Government by executive order signals a conflict between democracy and the modern world

Presidential Autocracy and the Rule of Law

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The year 1972 seemed fateful to those who cherish the commitment of American democracy to the tradition of checks and balances. Indeed, as the year ended, the realization was beginning to dawn that the nation was on the edge of a full-scale constitutional crisis.

Nineteen seventy-two was the year when President Nixon reopened the door to China, then mined Haiphong harbor and bombed the city of Hanoi; when he visited Moscow, concluded a treaty limiting strategic arms and directed Henry Kissinger to announce that peace was "at hand," then suddenly renewed and intensified the bombing, suspended it for thirty-six hours at Christmas, renewed it, then stopped it again—all without explanation to the people on whose behalf he was acting.

It was the year in which he proposed that the practice of "impounding" duly appropriated federal funds be legalized (a proposal in which Congress, incredibly, nearly acquiesced). It was the second full year of wage and price controls, designed and administered by the executive branch. And it was a year in which the only noteworthy domestic legislation that came near to passage (the revenue-sharing act and the welfare reform and spending ceiling bills) had been created by the President's aides.

It was also a presidential election year, which should be a time of celebration for those who love democracy. In an American presidential election millions of ordinary citizens by their free suffrages decide who is to occupy the most powerful office in the world. In 1972 the American people for the second time elected Richard Nixon to the Presidency with the understanding that he knew how to end the war on acceptable terms. Yet within six weeks we stood once more before the world as perpetrators of brutal devastation. Again, the American system was presenting the spectacle of one man determining why, how and for how long we should fight in Indochina. One had the impression that Le Duc Tho was answerable to some sort of council in Hanoi, but Henry Kissinger was answerable to a single man.

The 1972 campaign was a bitter disappointment for those who regard the constitutional question as fundamental. George McGovern never broached it. Indeed he seemed perfectly at ease with the assumption that public policy is made by the President and his personal aides. Whereas in 1968 Eugene McCarthy eloquently raised the issue of constitutional processes, McGovern revealed the typical executive-oriented contempt for Congress. In September, when an important end-the-war amendment came to a vote in the Senate, it was defeated 42-45. McGovern was not present for the vote. (Earlier in the summer the amendment had passed by a vote of 50-45.) Thus, in the midst of the campaign, McGovern showed his disdain for the legislative process and for his responsibilities as a senator, and, incidentally, missed a chance to capitalize upon the strength of his party in Congress.

What McGovern offered was the prospect of a more humane vision taking over the White House. It was alluring in a way, but our common sense made us skeptical. We remembered Camelot and knew that one beleaguered hero cannot make much durable difference. By a healthy instinct for realism, the people judged that the hope of salvation by McGovern was an illusion. (The image of competence, compassion and control offered by Nixon was an even greater illusion, of course, and far more vicious. The malaise that afflicted the country at election time, reflected in the depressed percentages of participation, suggests that the election of 1972 was widely perceived as a choice between two unappealing illusions.)

In all, 1972 was a year revealing the drift toward presidential autocracy and the dangers it entails. Congress, the last, best hope within present constitu-
tional arrangements for restraining the autocrat in the White House, seemed utterly demoralized. Although controlled by the opposite party, with every motive for taking partisan advantage of the President's arrogance, and although full of able men and women, Congress as a body seemed to flinch at meeting the President's challenge.

In November the Democratic majority in Congress was confirmed, and some of the worst oligarchs were replaced by fresh, young talents. There were signs at 1972's end, as I write, that congressional leaders were aroused by the depths to which their institution had fallen and were searching for something to do about it. But when Senator Edward Kennedy spoke of "extending the olive branch" to President Nixon and professed to see "a very great opportunity for effective action and cooperation between Congress and the administration, especially in vital areas such as national security, the economy, and health and education," it seemed that considerations of 1976 were already infecting the "front-runners," those who see Congress as a launching pad for presidential campaigns rather than a body with distinctive, dignified work of its own to do.

Throughout most of American history it would not have been necessary to argue that autocratic power in the executive branch is a bad thing. It is worth asking why we have grown so accustomed to autocracy.

