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THE USURPED POWERS OF THE SENATE

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A century of constitutional government in the United States has served to emphasize the wisdom of Hamilton's warning of "the tendency of the legislative authority to absorb every other." He clearly foresaw and attempted to guard against, dangers that today are only too apparent. "In governments purely republican," he wrote, "this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and, as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution."¹

¹*The Federalist*, No. 70.

Never did human ingenuity devise a more nicely balanced system of government than when the framers of the Constitution allocated to the executive and to the legislature the exercise of powers not to be infringed by the other; but like many things human the intent has been perverted. Every person familiar with the Constitution, the debates in the convention, and the writings of Madison, Hamilton, and Jay in *The Federalist*, must know that the purpose of the framers of the Constitution was to create a system of government by which the President should become neither the creature nor the controller of the legislature; and by vesting certain exclusive powers in the popular branch and certain other powers in the Senate to provide that the line of demarcation between the two houses should not be overstepped. What they feared, and believed they had effectually guarded against was an executive who would become possessed of autocratic powers; what they dreaded no less was a legislature that would reduce the President merely to a puppet—a puppet to dance when Congress pulled the strings. Monarchical Europe and the Roman republics had warned them of the danger to the liberties of the people when the king was the source of all power, or when, in a republic, that power was usurped by a council or other elected body supposed to safeguard the people against the encroachments of the executive.

In making this exact and definite division of power the framers of the Constitution had a distinct purpose in view. The legislature was to act as a check upon the executive; the restraining influence of one branch of the legislature was to be exercised upon the other. Modeled upon the House of Commons, the House of Representatives was given control over expenditures; and it

is that control that really constitutes the power of a legislature in a constitutional form of government. The right of the House of Representatives to originate "money bills" led to prolonged discussion in the constitutional convention. There was a marked disposition shown by many of the delegates to make the Senate a negligible quantity, so far as bills raising revenue were concerned, by prohibiting the right of amendment—the functions of the Senate in this respect to be analogous to the House of Lords, which may neither increase nor diminish a revenue bill sent to them by the Commons. But in granting that power to the Senate it is interesting to note (in view of what I believe is foreign to the spirit of the Constitution and the intent of its framers) the exercise of usurped powers by the Senate. In the constitutional convention, Mason, of Virginia, addressing himself to the powers of the two houses relating to revenue bills and the right of the Senate to amend, used this language:

"By authorizing amendments in the Senate it got rid of the objections that the Senate could not correct errors of any sort, and that it would introduce into the House of Representatives the practice of tacking foreign matter to money bills. These objections being removed, the arguments in favor of the proposed restraint on the Senate ought to have full force. The Senate did not represent the *people* but the *States* in their political character. It was improper, therefore, that it should tax the people. . . . Again, the Senate is not like the House of Representatives chosen frequently and obliged to return frequently among the people. They are to be chosen by the States for six years, will probably settle themselves at the seat of government, will pursue schemes for their own aggrandizement—will be able by wearying out the

House of Representatives and taking advantage of their impatience at the close of a long session, to extort measures for that purpose. . . . A bare negative was a very different thing from that of originating bills. The practice of England was in point. The House of Lords does not represent nor tax the people, because not elected by the people. If the Senate can originate, they will in the recess of the legislative sessions, hatch their mischievous projects, for their own purposes, and have their money bills ready cut and dried (to use a common phrase) for the meeting of the House of Representatives."¹

Here, very concisely, the fundamental question has been stated. The House represented the people; the Senate did not. Taxation was a prerogative to be exercised by the people. The makers of the Constitution feared executive as well as judicial usurpation. They erected barriers to protect themselves. For that reason the treaty making power was divided between the executive and the Senate, and the argument used in support of that division of power was that "a man raised from the station of a private citizen to the rank of chief magistrate—possessed of a moderate or slender fortune, and looking forward to a period not very remote when he may probably be obliged to return to the station from which he was taken—might sometimes be under temptations to sacrifice his duty to his interest, which it would require superlative virtue to withstand." And note again Hamilton's warning against placing too great power in the hands of the President. "The history of human conduct," he says, "does not warrant that exalted opinion of human virtue which would make it wise in a nation to

