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# Some Aspects of the Presidency\*

By EDWARD S. CORWIN

Delivered July 30, 1941

IT IS a common allegation that the terms in which the President's powers are granted are the loosest and most unguarded of any part of the Constitution, and this is true when Article II is read by itself. But what warrant is there for reading it thus, rather than in its context, the Constitution as a whole? When it is read in this way the net impression left is quite different.

"The Executive power shall be vested in a President of the United States of America"; "the President shall be Commander in Chief of the Army and Navy"; with the advice and consent of the Senate he shall make treaties and appoint to office; he shall have power to "grant reprieves and pardons for offenses against the United States"; he shall recommend to Congress "such measures as he shall judge necessary and expedient"; and so on and so forth. Yet, in order to exercise any of these powers—in order, indeed, to subsist—he must have money, and can get it only when and if Congress appropriates it. Likewise, he is dependent on Congress for the very agencies through which he must ordinarily exercise his powers, and Congress is the judge as to the necessity and propriety of such agencies. Again, he is bound to "take care that the laws" which Congress enacts are "faithfully executed"—for this purpose all his powers are in servitude; and Congress has the power to investigate his every official act, and can, by a special procedure, if it finds him guilty of "high crimes and misdemeanors," impeach him and throw him out of office. Moreover, by the

\*I wish to thank New York University Press for allowing me unrestricted use of my book, *The President, Office and Powers* (2nd ed., 1941) in the preparation of this article.

standard set by the prerogative of the British monarch in 1787, his "Executive power" and his power to protect that power were both seriously curtailed. The power to "declare war" was vested in Congress; the Senate was made a participant in his diplomatic powers; he was given a veto upon all legislative acts, but one which the houses may override by a two-thirds vote, whereas the supposed veto of the British monarch was absolute.

## TWO CONSTITUTIONAL CONCEPTIONS

In short, the Constitution itself reflects not *one* but *two* conceptions of executive power: the conception that it exists for the most part to serve the legislative power, wherein resides the will of society, and the conception that it ought to be within generous limits autonomous and self-directory. The source of this dualism was the eighteenth-century notion of a *balanced constitution*; its consequence has been a constantly renewed struggle for power between the political branches. Nor has the struggle ceased to this day, although its total result has been, especially within recent years, the vast aggrandizement of the presidency.

The Constitution was hardly set going when an indicative and decisive event occurred to head the presidency toward its destiny. "The Executive power shall be vested in a President of the United States," was originally intended merely to settle the issue whether the National Executive should be single or plural and to baptize the office. Yet when the question arose in the first Congress as to how nonjudicial officers appointed by the President and Senate should be removed,

Congress, under the leadership of Madison, took action which, in reliance on the clause just recited, attributed this power to the President alone; and 137 years later the Supreme Court, speaking by a Chief Justice who had himself been President, ratified this "practical construction of the Constitution" as the theoretically correct one. Likewise Hamilton, in justifying Washington's course in 1793 in issuing a Proclamation of Neutrality in view of the outbreak of war between France and England, appealed to the "Executive power" clause, which in effect he construed as endowing the President with the complete prerogative of the British monarch in the conduct of foreign affairs except only the "power to declare war," that having been transferred by specific provision of the Constitution to Congress. This time Madison took a brief on the other side; yet who can doubt that Hamilton's view has in the main won out?

In the case of the "fifty destroyer" deal in 1940 the President violated statutes which had been enacted by Congress in the uncontroverted exercise of its specifically delegated powers, and was justified by his Attorney General in so doing, by an argument which empowers the President, as Commander in Chief—and as organ of foreign relations—to ride high, wide, and handsome over the legislative powers of the Nation whenever he deems it desirable to do so. Yet I have heard of no impeachment proceedings being initiated in Congress against either the President or the Attorney General. Quite to the contrary, the attainments of the latter as a constitutional lawyer have been recently proclaimed to the Nation by his elevation to the Supreme Court.