Back in the 1950's, historian Daniel Boorstin argued that "the genius of American politics" lay in the capacity of the American people, like their Roman predecessors, to operate a system of institutions. Essential to this knack was the sense that the institutions were "given" and that it would be a mistake to disturb them by subjecting them to searching inquiry. Boorstin's argument had great appeal for a nation whose life seemed relatively satisfying, save for the nagging sense that our culture was inferior to Europe's. Boorstin's achievement was to transform our intellectual superficiality into a virtue.

Whether or not one approves, as Boorstin did, of our unreflective culture, he was no doubt accurate in presenting the American people as pragmatic rather than philosophical. It is precisely this quality that makes the present moment dangerous. What is needed now is not to make these institutions "work." Nixon and his aids appear to be doing that, at least for the present. What we need now is to recall American principles and to renew the debate about them, for, as John Stuart Mill insisted, principles must be constantly debated if they are to retain their vitality.

The deepest conviction in the American tradition is that no person can be trusted to dispose of power alone. This proposition is based partly on the understanding that human nature is sinful, but also on the conviction, enunciated by Aristotle, that practical political wisdom is a composite of diverse points of view. Policy fashioned by many people is thus more likely to be wise. It is also more likely to be sustained in time of trouble by the many who helped to make it. If policy has been made by one man, and if others have merely acquiesced, the vitality of the community will not remain engaged when the venture runs into difficulty. Thus policy made by one man is likely to be both less wise and less enduring than policy made by representatives of the people.

The corollary to this insistence on the sharing of power is an attachment to the rule of law, in preference to administrative decree. Laws are the characteristic expression of legislatures. They are the product of discussion and compromise, representing a consensus, at least of a majority of the nation's representatives. The rule of law is the opposite of tyranny. Adherence to the sovereignty of law forces the dispersion of power.

In service of these principles, authority under the Constitution was divided and distributed among several institutions of government. Lawmaking, the statement of the fundamental will of the republic, was assigned to representative assemblies. Execution of the will was given to a separately elected President. Interpretation was entrusted to judges, whose independence was encouraged by permanent tenure.

In the field of foreign affairs it must be acknowl-
edged that the intentions of the framers were less clear and simple, partly at least because the international sphere is less amenable to law. E. S. Corwin has described the causes relating to foreign affairs—treaty-making, the raising and command of armed forces, the initiation of hostilities, etc.—as “an invitation to struggle” between Congress and the President. Washington’s Proclamation of Neutrality, declaring this nation’s posture toward the struggle between England and France, gave evidence right at the start that the President’s role in foreign affairs would be a large one. Significantly, Hamilton’s brilliant defense of President Washington’s policy argued that the President should take the lead in foreign policy, to prevent the nation from being dragged into war. The President, in constant touch with foreign powers, could best steer a peaceful path between them. In addition, the President was in the best position to know the limits of the nation’s capacity to impose its will by force and would thus be less tempted to adventurism.

James Madison, then the leader of the opposition in the House, replied that the nation’s policy should be fashioned in Congress. If the nation, in Congress assembled, decided to side with republican France against imperial Britain, it was the President’s responsibility to carry that will into execution.

On the policy immediately at issue Hamilton’s position prevailed. But the struggle between President and Congress for control of foreign policy continued until World War II. During wartime, control ordinarily was with the President. Thus John Adams during the naval war with France in the Caribbean in 1798 and James K. Polk during the Mexican War of 1846-48 were able to dominate their congressional critics. Sometimes, as with Madison in the War of 1812 and McKinley in 1898, presidents were drawn rather reluctantly into conflict by a Congress jostling for action. On other occasions, most notably on the eve of World War II, it was the President who was willing to lead the nation toward the war while Congress sought to avoid it.

No persuasive theory accounts for these variations in role. The tendency of historians is to exaggerate the differences between the two branches in these episodes. Roosevelt wanted to avoid American involvement in World War II as much as most congressmen or senators. The President’s policy of rearmament and aid to Great Britain was aimed at Keeping America Out of War. Similarly, Madison’s reluctance to engage in the War of 1812 has often been exaggerated, as has the opposition that Polk faced during the Mexican War. Suffice it that neither branch has had a monopoly on pacifism, nor on bellicosity.

If any generalization can be offered, perhaps it is that presidents, until recently, have been more realistic in assessing America’s capacity to wage war. One of the nation’s most profound traditions, until the Korean War, was that there should be no standing army in peacetime. Thus, when presidents before Truman considered the possibility of going to war, they had to reckon with the nation’s military weakness. That weakness was, of course, perfectly deliberate. The framers of the American tradition knew that those who had strength would be tempted to use it. The surest safeguard against presidential Caesarism was to deny the strength necessary for its realization. Supporting traditions, reinforced by geographical facts, called for a policy of isolation and for the avoidance of “entangling alliances.”