¹Documentary History of the Constitution of the United States of America, vol. iii, p. 514.

commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."¹

The same distrust of the judiciary was expressed with equal frankness. It was proposed in the constitutional convention that the power to confirm appointments should be vested in the Supreme Court, but the suggestion was negatived, as it was feared that the Supreme Court would be too readily susceptible to the influence of the President, owing to the members of the court being his appointees. That the Senate would attempt to dictate appointments, that it would demand of the President that certain men should be appointed to office or failing this, that other men would not be confirmed, was so repugnant to the spirit of the Constitution that its framers refused to entertain it as a contingency to be guarded against. This interference with the President in the free exercise of the appointing power is another of the usurped powers of the Senate, dangerous to the people, and a curtailment of the rights of the executive.

Entertaining a distrust of the President and the judiciary, it was to the legislature that the framers of the Constitution looked to preserve those rights and liberties for which they had paid with their blood. But here again they saw the danger that might follow from the centralization of power in a small and cohesive body such as the Senate. The example of England and the teachings of history had convinced them that a bicameral legislature was necessary; and although there was pronounced opposition to the creation of a second chamber,

¹*The Federalist*, No. 75.

and much fear was expressed that the Senate would oppress the House of Representatives, the argument that "history informs us of no long lived republic which had not a Senate" prevailed, and the restrictions thrown around the Senate were considered strong enough to nullify any danger. It was to the House of Representatives that these men really pinned their faith. Its members were to be elected at short intervals, they came direct from the people, they represented the people, they were of the people. If they committed treason it was treason against themselves. If they were tyrannous they would suffer from their own tyranny. If through weakness or self-interest they bartered their own liberties they would pay the penalty. Surely this was confidence not misplaced. And above all they commanded the exchequer. "They, in a word, hold the purse," Hamilton said of the House. Against this power kings and oligarchs have contended in vain. The purse is more potent than the sword, for it is only when the purse is opened that the sword is unsheathed.

I have thus briefly sketched what my study of the Constitution has taught me was the intent of its framers, and I now propose to show how this intent has been perverted. But before doing so let me summarize the broad principles of the Constitution. It was contemplated that there should be: First, an executive untrammelled by the legislature in the exercise of his constitutional rights. Second, a Senate which should supervise the executive so as to prevent the appointment of improper or unfit persons to public office, or the making of treaties detrimental to national interests; and which should have coördinate powers with those of the House of Representatives except in legislation affecting "money bills." Third, a

House of Representatives that should have control over the national purse. How far have the American people departed in principle from the scheme of their Fathers?

Perhaps the most important divergence, which is almost the most dangerous to the rights and liberties of the people and to the future of the republic, is the right arrogated by the Senate (which, I regret to say, has been ratified by the Supreme Court) to control the purse, which in its broader sense means not only the right to make appropriations but the higher privilege to impose taxation. The Constitution provides that all bills raising revenue shall originate in the House of Representatives; but the Senate has power to amend these bills. By this power of amendment the Senate has defeated the purpose of the Constitution, which was to retain the taxing power in the hands of the representatives of the people. The tariff, which is the great source of revenue, is no longer the creation of the House. The House passes a tariff bill, which the Senate proceeds to "amend" in accordance with its own views or the special interests represented by particular Senators. Surely when the Senate strikes out of a tariff bill passed by the House everything except the enacting clause, writes in a new bill, and returns it to the House with an ultimatum that the House must either accept the Senate "amendment" or no tariff bill will be passed, it is obvious that that particular bill has originated in the Senate, even though the constitutional form has been observed because its origin can be traced to the House.