But this confrontation of Hamilton and Madison in 1793 is of importance for a second reason; it signaled the early differentiation of what may be termed the quasi-monarchical and the

ultra-Whig conceptions of the presidency. Under the first two Presidents the former conception prevailed as of course. The presidency at once furnished what Walter Bagehot would have termed the "dignified element of government" and also directed the legislative process to a notable extent, although without diminishing in the least the spontaneous legislative initiative of the houses themselves—exactly as in contemporary Britain before the younger Pitt, the legislative initiative was divided. The famous Judiciary Act of 1789 was elaborated in the Senate; the acts creating the great executive departments came from the House; Hamilton's financial measures exemplified the legislative leadership of the executive.

#### JEFFERSON'S VIEW

Jefferson's conception of executive power, on the other hand, was more Whig than that of the British Whigs themselves in subordinating it to "the supreme legislative power." At the time when the presidential election of 1800 was pending in the House, John Marshall predicted that if Jefferson was chosen he would "embody himself in the House of Representatives, and by weakening the office of President" would "increase his personal power. He will . . . become the leader of that party which is about to constitute the majority of the legislature." Better political prophecy has rarely been recorded.

In Jefferson we encounter for the first time a President who is primarily a party leader, only secondarily Chief Executive. The tone of his messages is uniformly deferential to Congress. His first one closes with these words: "Nothing shall be wanting on my part to inform, as far as in my power, the legislative judgment, nor to carry that judgment into faithful execution." His actual guidance of Congress' judgment

was none the less constant and unremitting even while often secret and sometimes furtive. The chief instruments of his leadership were the party caucus, which enabled the party membership to present on the floor a united front and over which he himself is alleged to have presided now and then, and his Secretary of the Treasury, Albert Gallatin, whose own influence with Congress was also enormous. At the same time, it should be noted that the principal issues with which Congress was asked to deal legislatively were issues of foreign policy. Nor was the flow of power all in one direction. Both in the enactment of the famous Embargo Act of 1807 and in its subsequent repeal at Congress' insistence, we have an outstanding example of departmental collaboration in the diplomatic field.

What, then, of Marshall's prophecy that Jefferson would weaken the office of President? This, too, was justified by events when the Ulysses bow of party leadership passed to feebler hands. With the practical disappearance of the Federalist Party the Republican caucus became "the Congressional caucus," by which Madison and Monroe were each in turn put in nomination for the presidency, while the younger Adams was virtually elected by it, through the election being thrown into the House. Thus, for twenty years the plan rejected by the framers, of having the President chosen by Congress, was substantially in operation. During this period the practice grew up of each succeeding President's continuing a considerable part of his predecessor's Cabinet in office; and when he convened them in council the Chief Executive counted the votes of the heads of departments as of equal weight with his own. Hardly more than *primus inter pares* in his own sight, he was glad if Congress accorded him that degree of deference. In short, the presidency was in commission.

#### JACKSON'S VIEW

With Jackson's accession this enfeebling tendency was checked as decisively as it was abruptly. Jackson's presidency was, in truth, no mere revival of the office—it was a remaking of it. The credit, however, should not go to Jackson alone. He contributed an imperious temper, a military reputation, and a striking personality; and he had the good luck to have an admiring public in the shape of a new and ignorant electorate. But the lasting impact of the Jacksonian presidency upon American constitutional practice also owed much to the constructive skill of his political lieutenants, and particularly to their invention of the National Nominating Convention. When Jefferson retired in 1809 his party began at once to dissolve into local or personal followings. That the same thing did not happen on Jackson's retirement was due to the rise of the national convention and the political devices which cluster about it.

