

SACB

“Inherent Powers” and Presidential Government

Post 7/3/71

The Senate is to vote today, whether its members realize it or not, on a proposition which would put Congress in the position of acting as a mere appendage of the presidency. There were those in the early days of the New Deal who castigated Congress as no more than a “rubber stamp” because in a national emergency it followed vigorous presidential leadership by enacting promptly legislation recommended by President Roosevelt. Today, however, it is being asked to demean itself in a far more drastic and dangerous way. President Nixon has asked it to ratify legislation already “enacted” by himself through executive order and to signify its submission through approval of an appropriation bill. Twenty-eight senators, in a letter to Senate Majority Leader Mike Mansfield, have characterized the executive order—without any extravagance whatever—as “an outrageous assertion of unauthorized presidential power.”

The executive order at issue concerns the Subversive Activities Control Board, that malign and functionless excrescence created by the Internal Security Act of 1950. Mr. Nixon proposed, by a wave of his presidential wand, to transform it from its well-deserved desuetude into a powerful censor of the voluntary associations which American citizens generally and government employees particularly may join; he proposed to do this by giving it functions entirely different from those given to it by Congress. At first, the President paid Congress the courtesy of asking it to enact legislation granting the SACB the powers he wanted it to wield; but finding Congress unwilling to do what he wanted, the President has indicated that he will regard passage of an omnibus appropriation bill (of which the SACB allotment constitutes no more than a tiny fraction) as congressional approval of his executive order.

Fortunately, as so often happens when essential liberty is imperilled, Sen. Sam Ervin rode to the rescue. The President's order, he pointed out, “raises difficult constitutional questions. The most serious issue involves the President's attempt to exercise legislative power by amending the Act of Congress which sets out the board's duties. To assign a new role to an independent board is an exercise of legislative powers which the Constitution gives exclusively to Congress.” He is manifestly right, of course. The Constitution says flatly in the very first section of its first article that “All legislative powers herein granted shall be vested in a Congress of the United States.”

Senator Ervin succeeded, when the appropriation measure embracing the SACB was before the Senate, in attaching to it an amendment which specified that no part of the appropriation should be used to carry out the executive order. But his amendment was not included in the House appropriation bill and was deleted in the conference committee report. In view of the interpretation which the President proposes to put upon it, this appropriation bill ought to be defeated. “Congress,” as the 28 senators wrote to Mike Mansfield, “cannot allow itself to be put in a position of approving in advance and in ignorance an executive usurpation of authority which the Constitution gives to Congress and denies to the executive branch.”

The pretext for this executive usurpation is once more, as so repetitively in the recent past, an assertion of “inherent” presidential power. “We hear ‘inherent power’ all the time these days,” Sam Ervin thundered. “‘Inherent power’ is just the modern equivalent of the divine sovereignty of kings.” Congress had better put a stop to it before it puts a stop to congressional power.