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SOME ASPECTS OF THE LEGISLATIVE PROCESS IN THE UNITED STATES

By

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The legislative process in the United States is a confusion of phenomenal forces, whose respective powers can be determined only by a painstaking analysis of their interdependence. In addition to these forces the unique legal framework in which the American people govern themselves presents certain assumptions. These assumptions must be understood, or they will tend to confuse the mind of the observer to the point where the legislative process becomes an abortive attempt at reconciling and harnessing these forces within the basic frame of government.

One of these assumptions is that there is a complete separation between the functions of the President and those of the Congress. Many are prone to believe that Congress legislates and the President takes care that the laws are "faithfully executed." This is gross oversimplification if not gross misstatement of what actually does occur when legislation takes place. Can there be a separation of the powers of the Congress from those of the President apropos the legislative function? If the founding fathers intended placing the legislative function solely in the hands of the Congress, they did not set about logically to do so. The President can veto a bill or joint resolution and perhaps a concurrent resolution. This is legislating negatively in the sense that the proposed law can be prevented unless there is at least two-thirds of each House supporting the bill. Prevention of enactment substantiates the existing law, and thus at least "reaffirms" the preexisting legal situation. But there is a positive joining of the President and Congress in the legislative process, which joinder further belies separability of functions. This joinder is in the area of policy formulation.

Perhaps before discussing the position of the President apropos the Congress in the matter of policy making, we should look at the relationship of policy to legislation. Is policy making part of legislation? Arbitrary definitions are never satisfactory; but if logic is employed, a working definition, aiding us in the determining of this relationship, may be obtained. Before a law is enacted there has to be a reason for the law. This reason is usually found in the clash of individual or special group demands with one another; and it is from the reconciliation of this clash that public demand finds its origin. By looking closely at some one...
interest group's desire and seeing how it is worked into the broad concept of the general welfare, we can begin to understand what is meant by public demand. From this inspection we see the process by which the individual or special group demands are fashioned into the mosaic of public policy. The effecting of a legal rule based on this policy is legislation. Under modern technology and interdependence of interests the formulation of policy and its use in rule making cannot be left to the Congress alone. As an example of this let us look at some one particular interest group demand and see how it aids in shaping and is itself controlled by public policy.

The sugar beet interests want their markets protected from foreign cane and beet crops. They want a floor under domestic prices, which floor can be elevated in case of disadvantageous general price rise. They want an adequate labor supply, adequate transportation, and storage. In times of rationing they want a voice in the determination of the rationing policy. Perhaps a dozen senators and some forty representatives speak for the growers. These members of the Congress will want to write a bill protecting the sugar beet interest, but can these Senators and Representatives determine, by themselves, the best way to protect the beet growing farmers? They may succeed by clever maneuvering in securing a high tariff, low rail rates, high domestic price underpinning, and yet may by their very act ruin the beet growers by keeping world trade unstabilized, railroads operating in the red, and an unbalanced domestic price structure, whose distortion will be reflected in beet growers' costs and indirectly in the cost of the total national product. The Congress alone doesn't have the ability to write a bill with the least danger of back-firing, because it is not in a position to obtain all the related data or to coordinate that data in terms of a broad, national economic policy. The Departments of Agriculture, Commerce, State, and the other interested agencies such as the Bureau of the Budget, through the use of interdepartmental committees, executive liaison, and well-organized staffs of investigators, statisticians, and research men, are able to gain a far broader view of any particular problem than does a group of well-intentioned but technically inept, overworked, and under-staffed representatives in Congress. As modern technology becomes more complex, the Congress becomes more perplexed. It cannot adequately formulate policy alone because it must rely on the executive agencies for the data upon which any workable policy is based. This is not to say that the desires and demands of the special interests are not part of the data; in a democracy they most certainly are, but it is the only part the Congressman is "expert" in dealing with. If he's intelligent, he does not try to use it as the sole element in policy formulation. The political demands, of which the Member of Congress is the exponent, must be worked in with the other "demands" of the facts and figures of the broad implications of foreign and domestic arrangements. This fusion can only be accomplished by close cooperation between the executive and the legislative branches.
Congressional staffing may help the Congressional Committee to appraise more adequately the data presented by the administrative agency, but it cannot ever provide the breadth and depth of public contact which comes from the administration of law. The subtle weaving and blending of the various factors that must go into a law are done at the point where the law is carried out. Unquestionably the "grinding out" of policy is largely in the hands of the Congressional Committees, but no committee can work successfully without having close relations with the administrative offices involved. This is most apparent in the second phase of the legislative function, that of policy execution. Once the policy has been formed and the rule laid down into law, the question immediately arises - Will the rule work? Can we call it legislation if it fails to work? The effectiveness of a law is tested in its execution. The carrying out of law is in the hands of the President. Here a most potent psychological factor enters. Are a President and his administrators able to give full-hearted effect to a law they did not have a hand in making? Whose inner guide was unknowable to them because it contained ideas alien to theirs? It's one thing to say the President shall faithfully execute law, and another to ask, Can he be faithful without a faith in the policy behind the law? The best laid plans of many a trust-busting Congress failed because the Chief Executive was not in favor of them. Legislation is a lot more than the formal process of the chain reaction from hopper to enrollment desk. Legislation is at base the rational rapprochement of facts, fancy, and force. These phenomena of the legislative process are in constant motion. What might appear to have been a most rational rule when passed may be utterly incapable of actual enforcement. The experiences of enforcement must therefore be a vital part in the consideration of legislating, and it is the Executive branch that has these experiences. The Congressional committee may work out the final policy governing Congress and the President, but it is a wise committee that makes use of the vast store of operational experience that is the stock in trade of the administrator. The combined and united intelligence of the Congress and the Administration is barely capable of harnessing the surging forces in the social milieu. The Congress or the President acting alone can merely check each other. To make the fine balance that is the law, demands close and constant harmony—legislation is a perpetual as well as a joint operation.