Backed by a party organization which reached far beyond the halls of Congress, indeed eventually penetrated the remotest corners of the Union, Jackson became the first President in our history to appeal to the people over the heads of their legislative representatives. At the same time, the office itself was thrust forward as one of three *equal* departments of government and to each and every one of its powers was imparted new scope, new vitality. The presidency became tridimensional, and all of the dimensions underwent more or less enlargement. Jackson was a more dominant party leader than Jefferson; his claim to represent the American people as a whole went to the extent of claiming to embody them; his claim to be one of three *equal* departments inferred the further claim that *all* his powers were autonomous, even his purely executive powers.

The logical implications of Jackson's

position, as stated in his famous Bank Veto Message of July 10, 1832, were not exaggerated by his Whig critics, although its practical effects were. "I look upon Jackson," Kent wrote Story early in 1834, "as a detestable, ignorant, reckless, vain, and malignant tyrant. . . . This American elective monarchy frightens me. The experiment, with its foundations laid on universal suffrage and our unfettered press, is of too violent a nature for our excitable people." "The President," thundered Webster in the Senate, "carries on the government; all the rest are subcontractors. . . . A Briareus sits in the center of our system, and with his hundred hands touches everything, controls everything." "We are in the midst of a revolution," lamented Clay, "hitherto bloodless, but tending rapidly towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man."

Actually, prior to the Civil War, the supposed menace was more apparent than real. For this there were several reasons. In the first place, while magnifying the powers of the presidency, Jackson subscribed to the states' rights doctrine of strict construction of Congress' powers. His legislative role consequently was chiefly negative, being confined for the most part to a vigorous use of the veto power. In the second place, even though it had been otherwise, the further development in the houses since Jefferson's day of the committee system interposed obstacles in the way of presidential participation in legislation which had not existed at first. But a circumstance which contributed even more to the temporary declension of the Jacksonian presidency was the emergence after 1846 of the issue of slavery in the territories. For the handling of this highly charged question by the devices of negotiation and compromise, Congress, and especially the Senate, of-

fered a far better theater than the presidency. So the forces making for compromise systematically depressed the presidency by taking care that only secondary and manageable personalities should be elevated to it. Lastly, the recently enunciated Monroe Doctrine had asserted a restraining principle upon presidential adventuring in the foreign field which gradually became invested with all the moral authority of the Constitution itself—an eminence it was to retain till 1898.

#### LINCOLN'S VIEW

The last important contribution to the theory of the presidency until recent decades was Lincoln's, whose ultimate conception of the office was as much an expression of temperament as was Jackson's. A solitary genius who valued the opportunity for reflection above that for counsel, Lincoln came to regard Congress as a more or less necessary nuisance and the Cabinet as a usually unnecessary one. Nor could it have escaped Lincoln's intuition—especially after Buchanan's Message of December 3, 1860—that, if the Union was to be saved, recourse must be had to some still untested source of national power, one which had not become entangled, as had Congress', in the strangulating sophistries of states' rights. So, for a double reason, Lincoln turned to the "Commander in Chief" clause, from which, read in conjunction with the "Executive power" clause, he drew the conclusion that "the war power" was his. Originally, it is true, he appears to have assumed that his power was a simple emergency power whose ad interim decisions Congress must ratify if they were to be permanently valid. But, as the problems of Emancipation and then of Reconstruction loomed, he shifted ground, and his final position was "that as President he had extraordinary legal

resources which Congress lacked," and which it could not control.

The long-run effect of Lincoln's presidency on conceptions of the office would be difficult to exaggerate. Here two points need to be specially noted. The first is that Lincoln's course, fortified by the Supreme Court's dictum in the Prize Cases, that insurrection is "war," affords a strong warrant for any President, called upon to deal with a widespread condition of violence in the country, to ignore all constitutional and statutory restraints in favor of personal liberty. The other is that presidential spokesmen have repeatedly turned to Lincoln's acts as if they supported the thesis of presidential autonomy—in other words, presidential autocracy—in all fields of presidential power, which of course they are far from doing.