When we turn to the consideration of amendments made by the Senate to "money" or, as we now term them, "appropriation" bills, they are so numerous that it is impossible to catalogue them. As a matter of practice

appropriation bills are, almost invariably, initiated by the House; but the Senate regards the House bill not as a finality but as a "project" (to use the word applied by a Senator to describe a treaty sent to the Senate for ratification). In other words, the bill passed by the House is a scheme expressing the views of the House in regard to the disbursement of the public moneys, but of no more binding force than a recommendation made by the head of a department. It is notorious that the Senate almost invariably increases the appropriations made by the House; it is equally notorious that in any contest between the House and the Senate it is the House that, nine times out of ten, has to yield to the Senate. The reason for this can be easily explained.

The legislative surrender of the House of Representatives to the Senate began with the election of Mr. Reed to the speakership of the Fifty-First Congress. Mr. Reed found himself confronted with a state of affairs that demanded a drastic remedy. The majority, because of the adoption of foolish rules, was at the mercy of the minority. Practically, business could only be transacted by unanimous consent or the test of endurance. The House could be rendered impotent by the opposition offering dilatory motions which, under the rules, must be voted on to the exclusion of legitimate business, or by breaking a quorum. When Mr. Reed came to the chair he had vivid recollections of the bitter contest over the Direct Tax Bill, when for twenty-six consecutive hours members sat behind locked doors while a call of the House was in progress and the Sergeant-at-Arms and his deputies were scouring Washington to bring members under arrest to the bar of the House.

Mr. Reed resolved, very properly, that the majority,

being responsible for legislation, should have the power to legislate. He framed a code of rules (and parenthetically it is interesting to add that the code framed sixteen years ago is virtually the code of today) that centralized all power in the hands of the Speaker and deprived the "private member" of all power. Mr. Reed aimed at two things: to enable the House to transact business instead of wasting its time in mere idle talk; to check the rising tide of extravagance that threatened to swamp the treasury. When the House had adopted these rules it was within the power of the Speaker to regulate to the fraction of a second the exact time to be allotted to the consideration of any measure; to permit a measure to be considered or to prevent its consideration.

No man entertains higher appreciation for Mr. Reed than I. His lofty ideals, his great reforms, and the courageous example he has set the country entitle him to the profound gratitude of the American people. And yet I am forced reluctantly to admit that Mr. Reed's rules had unfortunate consequences, albeit they were consequences that Mr. Reed could not foresee.

In his desire to prevent time from being frittered away it often happened that even vital measures were disposed of without proper consideration. When the time set for taking a vote arrived the gavel fell, often in the midst of a sentence, and all debate ceased. And because of the Speaker's rigid ideas of economy, members who were unable to secure appropriations induced Senators to offer these bills in the Senate in the form of amendments.

The rules of the Senate are radically different from those of the House. In the Senate there is no limitation of debate. So long as the physical endurance of a Senator lasts so long may he speak; and by an unwritten but

strictly observed rule the Senator who is weary may defer the conclusion of his speech until such time as he shall have sufficiently recuperated. Like the mysterious East, the Senate cannot be hurried. It is this freedom of debate that makes the individual Senator so all powerful, which is in such marked contrast to the individual Representative, who has no individual power. Senators do not scruple about the exercise of this power. The late Senator Quay threatened to defeat a tariff bill unless certain changes were made that he demanded. He came to the Senate with a speech that would have required weeks in its delivery. The Senate was compelled to make peace with Mr. Quay on his own terms. Senator Carter, of Montana, kept \$70,000,000 in the treasury by talking a river and harbor bill to death.

Because of this enormous individual senatorial power, business in the Senate nowadays practically can only proceed by unanimous consent, which bluntly stated means that every Senator must be paid his legislative price. (I use the term without any sinister meaning.) No Senator is so foolish as to antagonize a brother Senator, because, at an inconvenient moment, that Senator might use his power. And that is the reason why members of the House secure appropriations by the roundabout way of the Senate instead of directly through the House, and it explains the statement previously made that appropriation bills, as a rule, are increased by the Senate. It is perhaps almost unnecessary to add that Senators are only too glad to be of service to members of the House, as it places members under obligations to them and forces their constituents to realize that the real fountain of power in Washington is the Senator, which strengthens the hold of the Senator upon his State.

