the *Federalist* series there has been no discussion at all of either the executive or judicial departments, which "are reserved for particular examination in another place."

There are a number of passages, quoted in recent years by critics of Congress, wherein the Fathers warn against the chance of "legislative tyranny." The learned James Wilson, for example, told the Convention on August 15 that he "was most apprehensive of a dis-

3. *Debates*, June 4.

4. It is not certain whether Hamilton or Madison is the author.

solution of the Government from the Legislature swallowing up all the other powers. He remarked, that the prejudices against the Executive resulted from a misapplication of the adage, that the parliament was the palladium of liberty. Where the Executive was really formidable, *King* and *tyrant* were naturally associated in the minds of the people; not *legislature* and *tyranny*. But where the Executive was not formidable, the two last were most properly associated."

The comments of Madison (*Federalist* No. 48) are better known:

The founders of our republics . . . seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. . . .

In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people; with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

At the convention, Gouverneur Morris was also among those who warned eloquently against the possible excesses of the legislature. On July 19 he found these a telling argument for the strong and independent executive about which some of his fellow-delegates were still doubtful. "One great object of the Executive," Madison's notes report him as saying, "is, to control the Legislature. The Legislature will continually seek to aggrandize and perpetuate themselves; and will seize those critical moments produced by war, invasion, or convulsion, for that purpose. It is necessary, then, that

the Executive magistrate should be the guardian of the people, even of the lower classes, against legislative tyranny."

On the next day Morris (whose sudden solicitude for "the lower classes" may have puzzled some of his colleagues) made clear to the convention the possibly tyrannical legislative acts of which he was apprehensive: "emissions of paper-money, largesses to the people, a remission of debts, and similar measures."

The warnings of the Fathers against a danger of legislative tyranny must be understood in context. They were not arguing against the political priority of the legislature, even though some of them, aristocrats and anti-democrats at heart, regretted that priority. It was precisely because they assumed that the only viable form of government for the United States was a republic in which the legislature held the principal share of power, that they were sensible of the danger: a danger, one may add, that threatened the special interests that some of them represented more plainly than the political liberty of the nation at large.

"No government could long subsist," argued James Wilson on May 31, "without the confidence of the people. In a republican government, this confidence was peculiarly essential," and could be obtained only if sovereignty rested predominantly in a legislature, "the most numerous branch" of which would be drawn "immediately from the people." It was the inevitable legislative priority that made it expedient "to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit";⁵ and to fortify the counterweights of an autonomous executive and judiciary. In the public debate over ratification it was tactically advisable for the Fathers to stress the hypothetical threat from the legislative branch, which ordinary citizens looked on as their direct representative and the key to republi-

5. *Federalist*, No. 51.

can self-government, in order to quiet the natural fear that an independent single executive might easily evolve into monarchy and despotism.

The Fathers were of course right in predicting, as Gouverneur Morris did, that the "critical moments produced by war, invasion, or convulsion" would be seized for the aggrandizement of governmental power; but they mistook the branch of government that would do the seizing.

2

The primacy of the legislature in the intent of the Constitution is plain on the face of that document, as it is in the deliberations of the Philadelphia Convention. It is the Constitution's first Article that defines the structure and powers of the legislature. The legislative Congress is to be the sole source of all laws (except the clauses of the Constitution itself). In the conduct of the general government, Congress alone can authorize the getting or spending of money. It is for Congress to support, regulate and govern the Army and Navy, and to declare war. Save for the bare existence of a Supreme Court, it is for Congress to establish and regulate the judicial system. All officers of both executive and judiciary are subject to congressional impeachment; but for their own official conduct the members of Congress are answerable only to themselves.

It is not surprising, therefore, that the critical issues at Philadelphia were the manner of constituting the legislature and the method for selecting its members. There was longer and sharper debate over this set of problems than over any other; indeed, almost as much debate as over all the others. Because of the prolonged failure to agree on the composition of Congress, the convention reached the edge of breakup. When the complicated "Connecticut compromise," as amended by Gerry to provide for individual voting by the Senators, was accepted, the convention's success was assured.

