
BOOK REVIEWS

THE PRESIDENT OFFICE AND POWERS—*Edward S. Corwin. Second Edition (Revised) New York University Press, Washington Square, New York. 1941.*

“The truth is that in the presidential office, as it has been constituted since Jackson’s time, American democracy has revived the oldest political institution of the race, the elective kingship.”

This assertion of Henry Jones Ford in his *Rise and Growth of American Politics*, reminiscent of an earlier assertion of like import made by Secretary of State Seward, suggests the theme of this new volume by Edward S. Corwin, McCormick Professor of Jurisprudence at Princeton University

The work, which is an outgrowth of lectures given by Professor Corwin at New York University in 1937 on the Stokes Foundation, is both historical and analytical in nature. The emphasis is upon the power of the President under the Constitution, and, while the “personal aspects of the Presidency” are not neglected, they are emphasized only when they seem “to have materially affected the development of the office and its powers.” After considering the historical conceptions of the office and matters of qualification, election and tenure, the author paints five portraits of the President. as Administrative Chief, as Chief Executive, as Commander-in-Chief, as the Organ of Foreign Relations and, lastly, as Popular Leader and Legislator.

The book contains seven chapters, each of which is topically arranged and summarized in several succinct paragraphs. A Résumé follows the last chapter. The work is exceedingly well documented both in the text, which comprises 316 pages, and in the notes which constitute about 132 pages. It is to be regretted that the notes are concentrated at the back of the book. This reviewer greatly prefers that they follow the text, but the extraordinary length of many of the citations probably renders this impractical.

Asserting at the outset the vagueness of the constitutional grants of power to the President, the author sketches the historical concep-

tions of the office. The early state constitutions, in which gubernatorial office was "reduced almost to the dimensions of a symbol" (p. 4), undoubtedly were influential sources of the Framers' concepts of executive power, but "by no means the only source, or even the chief source" (p. 6). The Framers were familiar with the concepts of Locke, Montesquieu and Blackstone, and what they had in mind was the "balanced constitution" of these writers "which carried with it the idea of a divided initiative in the matter of legislation and a broad range of autonomous executive power or 'prerogative'" (p. 15). In terms of actual experience, two conflicting conceptions emerge (1) that the executive power "ought always to be subordinate" to the legislative power, and (2) that it ought to be more or less "autonomous and self-directing" (p. 310). "Taken by and large", the author concludes, "the history of the Presidency is a history of aggrandizement, but the story is a highly discontinuous one." Only about one in three of the individuals who have filled the office "has contributed to the development of its powers" (p. 29).

Considering presidential tenure, the author avers that "the prevailing sentiment of the Convention of 1787 favored the indefinite reëligibility of the President, a sentiment which was owing in considerable part to the universal expectation that Washington would be the first person to be chosen President, and that he would live practically forever" (p. 35). In fact, the Framers "devised the Electoral College with the intention of rendering the President indefinitely reëligible" (p. 62). In the light of these premises, the ban on third terms is developed and appraised, and the conclusion is reached that "it is impossible to adjudicate at all nicely between the contending arguments" (p. 38). Nevertheless, a prophecy is added to the effect that "if the anti-third-term taboo is once set aside, it will take a long time for an anti-fourth-term or anti-fifth-term taboo to develop. In a word, the presidential term will become indefinite" (p. 38). The latter prediction may be questioned. In the reviewer's opinion, it will depend in part upon the strategy of the presidential candidate who seeks to challenge the incumbent. He will find it difficult to succeed upon a multiplicity of issues that do not clash or upon some tradition that is not made secure by constitutional mandate.

Speaking of the Electoral College, the author emphasizes the importance of a continuously dominant party or two fairly equal, alternating parties. To avoid the danger of an election being thrown

into the House of Representatives, he urges serious consideration of the proposal advanced by Senator Norris by which the Electoral College as such would be abolished (p. 51). Likewise, the danger spot of presidential disability, as in the cases of Garfield and Wilson, is discussed and the enactment of some procedure to deal with it is urged (p. 51).

The power of the President as "Administrative Chief" is considered in Chapter III. Three aspects are considered (1) the power to appoint to office (p. 65), (2) supervisory power over subordinates (p. 76), and (3) the removal power (p. 84).

With respect to the removal power, the author discusses in detail the cases of *Myers v. United States*, 272 U. S. 52, (p. 84) and *Humphrey v. United States*, 295 U. S. 602, (p. 91). In the former, the Supreme Court upheld the power of the Executive to remove from office a first-class postmaster notwithstanding an Act of Congress requiring such removal to be "with the advice and consent of the Senate." In the latter, the Court held that a member of the Federal Trade Commission, appointed by President Hoover by and with the advice and consent of the Senate, was wrongfully removed by President Roosevelt. In other words, "(1) as to agents of his own powers, the President's removal power is illimitable; (2) as to agents of Congress' constitutional powers, Congress may confine it to removal for cause" (p. 96). Viewing the problem realistically, Professor Corwin says that "The *Myers* Case was decided by a former President (Taft) under the influence of Jacksonian concepts." The result "was soon perceived by the Court to clash with the doctrines which it had been building up since about 1890 with regard to 'a fair hearing' in connection especially with rate regulation, and in the *Humphrey* Case it beat a precipitate retreat from the ideology of the *Myers* decision" (pp. 109, 110).

Of added interest in this chapter is the author's discussion of the problem of administrative reorganization. Two proposals of the President's Committee on Administrative Management for the reorganization of the executive branch of the National Government are considered and evaluated, namely, its recommendations with respect to the independent commissions and the Comptroller General (p. 96).