We have seen that the Senate has usurped legislative powers that the Constitution did not originally contemplate it should possess, and by that usurpation the importance and dignity of the House of Representatives has been correspondingly decreased. It no longer controls the purse, but has been forced to share that control with the Senate. We have now to ascertain whether the Senate has in a similar manner encroached upon the prerogatives of the executive.

"Executive usurpation" has been a favorite theme of writers and speakers (especially during the last few years) who, relying upon their rhetoric rather than their facts, have deplored the growing power of the executive and longed for a return to the early days when the President respected the powers vested in the legislature. But, as a matter of fact, if there has been usurpation that of the President is trivial compared to that of the Senate. In the exercise of the two most important functions reposed in the executive—the conduct of foreign relations and the power of appointment—the purpose contemplated by the framers of the Constitution has been so thoroughly perverted by the usurpation of the Senate that the original relation existing between the President and the Senate has been reversed.

In dividing the responsibility for appointments between the President and the Senate—that is, in making the presidential appointment subject to confirmation by the Senate—it was intended to put in the hands of the Senate the power to prevent the President from making an improper appointment; but it was not intended that the Senate should be able to dictate the President's nominees. That possible assumption was scouted as preposterous.

"It will be the office of the President," Hamilton wrote,

“to *nominate*, and with the advice and consent of the Senate, to *appoint*. There will, of course [mark the words] be no exertion of *choice* on the part of the Senate. They may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President. They might even entertain a preference to some other person, at the very moment they were assenting to the one proposed; because there might be no positive ground of opposition to him, and they could be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected. Thus it could hardly happen that the majority of the Senate would feel any other complacency towards the object of an appointment than such as the appearances of merit might inspire, and the proofs of the want of it destroy.”¹

But Hamilton, wise man though he was, could not anticipate a time when “the courtesy of the Senate” would put it in the power of a single Senator to defeat a nomination, nay, even more than that, to coerce a President into nominating a man of whom he did not approve. One has only to recall the contest between Cleveland and the Senate and that between Harrison and the Senate, and to remember that McKinley as well as Roosevelt had to steer a very fine course to avoid shipwreck of their nominations, to become convinced that the Hamiltonian doctrine is archaic, and that that “complacency” to which Hamilton referred instead of being inspired by “the appearances of merit” springs from self-interest.

The relations between the President and the Senate are

¹*The Federalist*, No. 66.

harmonious so long as the President defers to the Senate and the Senate is willing to pretend deference to the President; but any assertion of independence on the part of the President is bound to lead to a clash. Seeing only the results, but unaware of the causes, certain superficial observers are fond of saying that the President can control the Senate because of the President's power of patronage, thus unconsciously voicing the fear of Hamilton that "sometimes we are told that this fund of corruption is to be exhausted by the President in subduing the virtue of the Senate." But the power of the President to appoint is a power exercised only by the permission of the Senate. The President is not a free agent in the exercise of the appointing power. Unlike the king of England he does not deal with one man, the responsible head of the majority party in Commons. The President must deal with ninety Senators. It would be "discourteous" to a Senator for him to appoint a man who is personally offensive to that particular Senator, quite irrespective of the reasons that animate that Senator. Virtually the Senate has now become the appointing power, although to save the shadow of the Constitution appointments are still made by the President.

Hamilton explained why the convention deemed it wise that treaties should be ratified by the Senate. The President was not to be given that absolute authority possessed by a sovereign in the negotiation of treaties that would enable the President to betray his country if he were venal, but at the same time he was to be given such latitude as would insure "that perfect secrecy and immediate despatch" which are sometimes "requisite." As showing the relation that Hamilton conceived would exist between the President and the Senate in the negotiation and ratifi-

cation of treaties he said: "Should any circumstances occur which require the advice and consent of the Senate he may at any time convene them. Thus we see that the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and despatch on the other."¹