Another assumption in American government is that only the Judiciary is concerned with the constitutionality of legislation. Let us have a look at what is meant by constitutionality and see if the President and the Congress in their combined strength as policy framers and legislators have anything to do with the constitutionality of a law. Obviously, over a period of years, Presidents and Senate can determine somewhat the membership of the Court, and thus have an indirect hand in the formulation of court decisions. But the Court has been at times at odds with President and Congress. When this is the case, who determines the constitutionality of the laws? Does the Court alone determine what are the
good and the bad in the laws? In a democracy, constitutionality has to do with the effective demands of the people. Constitutionality is highly political. Does the Court declare unconstitutional those statutes for which there has been a prolonged and definite public backing? At times there have been decisions running in the face of the tide of the political demands, but a quick look at the famous decisions overruling a law will show those laws to have been highly controversial. There was little national unanimity for or against the Dred Scott decision. *Pollock v. Farmer's Trust Co., Lochner v. N. Y.* and the child and female labor cases all represented situations in which the public mind had not spoken out with clarity as to its wishes. Bryan was defeated in 1896 although a Republican Court had beaten the income tax which he favored. Taft was elected, carrying New York after the bakery decision. The Old Guard Republicans, strong in their belief in their brand of *laissez faire*, were returned in 1920, 1924, 1928, in spite or perhaps because of, the child and female labor decisions. When the Congress and the President did speak with overwhelming votes behind them after 1936 and 1940, the Court gave way and followed the election returns quite closely. What does this imply? Chiefly, that when the legislature acts upon broad public issues which have real public backing, those acts are generally validated by the Court. If the Congress and the President truly reflect the definite desires of the preponderate majority of the people, the Court does not long stand against them. Congress and the President as well as the Court must sense the broad flow of the stream of political power and note the course in which that power flows. The channel may not be clear, but they must find it. It may change as the force of political power changes it. It is the job of the Congress and President and the Court to have some idea as to the channel's position, its strength, its susceptibility to change. They must be sure they don't allow the ship of state to run over the bank merely because the momentary high flood of public interest or pressure obscured the main course, marked by the ideals of constitutional government which serve as beacons for the progress of a representative democratic action. These beacons designate what is "good" legislation. Such matters as injunctions against ex-post facto laws and bills of attainder are easily discernible, but the subtler demands of "good" statute making are not so clear. Has the law adequately defined what it seeks to do? Is it class legislation? Has there been unwarranted delegation or abdication by the legislature? All these questions may find an answer in the Court, but the Court is fallible. It is not enough in a democratic government to depend on the Court alone. The Congress and the President and the Court as co-equal participants in the American governing process are equally responsible for the making of the law. Law must be the result of the optimum amalgamation of available data, of the subtle and expressed pressures of the various interests, and the pull of ideal sentiment which furnishes the motive force that keeps the unwieldy machine called society operating. No Court alone can possibly reflect all these disparate elements in the political situation.
Congress and the President together have the opportunity to get the facts, express the pressures, and if they will, supply that touch of the ideal element so necessary to the political workings of a free people. From all these come the behavior patterns of a democracy, and the course of legislation must be the reflection of these patterns; otherwise it can never be constitutional regardless of the Court’s decree.