Moreover, the immediate effect of Lincoln's incumbency was little short of calamitous for the office. A frontiersman, his conception of the requirements of sound administration were no less naïve than Jackson's, whose record as a spoilsman he far surpassed; while except for an ineffectual endeavor to interest Congress in the subject of compensated emancipation, he left the task of procuring necessary legislation to his Cabinet secretaries, and especially to Chase and Stanton, theirs being the departments most concerned. The outcome in the latter case was the creation of a direct relationship between the War Department and the congressional Committee on the Conduct of the War which under Johnson brought the presidency to the verge of disaster.

#### JOHNSON'S THEORY OF THE PRESIDENCY

Final appraisal of Johnson's incumbency for the theory of the presidency is, nevertheless, not easy. Johnson escaped dismissal from office by the High Court of Impeachment by a single vote, but he *escaped!* What is more, it

was during his Administration that the Supreme Court confessed its inability, in *Mississippi v. Johnson*, to enjoin a President from exceeding his constitutional powers or to order him to perform his constitutional duties. The principle which Marshall had stated in *Marbury v. Madison* as applicable to the President's "important political powers," that "in their exercise he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience," was thus extended *even to the President's duty to enforce the law*. Furthermore, whatever of popular glamour the office had lost under Johnson was promptly restored to it when "the man from Appomattox and its famous apple tree" became President.

Reflecting upon all this, Henry C. Lockwood, in his *The Abolition of the Presidency*, which appeared in 1884, advanced the thesis that only by replacing the President with an executive council after the Swiss model could American liberty be preserved. He wrote:

The tendency of all people is to elevate a single person to the position of ruler. The idea is simple. It appeals to all orders of intellects. It can be understood by all. Around this center all nationality and patriotism are grouped. A nation comes to know the characteristics and nature of an individual. It learns to believe in the man. Certain contingencies are likely to take place. It does not require a great amount of political knowledge to form an opinion as to the course of their favorite statesman, whose character they have studied. Under these circumstances, let a person be chosen to an office, with power conferred upon it equal to that of the presidency of the United States, and it will make but little difference whether the law actually gives him the right to act in a particular direction or not. He determines a policy. He acts. No argument that the law has been violated will avail. He is the chief officer of the nation. He stands alone. He is a separate power in himself. The lines with which we

attempt to mark the limits of his power are shadowy and ill-defined. A party, real or imaginary, stands back of him demanding action. In either event, the President acts. The sentiment of hero worship, which to a great extent prevails among the American people, will endorse him. Under our form of government, we do not think so much of what Congress may do. A great multitude declared: "Give us President Grant! We know him. He is strong! He will rule!"<sup>1</sup>

It is interesting to lay alongside Mr. Lockwood's words the contention advanced by Mr. Kemler, in his recently published *Deflation of American Ideals*, that our only escape from totalitarianism is to make the President a perpetual hero!

#### ABANDONMENT OF LAISSEZ FAIRE

The great accessions to presidential power in recent years have been due in part to an enlarged foreign policy, and in part to the replacement of the laissez faire theory of government with the idea that government should make itself an *active, reforming* force in the field of economic enterprise, which has meant, necessarily, that the *National Government* should be active in this way, inasmuch as the field in question has long since come to transcend state lines.

The result for the presidency of the latter development has been twofold. On the one hand, Presidents have made themselves spokesmen of the altered outlook, have converted their parties to it—a conversion not infrequently accompanied by backsliding—and, with the popular support thus obtained, have asserted a powerful legislative initiative. On the other hand, Congress, in responding to the President's leadership in its own peculiar field, has found it convenient to aggrandize his executive role enormously, by delegating to him the power to supplement its measures by a

type of sublegislation called "administrative regulations." Not all this delegated power, it is true, has gone to the President, but a vast proportion of it has; and it constitutes a realm of presidential power of which the framers had little prevision, although it began to appear in the field of foreign relations even as early as Washington's second Administration.