Since World War II, however, the struggle for dominance over American foreign policy has no longer been equal. After World War II, Congress moved, just as it had always done, to reassert its traditional place in the constitutional system. Rapid demobilization of military forces (Truman called it “disintegration”) began. But coincident with this military dismantling was a new thing in American history: the emergence of a popular consensus that the U.S. was responsible for security in Europe and large parts of Asia. Thoughtful people (Senator Robert Taft and E. S. Corwin, among others) realized that this departure would put great strain on America’s constitutional fabric. But, despite forebodings, a bipartisan decision was made to “assume the responsibility.”

It was not until June, 1950, when war broke out in Korea, that the full consequences of this decision began to be felt. At about the same time, the National Security Council prepared a memorandum describing the amount of armed forces needed to give effect to America’s new commitments around the world. This seminal document, NSC-68, spelled out the rationale for decisions which would treble the defense budget within two years and make the cost of national defense by 1952 larger than the entire national budget for 1950. Harry Truman, prior to the Korean War, would be the last American Commander-in-Chief to face the world without colossal military force at his disposal.

Developments since World War II are not the result of a cyclical swing of leverage between Congress and President, as some analysts suggest. It is the result of two quite new things in American history: the availability of massive military might even in peacetime, and the involvement of the nation in a worldwide network of security arrangements (NATO, SEATO, the Japanese, Philippine and Middle East commitments, among others).

It is important to understand these new factors, be-

cause the remedy for the current maladjustment must be tailored to them. We cannot expect relief from a cyclical resurgence of congressional ambition. The only reliable safeguard against autocracy is to force the Chief Executive to be accountable to peers for the ways in which he uses his power. The only way to do that, short of a fundamental revision of the Constitution, is to bind him to carefully written laws. Congress must frame such laws, and the Court must hold the President to them. So long as we have a massive "standing army" and a vast network of entangling alliances, so long as we conceive ourselves as existing in an atmosphere that makes these instruments necessary, it is going to be extremely difficult—maybe impossible—for the American system of government to live up to these standards.

To understand the predicament of the American Congress, it must be seen in comparative perspective. The theoretical model of the separation of powers was developed during the eighteenth century but reached practical fruition in real institutions during the nineteenth century. Lord Amery pointed out in *Thoughts on the Constitution* that the nineteenth century was a period of legislative dominance and, not coincidentally, also a period of laissez faire. In short, legislatures dominated when there was very little governing to be done.

In the twentieth century, as the complexity of national economies and social structures created a demand for governmental management, massive bureaucracies became the "core of modern government" (as Carl J. Friedrich titled a chapter of his *Constitutional Government and Democracy*). The experience in France since the Second World War offers vivid illustration. Under the Fourth Republic political life presented a spectacle in which coalition governments circulated with dizzying rapidity. Underneath this parliamentary confusion the bureaucracy carried on the day-to-day functions of government, virtually oblivious to the circus in the Chamber of Deputies. When the agenda of decisions, long neglected by weak governments, began to lengthen, strong men (most notably, Pierre Mendès-France) emerged briefly, made a few tough decisions, and were soon dismissed. In 1958 this volatile system gave way to one in which centralized, popular executive leadership was institutionalized, enabling Charles de Gaulle to rule by the force of his own personality, reinforced occasionally by plebiscites and referenda.

The eclipse of the legislature is a phenomenon not confined to France. The "Mother of Parliaments" herself has been relegated to a relatively minor role. In his recent Godkin Lectures, entitled *The Myths of Cabinet Government*, Richard H. S. Crossman sets Walter Bagehot on his head. Parliament, in Crossman's account, has replaced the monarch as the "dignified element" of government. It is now Parliament which is confined to the role of consulting, warning and encouraging the "efficient" elements of government. The real power of governmental decision now lies with the cabinet, or rather, with the prime minister.

