

THE RELATION OF THE EXECUTIVE POWER TO LEGISLATION

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The relation of the executive power to legislation by Henry Campbell Black

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HENRY CAMPBELL BLACK

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BY

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PREFACE

The framers of the Constitution of the United States and of the contemporary state constitutions firmly believed that the preservation of liberty required a careful separation and delimitation of powers between the three great branches or departments of government, and made provision accordingly. In one respect, at least, their expectations have been frustrated and their plans have gone awry. For a survey of the course of our political history and of the development of political forces and methods shows that, as between the executive authority and the legislative power, the balance originally intended to be maintained has, both in the Union and the states, been very gravely disturbed. The President of the United States has grown into a position of overmastering influence over the legislative department of the government. He presents and procures the enactment of such measures as he desires, and prevents the passage of those which he disapproves. Congress is subservient to his will; its independence is in eclipse. On the other hand, many of the state governments are working ineffectively, and the states are losing their rightful jurisdiction and influence in our federated government, chiefly because they have stripped their governors of much of the authority which their responsibility to public and political opinion properly demands.

There are those who tell us that the political philosophy of the founders of the Republic is unsuited to a twentieth-century world, that what they regarded as a self-evident truth is now seen to be only a fetish. If we are not prepared to reject the theory of the separation of powers, we should endeavor by all means to restore the lost equipoise, and to regain the ancient paths of ordered liberty under representative government. But if the new view is correct, or if it is true that executive arrogation of power is the result of forces operating irresistibly in the life of the nation, or the outcome of an evolutionary process which cannot now be reversed, then it becomes us to ask ourselves what we mean to do with our new form of government.

In this dilemma, we get but little light from the institutions of other countries. An examination of the so-called "parliamentary" or "cabinet" system shows it to be entirely unadapted to the government of a country whose constitution provides its executive with a fixed tenure of office. But the fact is patent that there has insensibly grown up around the Constitution a system of usages and conventions, which is only partially within its cognizance, and which is very largely a matter of make-believe. The question is propounded in these pages whether we cannot take this system (if indeed its continuance is inevitable) and put it where it belongs—squarely within the four corners of the Constitution. Suggestions are offered in that behalf. It is not pretended that they furnish the ideal solution of a very serious and difficult problem. But at least they would legalize that which is at best extra-constitutional, deliver the supreme law of the land from a

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mocking pretense of obedience, and liberate the most important function of a free country's government—the making of its laws—from an atmosphere of shams and subterfuge.

HENRY CAMPBELL BLACK.

Washington, D. C.

I

THE GROWTH OF EXECUTIVE POWER

The most portentous development in American political and constitutional history since 1865 is the change in the relations between the executive and legislative branches of government, the one making enormous gains in the direction of influence and actual power, the other suffering a corresponding decline in prestige and in its control over the processes of government. The President of the United States occupies today a position of leadership and of command over the government of the country so different from that which was intended by the framers of the Constitution that, if it were not the outcome of a natural process of evolution working through a long period of years, it would bear the stigmata of revolution, and if it had been achieved in a single presidential term, it would have been denounced as a *coup d'état*.

The men of the convention of 1787 were scrupulously anxious to separate the three great functions of government in fact as well as in theory. And hence the first article of the Constitution begins with the words "all legislative powers herein granted shall be vested in a Congress of the United States," and the second with the words "the executive power shall be vested in a President of the United States." But while they meant to keep the chief magistrate from