The first exponent of the new presidency was Theodore Roosevelt, whose achievement was to some extent negated by faults of method. Woodrow Wilson was enabled by the advantage of having critically observed his predecessor, by his knowledge of political methods abroad, by a taste for institution building, which was later to divert him into an abortive effort at world organization, and finally by the opportunity afforded by our entrance into the first World War, to illustrate on an unprecedented scale both the new roles of the President—that of legislative leader and that of recipient of delegated legislative power. Our war with Germany was prosecuted for the most part under laws which were drafted under the appraising eye of the President and which conferred upon him far greater powers than those which Lincoln had exercised as Commander in Chief.

To be sure, the war being ended, some degree of reaction to earlier, conventional views of the relations of President and Congress ensued; but the really surprising thing is that the reaction was so slight. Candidate Harding announced that while as President he would recommend a program, as the Constitution required him to do, legislation would be the work of Congress; but there is good reason to believe that he later regretted the promise thus implied. His ultimate failure to lead was apparently due much less to lack of willingness than of will. Although to Mr. Coolidge's ingrained conservatism legislation was in itself thoroughly distasteful, he nevertheless

<sup>1</sup> Pp. 191-92.

asserted it to be "the business of the President as party leader to do the best he can to see that the declared party platform purposes are translated into legislative and administrative action." Mr. Hoover was rather less articulate regarding his views on the subject, but according to Mr. Luce, an excellent authority, "he sent drafts of several important proposals to the Capitol to be introduced by leaders." And thanks to his inaction at the time of framing the Hawley-Smoot tariff, he has had in retrospect the doubtful satisfaction of being responsible for the supreme legislative monument to the futility of the gospel of "hands off."

#### FRANKLIN D. ROOSEVELT'S PRESIDENCY

While President Franklin D. Roosevelt's accomplishment as legislator has surpassed all previous records, yet the story of it, so far as it is of interest to the student of constitutional practice, offers little of novelty. Old techniques have been sharpened and improved, sometimes with the aid of modern gadgets—radio, for instance. The President, said one columnist in 1933, "has only to look toward a radio to bring Congress to terms." And there are certain lessons for the future which the record underlines. Yet except for two features, the pleasure afforded by its study is—to employ Henry James's classification—that of recognition rather than of surprise.

The first of these features is Mr. Roosevelt's consistent championship of the demands of certain groups, especially Agriculture and Labor. Congressional legislation meant to promote the general welfare via the welfare of particular groups is, of course, as old as Congress itself. The element of novelty presented by the New Deal legislation in this respect is furnished by the *size and voting strength of the groups served by it*. The tendency of this development

to aid the party in power to remain in power is obvious.

The second exceptional feature of Mr. Roosevelt's legislative achievement is its dissolving effect on the two great structural principles of the Constitution—the principle of the Separation of Powers and the principle of Dual Federalism. The Supreme Court's decisions sustaining the New Deal legislation all turn on the one essential idea, even when it is not distinctly stated, that the reserved powers of the states do not afford a valid constitutional test of national legislation. As to the Separation of Powers doctrine, I have already pointed out how the President today takes toll at both ends of the legislative process, by pressing a legislative program upon Congress and by rounding out Congress' completed work with administrative regulations.

Is the presidency of today a potential matrix of dictatorship? The dictatorship theme is a familiar one in the history of the presidency—Jefferson was a dictator, Jackson was a dictator, Lincoln was a dictator, Theodore Roosevelt was a dictator, and so was Wilson. Nevertheless, it seems we still have rights and free institutions to be menaced.