Theoretically, of course, Parliament can vote no confidence in a prime minister. But in the context of twentieth-century party discipline this possibility virtually evaporates. Neither Neville Chamberlain nor Anthony Eden was removed by a parliamentary vote of no confidence. To be sure, the indefinite tenure of the prime minister and the rather mysterious machinations of British party leaders facilitated the replacement of these discredited leaders. But Parliament was the arena, not the agent, of these changes.* The essential point is that members of Parliament as such have even less leverage over policy-making in England than members of Congress have in the United States.

For all its obvious weakness the American Congress is probably the strongest independent legislature in the world. Under our written Constitution Congress has the sole legitimate powers of appropriation. (The qualifier, "legitimate," must be added, according to the evidence gathered by Louis Fisher. In his important new study, *President and Congress: Power and Policy*, Fisher shows that presidents have exercised considerable discretion in transferring funds within budgets, spending money appropriated for other purposes and impounding funds duly authorized and appropriated—all despite the clear injunction of the Constitution to see that the laws are "faithfully executed.")

The power of Congress over appropriations can induce considerable deference from the executive branch. Congress in this respect is a throwback to the earliest stages in the evolution of representative government. Parliament emerged in British history as the nobility demanded to be consulted before they would grant the monarch the "supplies" necessary to carry out his policy. This is still the basic legislative function: to represent the people, to give or withhold popular consent to the designs of the head of state. The American Congress is superior to the British Parliament in the independence with which it performs this fundamental legislative role.

Despite this relative superiority, however, the generalization holds that the engine of American government is now in the executive branch, with the President at the controls. Mr. Nixon is supposed to have told Theodore White during the 1968 campaign that presidents were needed mainly for foreign policy, that domestic policy could be managed by competent cabinet secretaries. The idea might be viewed as an invitation to Congress to

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reassert itself, at least in the domestic field. But a glance at the list of "major legislation" during the ninety-second Congress (1970-1972) shows what Congress has done with its opportunity. The most significant items—revenue sharing and welfare reform—came in their current form from the Nixon Administration. Congress did pass acts substantially of its own making in the fields of aid to higher education (appropriations for which were subsequently vetoed), consumer protection (the strongest proposals, however, were defeated), water pollution control (vetoed, veto overridden, funds impounded), women's rights and social security. But consider the items missing from the list: tax reform, metropolitan reorganization, race relations and economic management, to mention only the most obvious.

Perhaps the most vivid illustration of the abdication of Congress is in the field of economic management. The war in Indochina, the cost of which has never been faced candidly, has knocked the American economy haywire. Who should decide what to do to set it right? The reorganization of the economy requires forceful governmental intervention, based on some very tough choices between the demands of labor, management, farmers, consumers and other well-organized interests. The man in the White House is a corporation lawyer from southern California, a man few congressional Democrats trust on economic matters. Yet Congress shudders at the prospect of grappling with the problem itself. The Senate is dominated by men who think of themselves first as presidential candidates and only temporarily as legislators. A candidate always prefers to create an issue rather than to make a decision.

And so the Democratic Congress in 1970 passed an act giving the President power to issue "such orders and regulations as he may deem appropriate" to stabilize prices, rents, wages and salaries. The President was further authorized to "delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate," or to create new bureaucracies for the task if he preferred. That is all that the Economic Stabilization Act of 1970 sets forth in the way of guidelines.

These new powers were received ungraciously by the White House, but since they were part of a bill that included other desired elements, Nixon signed the act into law. Immediately, presidential hopefuls in the Senate began to howl that the President should use his new powers to control inflation. When, after months of wrangling, the supple politician in the White House finally did move, his critics were completely disarmed. Thus, even in this domestic case, it fell to the President alone to decide the policy of the federal government and to fashion the bureaucratic machinery for administering it. Congress consigned itself to the role of witness. When it came time, toward the end of 1971, for Congress to review the President's actions and renew the legislation, it substantially ratified what Mr. Nixon had done. No case could illustrate more vividly the incapacity of Congress, as presently constituted, to come to grips with the demands of governing the country.

The conclusion to be drawn from recent experience is that all the ambiguities in the Constitution, particularly with regard to responsibility for foreign policy, have been effectively resolved, in favor of the Presidency. Indeed, the impression is widespread in Washington these days that the Constitution actually gives responsibility for foreign affairs to the President. Recently, explaining the Senate's reluctance to force the Administration to submit executive agreements to Congress, a member of the Senate Foreign Relations Committee staff told me most senators believe that the Constitution gives "95 per cent" of the power over foreign affairs to the President. The President, he said, is responsible for troops in the field. He has the information upon which foreign policy must be based. He is the one with whom contact is maintained by foreign powers. Besides, in an age of push-button warfare, only he can act with the speed that may be required. Most senators therefore conclude that we must "trust the President."