It has been suggested that Congress be led to see its constitutional role by having it rationalize the proposed statute in terms of what it believes is the law of the land. This in itself would be the formulation of Congressional constitutional policy, and the chances are it would be a cardinal factor in the formulation of the Judiciary’s constitutional policy. I know of nothing that would tend to integrate the thinking of the Congress on the problem of what the law should be more than this. As former Director of the Budget, H. D. Smith, stated before the Congressional Committee on Reorganization, Congress should re-think again and again the questions: (1) what can a legislature do? and (2) what should it do? It is the Congress with the President who express the effective political ideas of the people. Thus Congress and the Executive have the primary duty of seeing to it that the force of a freely expressed political opinion finds its way into the law of the land. They are the Constitution makers in a very real sense. Without the forum which Congress provides for the airing and hearing and criticism of ideas, for the compromises, deals, and common horse trading, no free and representative government can function. Congress in its role of critic provides the machinery by which the desires of the articulate persons and interest groups throughout the sections of the nation are voiced and evaluated in terms of political power. Governments are run by men, and in the political operation the data are not only the cold, impartial, scientific facts arrived at through the stringent process of investigation, but also the quick flash of emotion, prejudice, and downright stubbornness. The Congressional forum is the cockpit where the psychological forces which control political animals have their play. Further, it serves as an educative force whereby ideas can issue forth and become part of the grist from which the law is ground.

The final assumption in our frame of government is that the officials are responsible. When President and Congress legislate, to whom are they actually responsible, and for what are they responsible? We have hinted at both these problems in the discussion of separability and in that of the role of the Congress in the matter of constitutionality. The word “responsible” has in it the element of promise which implies answerability. The question that is involved here is whether the representative speaks only for those who voted for him, for all his local constituency, or for the constituency of the nation. The President speaks for the nation in broad terms of the national weal. Does the Congress likewise contain a sense of the general welfare, or is it merely an assemblage of parochial demagogues bent on satisfying their own local, selfish interests even though they
destroy themselves by failing to note the national interest? Though too many
Congressmen fit this last, there are those who do see and strive for the public
good. They have their human limitations, but in spite of the strict confines of
their jobs they are able to rise above the petty and parochial to view the broad
expanse of the nation. In the measure that they do this they are truly responsible
to the nation. But the mere fact that the Congress does come from the local,
the sectional areas, can be of great use in checking the overweening efforts of
the Administration to forget the local interest and thus to forget the basic fact
that a United States citizen is also a citizen of some town, with all that that implies
under our system of government. The representative knows his local constituent
as the bureaucrat never can. The representative, if he will, can also see the
broad, national, and international picture in terms of the needs of his local
hustings. He therefore has much to offer the administrator. His intervention and
criticism makes his attack a "valuable corrective to administrative generalization."2
Without this corrective, made in honest wise by a local representative, the bureaucrat
would be his own worst enemy. While he was saving the nation he might be
destroying the small fibres from which the general fabric is woven.

For the Congress to be truly responsible it must answer for both the general
and the local welfare. These are inseparable, both logically and factually. Cong-
ress is the only branch of the Government that has the privilege of being able
to so answer. To the extent that it does is the measure of true democratic responsi-
bility.

These three closely joined problems seem to be at the nub of the question,
"What is legislation in the United States of America?" Briefly, they are concerned
with (1) whether the Executive and Legislature are and must be a team in
the law-making process; (2) whether Congress together with the Administration
is the area wherein political power should get its chance to form the amalgam
that eventually becomes the law of the land; (3) whether, if the Congress were
not responsible for the inseparable linking of the local with the national interest,
government under the assumptions of our constitution would be possible.

From a discussion of these few points we begin to see the democratic legisla-
tive process by which a mass of disparate, impassioned, and often inarticulate
political elements are blended into a rule of order serving the happiness of the
individual as a member of a political community. It is only when this process
reaches its full maturity that we can say there is really legislation.