There were some among the Fathers who conceived the executive as only the administrative agent, "the mere creature" of the legislature. Roger Sherman, for example, stated (on June 1) that "he considered the executive magistracy as nothing more than an institution for carrying the will of the legislature into effect"; and he, as well as John Dickinson and several others, wished the executive to be made removable by the legislature. A century of constitutional experience did not altogether erase this conception. Roscoe Conkling, Senator from New York during 1867-81 explained in a speech delivered to his Utica constituents what he still held to be the settled view of his colleagues: "Congress maintains that the President is not the law-making power of the country—that he has only the power to approve or veto bills, that two-thirds of each House, without his approval and notwithstanding his veto, are clothed with the full legislative power of the nation; that it is the duty of the President to see that all laws are faithfully executed, and that except, as already stated, he has nothing to do with the composition of Congress, nor with the adoption or rejection of measures, except that he may give information, and may recommend matters to consideration." Harold Laski quotes the still stricter views that Senator John Sherman of Ohio included in his *Recollections*, published as late as 1895: "The executive department of a republic like ours should be subordinate to the legislative department. The President should obey and enforce the laws, leaving to the people the duty of correcting any errors committed by their representatives in Congress."⁶

These views on executive dependency are doubtless more extreme than those held by a majority of the Fathers, laid down by the Constitution, or carried out in the practice of the government. Still, they were close enough to traditional fact and opinion to be believed by informed and conscientious citizens. The priority of the

6. Harold J. Laski, *The American Presidency* (New York: Harper & Bros., 1940), pp. 124-5.

legislature in the traditional system has rested not solely on the immense powers assigned directly to it, but also on the ability of the legislature to exert indirect pressure on the other two branches. Even if impeachment has proved a last and almost unused resort, the power to impeach—lodged solely in the legislature—is a continuously implicit threat. From a formal standpoint, congressional power over the purse is unlimited, up or down. Formally, Congress could with a single law wipe out the entire executive establishment, save only for the President and the Vice President; and could abolish all federal courts, save for the Supreme Court, which it could reduce to a single judge with a minor jurisdiction. The missions of executive agencies and the subordinate courts, as well as their mere existence, depend on congressional statute. Even the treaty power, a primarily executive function under our Constitution, is made subject to the two-thirds approval of one of the legislative chambers. The executive's veto, by which he shares in the legislative power, may in all cases be over-ridden. Through the investigatory power—which, though not explicit in the Constitution, has been asserted from the government's first years—Congress can call the executive to detailed and public account.

In the American system, moreover, the legislature is protected from what can be made the keenest weapon of an aspiring executive: the executive's power to prorogue, or dissolve, the legislature, and to force a new election. It is this power that has brought about such an ironic transformation of most of the world's parliamentary governments. Under the parliamentary system (as under our Articles of Confederation) the legislature (parliament) is in theory all-powerful, with the executive only its agent. But in fact, in most cases, the parliamentary executive⁷ has gained an ascendancy over the body of the parliament, which is reduced to the function of registering or declining to register its consent to what the executive has

7. Actually, the controlling committee (or committees) of the majority party (or parties).

done or decided. In a showdown the executive, if it is sufficiently determined, can almost always get that consent by threatening an ad hoc dissolution, with a new election that can seldom be agreeable to the existing majority. This threat cannot be made under the American system. In casting his vote a Congressman does not need to worry about a surprise election held at a time and on an issue that might put him at a maximum disadvantage. The President can neither advance nor delay the fixed date.

In the view of the Fathers, the judiciary's share in the diffused fund of political sovereignty was the smallest:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power.⁸

8. *Federalist*, No. 78 (Hamilton). A footnote to this passage quotes Montesquieu: "Of the three powers above mentioned, the judiciary is next to nothing."