But these factors only partially account for the reluctance of Congress to insist on being kept informed, to demand the opportunity to give or withhold reasoned consent when the President's policy involves national commitments. "Supporting the President" relieves congressmen of their own responsibility. Foreign policy making is, inevitably, full of ambiguities and uncertainties. Even the best-informed often do not know what to do. Confronted by Administration spokesmen whose presentations mask un-
certainties, congressmen can hardly resist the temptation to "support the President." Later, if things go wrong, it is easy enough to say that one was misled.

Despite its discouraging performance, there are signs that Congress is anxious to regain its rightful place in the constitutional scheme. A review of two or three efforts, in ascending order of importance, illustrates the tactics presently being contemplated.

One effort last year was to impeach the President. It must be admitted that the impeachers had a fair case, legally speaking. The President is charged by the Constitution to see that the laws are "faithfully executed." It would not be difficult to demonstrate that President Nixon has failed to execute the laws of Congress regarding the expenditure of funds in Indochina. For example, Congress has passed a law prohibiting the use of American funds to support the forces of other nations fighting in Laos or Cambodia. Yet the Foreign Relations Committee of the Senate has discovered that we are spending $100 million a year to support an army of ten thousand Thais fighting in Laos.

In addition, the bill of impeachment introduced last year by Congressman John Conyers of Detroit (House Resolution 989) would have tried the President for failure to execute the Mansfield Amendment to the Military Procurement Authorization Act of 1971. The Mansfield Amendment, as passed in 1971, stated that it was "the policy of the United States to terminate at the earliest practicable date all military operations of the United States in Indochina . . . subject to the release of all American prisoners of war held by the Government of North Vietnam . . . and an accounting for all Americans missing in action . . . ." It "called upon" the President to establish a final date for American withdrawal from Indochina and to negotiate with the North Vietnamese a cease-fire and "a series of phased and rapid withdrawals of United States military forces from Indochina in exchange for a corresponding series of phased releases of American prisoners of war. . . ."

In arguing against this legislation, Senator John Stennis, Chairman of the Senate Armed Services Committee, warned that "as a policy matter it binds Congress and the President of the United States." Nevertheless, the Senate adopted it by a vote of 57 to 38. House leaders, violating a provision of the Legislative Reorganization Act of 1970, allowed the Act to pass without permitting a direct vote on the Senate's amendment. The role of Gerald Ford in engineering these strategies of avoidance suggests that the Administration believed it lacked sufficient support in the House to defeat the Mansfield measure.

Nevertheless, when the President signed the Military Procurement Act of 1970, the Mansfield Amendment became law. In signing it, however, the President brazenly stated that the law "does not reflect my judgment" and "will not change the policies I have pursued and that I shall continue to pursue." Conyers's bill contends, with considerable justification, that this statement is in clear violation of Nixon's oath to see that the laws are "faithfully executed."

The Conyers Bill of Impeachment goes on to charge Mr. Nixon with having violated the Charter of the United Nations, the Hague and Geneva conventions on the rules of warfare, the laws of land warfare embodied in the United States Army Field Manual and the Charter of the Nuremberg Tribunal. Were the conscience of the nation sensitive to such charges, however, Mr. Nixon would never have become President in the first place. No hearings were held in 1972 on the bills of impeachment. Conyers's bill, incidentally, was cosponsored by six black congressmen (Dellums, Chisholm, Rangel, Stokes, Mitchell and Fauntroy) and by two (Ryan and Abzug) of the left-most white members of the House. Again, if such people had much influence in the American political structure, Mr. Nixon would not be in the White House.

Another expression of a congressional sense of responsibility was the so-called "War Powers Resolution" introduced originally by Senator Javits. The resolution is noteworthy more for the amount of time spent on it than for its intrinsic merit. It would have authorized the Commander-in-Chief to use armed forces to repel a sudden attack, to protect the lives and property of American citizens abroad or "to comply with a national commitment resulting exclusively from affirmative action taken by the executive and legislative branches of the United States government. . . ." Hostilities could not be sustained by the Commander-in-Chief beyond thirty days unless Congress gave specific authorization by declaring war or passing legislation otherwise authorizing the action taken.