That a disturbing case can today be made out for regarding the President as a potential despot has to be conceded. By *Mississippi v. Johnson*, as I mentioned earlier, the President has no judicially enforceable responsibility either for nonperformance of his duties or for exceeding his powers. Impeachment is, as Jefferson discovered much earlier, a "scarecrow," and to galvanize this scarecrow into life would be to run the risk of reducing the presidency to a nullity, as almost happened in 1868. Congress has, to be sure, the power of the purse, and could not be deprived of it except by a coup d'état; but the President dominates Congress by the hold which fat relief rolls give him over millions of votes, and so a vicious circle is created

whereby Congress pays for its own slow enslavement. Moreover, within recent times, propaganda, once the casual art of a gifted few, has been converted into a skilled technique, which is supplemented by the most ingenious gadgets of mechanical science. Today the President of the United States can at any time request that the Nation's broadcasting channels be cleared that he may chat with the people, and the request will be granted pronto, all the available frequencies being allocated to companies by a Federal license which terminates every six months.

Then there is the role of the President as organ of foreign relations, the potential menace of which to American democracy has been pointed out by writers many times. By virtue of his powers in the diplomatic field, wrote Professor Pomeroy as far back as 1871, the President holds in his keeping "the safety, welfare, and even permanence of our internal and domestic institutions." And the Marquis de Chambrun, writing at the same period, voiced his concurrence in this judgment, for, said he, "An active and energetic foreign policy necessarily implies that the executive who directs it is permanent and clothed with powers in proportion to his vigor of action." And both these warnings, be it noted, were written at a time when the acknowledged field of American foreign policy was still limited in the main to the Western Hemisphere.

Finally, we must not forget what occurred in November 1940, when the most generally understood, most widely accepted usage of the Constitution was tossed casually into the discard. It is true that what occurred was by the approval of the American electorate, but that is precisely why the occurrence was so disturbing a portent, for the electorate in question contained millions of voters who were recipients of governmental bounty and other hundreds of thousands

who were on the Government's pay roll, and the number of both classes seems likely to increase indefinitely. And surely it is not necessary to cite Aristotle to prove that the very processes of democracy, and the electoral process in particular, can be, and have been, used in times past to overthrow democracy.

The picture is somewhat overdrawn. Nevertheless, I doubt very much if it would be worth while to point out meticulously just wherein the exaggeration lies. Even after all the words of reassurance were spoken, important counts would remain unanswered. The real refutation of the above jeremiad is that it deals with *symptoms*, not with *causes*. The menace today of the presidency to "liberty" and "democracy," as these have been conceived in the past, consists in the fact that the enlarged role of the President is the product for the most part of conditions which appear likely to continue operative for an indefinite future. The first of these conditions is the international crisis; the other is the persuasion of the American electorate that government does not exist primarily to supplement and reinforce private economic superiority, but ought on the contrary to correct and improve the operation of economic forces in the interest of the masses. And both these conditions spell one thing—increased and increasing governmental activity, which means, of course, increased activity and hence increased power for the National Government. The only question therefore which can be profitably raised from the point of view of those whose concern for "liberty" and "democracy" I have voiced is whether or not all this increased power is to go to the President; and if it is not, how such outcome is to be obviated.

#### NEED FOR CONSTITUTIONAL REFORM

My answer to this question, or rather to the latter part of it, is that *the present enlarged position of the President in the*

*constitutional system requires of the American people a deliberate effort at constitutional reform*, though this need not mean resort to the formal process of constitutional amendment. The reform demanded, however, must have for its purpose not merely the preservation of "liberty" in the conventional sense of *liberty against government*, but also—and indeed primarily—the enhanced *responsiveness* of government to public opinion. Bearing this qualification in mind, I suggest that under the existing constitutional setup the solution must take the form of providing some method of equating easily and without constant jar to society the political forces which Congress at any time represents with those which the President represents at the same time, and of putting the relationship of the two branches on a *durable* and *understood* basis. And for this purpose I suggest a reconstruction of the Cabinet to include the principal leaders of Congress, men who do not owe their political salt to presidential bounty, and so can bring an independent judgment to bear upon presidential projects betimes.