For this reason, the Fathers believed it difficult to guarantee the judiciary a genuine independence, as the doctrine of the diffusion of sovereignty demanded. In partial solution, they provided in the Constitution that judges "shall hold their Offices during good Behaviour" (that is, unless convicted under impeachment proceedings), and may thus render displeasing opinions without risking dismissal. Further to the same purpose, the compensation of judges "shall not be diminished during their continuance in Office." Apart from these clauses, and from the assignment of a limited special jurisdiction to a Supreme Court, the establishment as well as the regulation of the judicial branch are left to Congress, one House of which must also confirm each judicial appointment.

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From the standpoint of the Philadelphia Convention, then, and of the written Constitution that was its end product, "legislative supremacy"—or, at any rate, legislative priority—was of the essence of republican government. Granted the maintenance of a firmly republican system, the Fathers anticipated little danger of executive tyranny and none at all of judicial. The constitutional problem was, rather, to devise a structure wherein the executive and judiciary would not be altogether swallowed up by the legislative branch. The diffusion and balancing of power, requisite to the defense of liberty, would be secured in the first instance by the concurrent sovereignty of the central government and the several states. Within the central government the inevitable predominance of the legislature could be somewhat reduced by allotting the executive a share in the legislative process (through a conditional veto, the ability to recommend legislative measures, and the right to convene Congress in emergency session), by giving the executive the first voice in appointments and foreign relations, and by providing methods for choosing the nation's executive and judicial officers on

a basis separate and independent from the procedures for electing its legislators.

In the event, the legislative preponderance in the power balance was never as much as had been assumed. From the very first administration the executive weight was relatively heavier than expected. From the time of John Marshall's appointment as Chief Justice (1801), the judiciary quickly disapproved Montesquieu's and Hamilton's belief that, in power terms, it would be "next to nothing."

One important reason for the emergence of an executive relatively stronger than some hoped and others feared was the character of the men who led the first administration. The first President was himself the most respected of all the new nation's citizens, a stern and forceful man who believed that an executive should be strong and self-sufficient. His principal adviser, who became both his Secretary of Treasury and his chief deputy in liaison with Congress, inclined even toward monarchy. Their leading collaborators, who had become known as Federalists, were distrustful of popular passions and of assemblies linked too closely to the people. From a technical point of view also, they believed in vigorous, efficient administration, which they felt could be guaranteed only by a centralized executive organization sustained by clear lines of direction and responsibility.

Apart from the two elected officers, the Constitution made no attempt to prescribe the structure of the executive branch, which was left for determination by statute. Even the nature of "Executive Power," which the Constitution vested in the President, was left undefined by the Philadelphia Convention. (Several attempts at definition, as in the June 1 and 2 debates, produced no coherent or agreed results.) Nor were the boundaries of the dual responsibility clearly marked in those cases where both executive and legislative action were required, as with appointments, treaties and military affairs. Thus the practical construction of the governmental framework and the setting of the earliest precedents, both presuming a particular interpretation of the new Constitution, were influenced by men who

were inclined, up to the point that they thought compatible with their republican duty, to favor the executive rather than Congress when a choice seemed to be open.

There was an analogous situation, though somewhat later, when John Marshall took over direction of the judicial branch on John Adams' lame duck appointment in January 1801. A showdown over the role of the judiciary came quickly, because the incoming President and his Republican enthusiasts, in firm control of the other two branches, were resolved to remake and repopulate the entire government structure. They struck down Adams' revisions of the Judiciary Act, and set out to use, where necessary, even the impeachment process to get rid of political opponents. But with the failure of the move in 1805 to convict Justice Samuel Chase, very much as the 1868 impeachment move against President Andrew Johnson failed, the partisan attempt to assimilate the judiciary collapsed. Under Marshall's long leadership, the Court cemented its independent political foundation.

In both 1805 and 1868 the nation spoke in the denouement through the legislative assembly which it intuitively felt to be its most authentic representative. Thereby the nation was implicitly reaffirming the priority of Congress at the same time that it asserted the American principle of the diffusion of power. Within the varying equilibrium of power, the changing relative weight of the executive and judiciary would be at once junior and autonomous.