Once again we see how the spirit of the Constitution has been perverted by the assumption of the Senate. The President negotiates a treaty; but that treaty the Senate regards in the same light as it does an appropriation bill passed by the House. It is merely a scheme, a "project," an outline expressing the views of the negotiators, which the Senate will accept or reject at its pleasure; and of recent years the Senate has shown what amounts almost to a mania to amend treaties; and unless the President accepts the amendment a treaty that may have been the work of months of careful and intricate negotiations is wrecked. President McKinley, in his great desire to remain on harmonious terms with the Senate, permitted that body a further and unconstitutional grant of authority. By the terms of the treaty with Great Britain relating to the tenure and disposition of real and personal property, possessions of the United States beyond the seas were to be permitted to adhere to the convention upon notice "being given by the representative of the United States at London, by direction of the President." This the Senate amended to read "by direction of the treaty making power of the United States," which gives to the Senate the right to direct the American ambassador in London, for which no warrant can be found in the Constitution.

¹*The Federalist*, No. 66.

Jackson, jealous of his own prerogatives and the encroachments of the Senate, used this admonitory language in defining the line of division between the executive and legislative branches of the government. "The resolution of the Senate presupposes a right in that body to interfere in this exercise of executive power. If the principle be once admitted. . . . the constitutional independence of the Executive Department would be as effectually destroyed and its powers as effectually transferred to the Senate as if that end had been accomplished by an amendment to the Constitution."

Grant, in returning to the House of Representatives a resolution directing the Secretary of State to acknowledge a despatch of congratulation, used this language: "I cannot escape the conviction that their adoption had inadvertently involved the exercise of a power which infringes upon the constitutional rights of the executive. . . . The Constitution of the United States, following the established usages of nations, has indicated the President as the agent to represent the national sovereignty in its intercourse with foreign powers and in all official communications from them The whole correspondence of the government with and from foreign states is entrusted to the President; that the Secretary of State conducts such correspondence exclusively under the orders and instructions of the President, and that no communication or correspondence from foreigners or from a foreign state can properly be addressed to any branch or department of the government except that to which such correspondence has been committed by the Constitution and the laws.¹

The Senate now assumes the right not only to amend

¹Richardson: Messages and Papers of the President, Vol. VII, p. 432.

treaties, so that by the power of amendment it exercises the same control over the conduct of foreign relations as it does over the national purse, but also to be consulted in advance of and during the progress of treaty negotiations; and if it is not consulted in advance it resents the implied imputation of presidential distrust. That "perfect secrecy and immediate despatch," which Hamilton deemed requisite, are of course impossible if the Senate must be consulted in advance; and even after the unofficial advice of the Senate has been taken, Senators are not precluded from reversing their judgment. The late Secretary Hay complained bitterly of certain Senators opposing a treaty in the Senate the terms of which they had acquiesced in while that treaty was under negotiation. More than once I have heard Mr. Hay say that in dealing with foreign governments he felt as if he had one hand tied behind his back and a ball and chain about his leg, as he was always hampered by the Senate.

James Russell Lowell was asked by Guizot how long he thought the Republic of the United State would endure. "So long as the ideas of those who founded it continue dominant," was Lowell's reply. With this observation of an acute mind, which is food for serious reflection to those who would see the Republic endure, I leave the subject.

NEGRO SUFFRAGE: THE CONSTITUTIONAL POINT OF VIEW

JOHN C. ROSE

The Constitution of the United States as amended provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."¹ These words are plain. Everybody understands them. They mean, and every one knows that they mean, that, from the constitutional point of view, one question relative to the suffrage is no longer open. That question is the very one about which I am asked to write. From the political point of view, from the historical point of view, from the social point of view, from the economic point of view, and from the ethical point of view, there is much to be said about negro suffrage. For centuries yet to come there may be much to be said. From the constitutional point of view, accurately defined, there has been nothing to say since March 30, 1870. On that day the Secretary of State of the United States proclaimed that the Fifteenth Amendment had been ratified by the legislatures of twenty-nine out of the then thirty-seven States. The apparent assent of a number of these legislatures, perhaps, had not been a real assent. It might have been given under duress. Still, it had been given. The men who assumed to be the legislatures of other of these States may have had little moral and a very doubtful legal right to speak for them. Yet

¹Fifteenth Amendment.