There are several weaknesses in the Javits proposal. For one thing, it explicitly exempts Vietnam. More basically, it directs congressional attention to the wrong point in the evolution of policy. When hostilities break out, and in the period immediately following, we are least likely to be able to deliberate intelligently. The proper times for decision are both before and after that period of white heat. What the Senate should insist on is the authority to give its consent before the commitment can be undertaken in the first place. After the commitment has been made and the President as Commander-in-Chief decides it is necessary to employ armed forces, the proper role for the Senate is not to rush in and lend moral support but to hide and watch. The lesson of Vietnam is not that the Senate is well equipped to control the escalation of hostilities. The Gulf of Tonkin resolution testifies otherwise. It would have
been better had the Senate kept its distance in August, 1964.

Far more promising than the Javits proposal are proposals fashioned by Senators Fulbright, Case and Mansfield to deal with the crucial times before and after the outbreak of hostilities. The "National Commitments Resolution" of 1969 pronounces the sense of the Senate that "a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute or concurrent resolutions of both Houses of Congress. . . ." This resolution was adopted by a vote of 70 to 16. In commenting on the then-pending resolution, the Nixon Administration declared that "As Commander-in-Chief the President has the sole authority to command our armed forces, whether they are in or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific Congressional approval." A year later, the Nixon Administration demonstrated its adherence to this doctrine by initiating hostilities in Cambodia without the consent or prior knowledge of Congress or any of its committees. Shortly after the Cambodian invasion, Senator Fulbright noted "that the National Commitments Resolution has had no effect on the Executive's attitude or behavior and that hereafter, in order to discharge its responsibilities in the field of foreign policy, the Congress shall have to resort to measures more binding than a sense-of-the-Senate resolution."

Last year the Senate Foreign Relations Committee tried to lead Congress to act on this judgment. Coincident with the world monetary crisis in December, 1971, the President concluded an agreement with Portugal, providing for the stationing of American troops in the Azores and furnishing Portugal with large amounts of foreign aid. He also agreed with Bahrein, a sheikdom in the Persian Sea, to establish a new American military base there to replace the one Britain was abandoning. Both agreements provided for the deployment of American troops abroad, and both involved the spending of American money. Both were concluded by executive agreement, that is, by an undertaking between the President and the foreign head of state.

On March 3, 1972, the Senate's annoyance with this procedure produced a resolution stating that the agreements with Portugal and Bahrein "should be submitted as a treaty to the Senate for advice and consent." The vote was 50 to 6. The Administration took official "note" of the Senate resolution, but did not comply with it.

During the summer of 1972 the Foreign Relations Committee tried to escalate its struggle with the Administration. As part of the military aid bill, the Committee proposed a stipulation that "no funds may be allocated or expended to carry out the agreements signed by the United States with Portugal or Bahrein . . . until the agreement . . . is submitted to the Senate as a treaty for its advice and consent." Another stipulation would have prohibited the expenditure or obligation of funds to carry out any agreement between the United States and a foreign government which involved the stationing of American military forces in that country or the storage of nuclear weapons abroad, unless the Senate gave its consent.

The effort collapsed in October, when the House conferees refused to accept either provision—refused even to accept a compromise tendered by the Senate conferees, to drop the Azores provision (Bahrein had already been struck by the Senate) and to revise the base agreement provision to require approval by joint resolution of both houses rather than two-thirds of the Senate. This last offer by the Senate conferees involved a sacrifice of the Senate's special responsibility in foreign relations and thus provides a poignant measure of the feeling of men like Case, Cooper and Fulbright on this issue.

The same foreign assistance bill, as reported by the Foreign Relations Committee, contained a revised and greatly strengthened version of the Mansfield Amendment to end the war. It provided that four months after enactment no more funds could be used to maintain American forces in South Vietnam. That meant not only that all ground combat forces would have to be removed by that date but that all our naval and air bases would have to be dismantled as well. How that could have been accomplished within four months surpasses imagination. But that is what the Senate Foreign Relations Committee meant to require.

