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The President: Office and Powers, by Edward S. Corwin

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THE PRESIDENT: OFFICE AND POWERS. By Edward S. Corwin. New York: New York University Press, fourth revised edition, 1957. 519 pp. \$6.50.

I suppose that in a sense reviewing the latest edition of Professor Corwin's book on the presidency poses the same problem that would confront one who is asked to review Shakespeare's *Romeo and Juliet* or Tolstoy's *War and Peace*. How does one "review" a classic? To be sure, critics still have much to say about the works of Shakespeare and Tolstoy, but this hardly passes under the rubric of reviewing. The short of the matter is that Corwin's study of the presidency has universally been regarded, ever since the first edition appeared in 1940, as a very great book, and that Corwin himself is generally honored as our most distinguished living constitutional authority.

Certainly he has been one of our most productive constitutional scholars and I am glad to note, as this most recent revision of his work on the presidency suggests, that his retirement in 1946 has had no discernible effect upon his productivity. I am sure that Corwin's must be one of the most strenuous and busy retirements in the annals of American scholarship. Some of his most important work has been done since 1946 when, after forty-one years of teaching at Princeton, he left the classroom. It would seem that this is about all he left, since his flow of writing and speechifying has continued without abatement. In fact, I have it on unimpeachable authority that he recently lost his voice as a consequence of too much public speaking and that his doctor sentenced him to a period of complete silence. It is to be hoped that the sentence will soon be commuted since Professor Corwin's voice is one we cannot well spare. True constitutional oracles are, alas, in very short supply.

Corwin came to Princeton in 1905 fresh from his Ph.D. work at the University of Pennsylvania (under the historian John Bach Mc-

19. Cheshin, *Justice in a New State*, 10 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 1 (Jan. 1955).

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Master), as one of Woodrow Wilson's original preceptors. He was given what is perhaps Princeton's most distinguished chair, the McCormick Professorship of Jurisprudence, in 1918, and served for many years as chairman of Princeton's Department of Politics. Not counting revised editions, Corwin has written about twenty books, and innumerable articles in the learned journals and popular press. Perhaps his most successful book has been *The Constitution and What it Means Today*, which has already gone through eleven editions since it first appeared in 1920. A twelfth edition is now in the works. One of his leading monuments to legal scholarship appeared in 1953 when the Legislative Reference Service of the Library of Congress published the *Annotated Constitution* which had been prepared under his editorship. But for my taste his principal book has been what he himself calls the "history and analysis of practice and opinion" of the American presidency.

One of the distinctive features of this book is its tremendous scholarship. The notes, which are printed after the text, run to 181 pages, and the reader will miss much of the flavor of the book if he ignores them. Corwin's conception of what constitutes constitutional law goes far beyond the opinions of the Supreme Court, although it goes without saying that he does full justice to them. But he draws very heavily upon congressional debate, legislative committee reports, statutes and executive orders, newspaper and magazine comment, the opinions of the attorneys general, biographies, general and special histories, and all sorts of formal legal scholarship. Corwin's method is primarily historical and analytical. The presidency is, in his view, a living institution, the nature and proportions of which are reflected not merely in the holdings of appellate courts, but in what all of us say and do in the great society in which we live. Perhaps in contrast with the new look in the scholarship of contemporary political science, with its heavy emphasis upon what is called behaviorial research, Corwin's work may seem to some to be a bit old-fashioned, but to me it is a refreshing experience to read a truly learned book written by a cultivated man who knows what he is talking about. I venture to say that this sort of scholarship will never be dated.

The organization of this book remains as simple as it has been from the start. The opening chapter deals with various conceptions of the office, beginning with a thorough analysis of the views expressed in the Philadelphia Convention of 1787 and running through history from Washington to the present day. It is made abundantly clear that the term "executive power" has an uncertain content. The next chapter is concerned with the apparatus of the presidency, wherein the author dis-

cusses such matters as the third term problem, the electoral college, presidential disability, the oath of office, compensation and the vice-presidency.

The third chapter deals with the President as administrative chief, focusing largely upon an analysis of the appointment and removal power of the President. The fourth chapter discusses the President as the chief executive who must interpret and enforce the law. In addition to the problem of delegation, the chapter stresses the military and emergency powers of the chief executive. The next chapter describes the presidency as the nation's chief organ of foreign relations. A great deal of attention is given here to the problem of executive-legislative relations in this important and delicate area of activity. The sixth chapter describes the position of the President as commander-in-chief in wartime. This is a subject as to which Corwin has a great deal of pessimism, such as that expressed in *Total War and the Constitution*. He reviews in detail Lincoln's successful exploitation of the commander-in-chief clause of the Constitution, the steady growth of delegated power in the two world wars, the use of indirect sanctions in World War II, and the development of the "stewardship theory" in total war. I think that Corwin's moral may well be that if we wish to preserve constitutional government, staying out of war would help.