Treatment of the President as "Chief Executive" will especially interest students of the law. The problem of congressional delegation of power is given first attention. Beginning with the maxim

derived from John Locke's *Treatise on Civil Government* that "the legislature may not delegate its power" (p. 115), American practice is traced from the earliest cases through the New Deal legislation. The maxim, Professor Corwin concludes, "has passed its heyday, along with the laissez-faire conception of the governmental function of which it is a reflection" (p. 126).

Passing from executive practice and constitutional doctrine of delegation of powers, the author deals at length with the emergency powers of the President. From the doctrine of *In re Neagle*, 135 U. S. 1, that "there is a peace of the United States" which entitles a United States marshal to resist by force an assault on one of its judges (p. 127), we are brought to the so-called "Stewardship Theory" of Theodore Roosevelt, set forth in his *Autobiography* (p. 131). The latter, which regards executive power to be "limited only by specific restrictions. . . in the Constitution or imposed by the Congress" (p. 131), is viewed by the author as "unquestionably disruptive of conventional views" (p. 132).

As supplementary to executive powers, the prerogative of pardons, amnesties and reprieves is considered. "Whereas Blackstone was thinking of pardon as an instrument only of clemency. . . , the Framers regarded it as also an instrument of law enforcement" (p. 136). The case of Gerald Chapman, whose Federal sentence was commuted by President Coolidge in order that he might be turned over to Connecticut authorities for trial on a murder indictment, is cited in support of this observation (p. 138).

To those who are inclined to speculate upon the war power of the President, with or without a declaration by Congress, Chapters V and VI will be of particular interest, even though they do not answer all current questions.

Chapter V views the President as "Commander-in-Chief", primarily "as the custodian and wielder within the United States itself of the physical forces of the National Government" (p. 155). The first phase of the discussion concerns Lincoln's war power. In addition to Lincoln's course of action and reasoning, the author refers to the famous Prize Cases, 2 Bl. 635 (March 10, 1863) in which the Supreme Court "endorsed for the time being the idea of presidential dictatorship" (p. 158), and also to *ex parte Milligan*, 4 Wall. 2 (p. 162), the majority opinion of which registered reaction "from these extremes of doctrine and practice" (p. 198). Nevertheless, "candor compels recognition of the fact that in emergencies the legis-

lative power has to stomach many a *fait accompli* with such cheerfulness as it can muster" (p. 165)

This chapter also includes a discussion of the powers of the President in situations of violence less than war (p. 166), his powers in the establishment of martial law (p. 176), and his powers as the result of Congressional delegation and as illustrated by World War I (p. 189).

In Chapter VI we obtain a view of the President as the "Organ of Foreign Relations." Here, Professor Corwin's historical-analytical method finds its most effective expression. A sincere effort is made to separate the powers of the President and Congress in the field of foreign relations. The import of the entire chapter is clearly expressed at the outset where the author says that "the Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy. In such a struggle the President has, it is true, certain great advantages, which are pointed out by Jay in *The Federalist*, the unity of the office, its capacity for secrecy and despatch, and its superior sources of information, to which should be added the fact that it is always on hand and ready for action, whereas the houses of Congress are in adjournment much of the time. But despite all this, actual practice under the Constitution has shown that while the President is usually in a position to propose, the Senate and Congress are often in a position to dispose. The verdict of history, in short, is that the power to determine the substantive content of American foreign policy is a divided power, with the lion's share usually falling to the President, though by no means always" (pp. 200, 201)

Even more emphatic, in this connection, is the author's conclusion "No President has a mandate from the Constitution to conduct our foreign relations according to his own sweet will. If his power in that field is indefinite, so is Congress' legislative power, and if he holds the 'sword', so does Congress hold the 'purse-strings.' For the rest, the President's diplomatic powers are, and always have been, a function of our foreign policy, and if they seem dangerously great today it is partly because our position in the world has become, for one reason or another, dangerously great" (p. 254)

The final portrait of the President—as "Popular Leader and Legislator"—is a vivid, though incomplete, study in the personal traits and concepts of individual Presidents as well as a study of

presidential leadership. Beginning with the "literary sources of presidential leadership" (p. 256), the author surveys "the constitutional basis and *modus operandi* of presidential leadership from Roosevelt I to Roosevelt II" (p. 264) "The present-day role of the President as policy determiner in the legislative field is largely the creation of the two Roosevelts and Woodrow Wilson, each of whom came to the Presidency following a notable and successful experience as governor of his home state" (p. 267) After analyzing in some detail the technique of these individuals, the author concludes that "presidential leadership has usually been a function of two highly variable factors, Crisis and Personality" (p. 281).

Following a consideration of the veto power as a "positive" weapon of presidential leadership (p. 282) and such "collateral factors" as patronage, filibusters and judicial review (p. 289), Professor Corwin concludes with the problem of "stabilizing presidential leadership" (p. 297) He alleges that presidential leadership is "discontinuous, not to say spasmodic, that it is too dependent on the personality of the President rather than on the authority of the office, that it is often insufficiently informed, especially as regards the all important matter of administrative feasibility, and, finally that the contact between the President and Congress is most faulty, being, in fact, at the mercy of either's whim" (p. 300). As a remedy, he suggests among other things that a reconstruction of the Cabinet "is at least a promising expedient, and one to which the Constitution interposes no obstacles" (pp. 304, 307) This solution, he admits, would not eliminate the "alleged undue influence of the President on public opinion nowadays. For that, there is under our system no remedy except an unshackled public opinion itself For while Democracy implies leadership, it also implies criticism of that leadership, criticism outspoken and unremitting" (pp. 307, 308)

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