In addition, the new Mansfield proposal would have required that no funds be spent to maintain American participation in hostilities "in or over Indochina" after the following conditions were met: an agreement was reached for a cease-fire between the United States and the Viet Cong and North Vietnamese; all American prisoners were released by the Viet Cong and North Vietnamese; and all Americans
missing in action had been accounted for. This proposal, too, was breathtaking. Unlike other cease-fire proposals, it required an agreement only between the United States and the Viet Cong and North Vietnamese. As written, the Thieu regime would not have been able to sabotage it. Presumably, if all American ground forces had been withdrawn from South Vietnam, as required by the first part of the proposal, the Viet Cong and North Vietnamese could have presented in Paris a proposal for a cease-fire between themselves and the U.S. and for the release of all prisoners of war and an accounting of those missing in action. The Administration would have been under enormous pressure to accept such an offer. If it did, American forces would have been bound not to participate in hostilities anywhere in Indochina, including Laos, Cambodia or Thailand.

The significant thing about this latest “Mansfield Amendment” was that Congress now had a policy for ending American involvement in Indochina. No wonder President Nixon called it the most “ill-founded” of all the end-the-war resolutions, “the wrong resolution at the wrong time.” Senator Mansfield said that his proposal was “intended to underscore what is the apparent policy of the Administration—namely, the total extrication of all U.S. troops from South Vietnam.” But Senator Mansfield’s policy of extrication was unconditional. The real effect of his proposal was to expose the true scope of the Administration’s ambition in Indochina.

In the end, the proposal was lost in the toils of the legislative process. Two factors killed it: opposition in the House; vacillation and absenteeism in the Senate. A 160-280 roll-call vote in the House on a measure similar to Mansfield’s showed the sentiment there. And a remark by Senator Cranston, that the issue of the war had passed to the arena of the presidential campaign, coupled with the absence of McGovern and his allies on the day of the crucial vote in the Senate, sounded the knell there—for 1972.

Still, the labors of men such as Case, Mansfield, Fulbright, Cooper, Symington, Church and Brooke have not been in vain. By their efforts the Senate has finally fashioned legislative instruments, via the appropriations process, capable of controlling such wars.

I have focused chiefly on the governance of international relations because that is where executive autocracy has progressed furthest and where congressional recovery is most problematic. Until there is a fundamental constitutional revision, the best hope within the system for keeping presidents in check between elections lies with Congress.

Alexander Bickel has written: “The Presidency can speak for an existing broad consensus, and its genius is action. But its antennae are blunt, and it can mistake silence for consensus. Its errors are active ones, like the Indochina war—sins of commission. The genius of Congress lies precisely in its antennae. . . . Its errors generally are those of irresolution, sins of omission” (“The Constitution and the War,” Commentary, July, 1972).

The special difficulty in the present impasse is that, to arrest the career of the modern Presidency, it is Congress that must take positive action. As Bickel points out, the founders involved both President and Congress in warmaking precisely in order to make warmaking difficult. The irony is that, now that the warmaking machinery is in full tilt, these very complexities make it almost impossible for Congress alone to stop the momentum.

Congress is not well equipped to play the role of policy-maker for a modern nation. Three factors—the uneven distribution of party strength in different regions, the dominance of the committee system and the seniority principle—combine to give power in the legislative process to the least modern sectors of the country.

Apologists for current arrangements are fond of pointing out that Congress can restrain the President any time it wants to. The implication is that, since Congress does not act, it is extending the functional equivalent of support. True, Congress could, constitutionally, withhold military appropriations. It could frame precise legislative guidelines instead of delegating the tough questions to the Administration by passing vague laws. It could equip itself with expertise comparable to that available to the major executive departments, or compel testimony from White House aides, or establish joint committees on national security or the budget. It could do any or all these things. But year in and year out it fails to do them. This failure is related to the ways in which Congress sets itself up for legislative business. There can be no effective resurgence of legislative authority in the American system until Congress reconstitutes itself. No other authority on earth, save the constituents themselves, can do that job.

Legislative assemblies arose when the ambition of princes oppressed the people. Barons and leaders among the Commons capitalized on the resulting discontent to gain support for their demand that political power be shared. Now that princes are elected, the task of legislators in maintaining the distribution of power is more difficult. Concern for the rule of law greatly reinforces the leverage of legislators. But can the modern world, particularly in relations between nations, be made conformable to the structure of law? Princes as a class doubt it. Legislators themselves seem unsure. Unless both executive and legislative leaders are determined to maintain the quest for law, the drift toward executive autocracy will continue and the struggle for democracy will regularly revert to popular despotism.