The objection will no doubt be forthcoming that it is constitutionally impossible for an individual to be a member of Congress and to hold office at the same time. The answer is that membership in the Cabinet is not as such an office, though headship of a department is. The Cabinet as a body is as little known to the Constitution as is a "kitchen cabinet" or a "brain trust." All three comprise persons whom the President chooses to consult, the only difference being that the latter two are more apt to contain his real advisers, while the Cabinet goes neglected or is consulted only because Cabinet meetings have become an understood part of presidential routine.

More pauseworthy is the objection that such an arrangement could not long be adhered to, otherwise it must at times

cut athwart the two-party system, and so weaken the political responsibility of the President. The objection has reference to the possibility that the President would belong to the party which was a minority in Congress. Actually, the supposed situation has obtained comparatively rarely—only twice, I believe, in the last seven Administrations, or four years out of twenty-eight. What is more to the point, the objection overvalues the importance of so-called "political responsibility," which operates in the main only *ex post facto*, that is, after the damage is done, *whereas the problem is to prevent the damage from being done in the first place*. Nor does cooperation between the President and Congress under present arrangements invariably stop at the party line, or even generally do so when conditions of crisis arise; and why should it require a crisis to bring forth the best methods? Suppose one takes the position that government is normally a species of *nation keeping*; then it is clear that much of the fuss and fury of politics is really factitious and a sheer waste to the community; that the chief objective to be sought in political discussion, whether carried on in Cabinet council, on the floors of Congress, or elsewhere, is *consensus* or compromise—in what light does the above proposal then appear?

Finally, it may be objected that the arrangement I propose would put the President as organ of foreign relations in leading strings to Congress. The answer is, that the Constitution itself already puts him there. Contrary to a common, but quite mistaken impression, no President has a mandate from the Constitution to conduct our foreign relations according to his own sweet will. If his power in that respect is indefinite, so is Congress' legislative power; and if he holds the "sword," so does Congress hold the "purse strings." Simply from constitutional necessity, therefore, the

actual conduct of American foreign relations is a joint affair, and to my mind this is an altogether desirable arrangement which should be lived up to in spirit. Thanks especially to the bad tradition of secrecy which surrounds foreign policy and which ministers to the self-importance of State Departments and diplomats, there is no field where presidential whim has been more rampant or its solicitations for popular support more misleading and dangerous. But why not a foreign policy based on candor and a real attempt at securing popular understanding of its motivation, rather than on bamboozlement and hysteria? And would not frank recognition by the President that Congress is an equal in this field of power, and not a mere servitor, be apt to eventuate in just such a policy?

#### CONCLUSION

The presidency of this present year of grace, in terms of power, is the product of the following factors: (1) social acceptance of the idea that government should be active and reformist, rather than simply protective of the established order of things; (2) the breakdown of the principle of dual federalism in the field of Congress' legislative powers; (3) the breakdown of the principle of the separation of powers as defining the relation of President and Congress in lawmaking; (4) the breakdown of the Monroe Doctrine and the enlarged role

of the United States in the international field.

To repeat what I said before, it is my belief that the growth of presidential power within recent years confronts the American people with a problem of deliberate constitutional reform; otherwise what was the result of democracy may turn out to be democracy's undoing. And it is my further belief that the reform must consist in stabilizing by means of a reconstructed Cabinet the relationship between President and Congress, for there today lies the center of gravity of our constitutional system, therein lies enfolded the secret of our democracy's future.

The problem of the alleged undue influence of the President on public opinion, of course, remains. For that, I suspect, there is under our system no remedy except an unshackled public opinion itself. When the self-renewing stream of public opinion ceases to provide a cure for its own humors, free institutions fail of their main support and their main purpose, and the democratic process withers away for want of the juices of life. For while democracy implies leadership, it also implies criticism of that leadership, criticism outspoken and unremitting. Leadership immune from criticism is the very definition of totalitarianism. Mr. Kemler to the contrary notwithstanding, no President should be regarded as *hero ex officio* unless it is at the same time recognized that even heroes have their off days.

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