The last chapter describes the presidency from the point of view of the legislative responsibilities and powers of the office. He considers both the weapons and institutions of presidential leadership in the field of legislation and offers a few suggestions for improving relations between President and Congress. In fact, while the main purpose of this book is to describe the presidency, Corwin devotes a great deal of space to discussing Congress, for at almost every step the President is bound to take into consideration the point of view of the legislative body. While the President possesses great weapons which enable him to play a decisive role in the legislative process, Congress has its own formidable weapons, and on the whole Corwin's view of the matter is somewhat Whiggish in nature. That is to say, while he recognizes the facts of life as they are, he seems to incline in the direction of legislative supremacy as a matter of taste and preference. It seems clear that he is not too happy about the steady growth in power and prestige of the presidential office. Thus he writes: "Kept within bounds, the power and prestige of the presidency comprise the most valuable political asset of the American people. But centering as they do in a single individual who is free to advise, or to refrain from advising, with whomsoever he chooses, this power and this prestige are apt to become unduly *personalized*, thus inviting two dangers: the slowing down of the legislative process to an extent

that unfits it for a crisis-ridden world in which time is often of the essence, and—in consequence—autocracy.”¹ Thus, in order to abate these dangers, he advocates a reorganization of the cabinet so that it would be drawn from the leading members of Congress.

The basic theme of this book, then, is, in the author’s words, that “the Constitution reflects the struggle between two conceptions of executive power: that it ought always to be subordinate to the supreme legislative power, and that it ought to be, within generous limits, autonomous and self-directing; or, in other terms, the idea that the people are *re-presented* in the Legislature *versus* the idea that they are *embodied* in the Executive.”² And he has no doubt of the fact, as he says several times, that the history of the presidential office has been a history of aggrandizement.

The steady, seemingly inexorable aggrandizement of the chief executive office of the nation is explainable in terms of American constitutional law and theory, according to Corwin, as the end-result of several basic factors: the general acceptance by the people of the notion that government should be active and reformist, and not merely a protector of the established order; the “breakdown” of the principle of dual federalism in the area of congressional power; the “breakdown” of the principle of the separation of powers as defining the relationship between Congress and the President; the “breakdown” of the principle that Congress may not delegate its powers; and the impact of the President’s power as commander-in-chief and manager of our foreign relations, as expanded in the course of two world wars and as a response to the vastly enlarged role of the country in international affairs.

It should be added, perhaps, that the fourth edition of Corwin’s book, as one might anticipate, brings into focus some of the issues relating to the presidency which have recently risen to prominence. Thus the reader will find here a discussion of such recently-agitated subjects as the presidential primary and the Twenty-Second Amendment, as to the wisdom of which he has grave doubts; the Bricker Amendment, to which he is definitely opposed; the matter of presidential disability (he believes Congress is free to act without benefit of a constitutional amendment); reform of the electoral college system, which he would leave alone; the problem of disloyalty in the government service; the recent enhancement of the office of Vice-President; American participation in the United Nations; and the nature of the war powers of the Presidency. He also discusses President Eisenhower’s preference for reigning rather than

1. P. 299.
2. P. 307.

ruling. Since he believes, as all observers do, that the office depends to a considerable extent upon the character of the particular occupant of the position, I am sure he would agree that the Eisenhower conception of the office will not necessarily become a permanent part of our system. After all, Lincoln followed Buchanan and Wilson followed Taft. The office has its ups and downs.

I cannot leave this engaging subject without calling attention to Corwin's considerable literary gifts. He is not only a learned constitutional lawyer, but also an interesting writer, and the reader is richly rewarded with pungent expressions and well-turned phrases. Thus, speaking of the party convention, he writes: "The National Convention is the periodic reminder of the party's entity. It dramatizes and climaxes the procedures by which a party sustains the consciousness of its nationwide character and mission."³ Speaking of our martyred Civil War President, Corwin says: "A solitary genius who valued the opportunity for reflection above that for counsel, Lincoln came to regard Congress as a more or less necessary nuisance and the Cabinet as a usually unnecessary one."⁴ And as for Lincoln's successor, "few Presidents have surpassed Johnson in the exorbitance of his pretensions for the office, none in his inability to make them good."⁵ He points out that since the loyalty program affecting the civil service is not open to serious challenge in the courts, it follows that "reliance must therefore be had on the willingness of the political branches to do the fair thing by government employees, bearing in mind that, while the national security is indeed a primary interest, yet sound administration will not neglect the claims of justice or ignore the probable demands of those who contemplate staking a career in the public service."⁶ Reviewing the 1935 Court decisions in the "Hot Oil" and Schechter cases, which for the first time in our history held invalid congressional delegations of legislative power to the President, Corwin notes: "Neither of these precedents materially influenced congressional policy even at the time, and both have been subsequently relegated by the Court to its increasingly crowded cabinet of juridical curiosities."⁷ Again, stressing the central importance of the lawmaking body in our constitutional system, the author writes: "The best escape from presidential autocracy in the age we inhabit is not, in short, judicial review, which can supply only a vacuum, but timely legislation."⁸ Never-

3. P. 20.

4. P. 23.

5. P. 25.

6. P. 118.

7. P. 127.

8. P. 157.

theless, legislation is not always wise. Thus, he described the Act of 1924 which brought Japanese immigration to an abrupt halt as signaling "a particularly wild romp of the congressional bull in the diplomatic porcelain shop."⁹ Corwin describes in some detail the manner in which the Roosevelt administration created during the Second World War new "offices," "authorities," and "administrations" without statutory authorization, observing that "the process is one that might have been dragged out to even greater length without impairing the force of the axiom that zero plus zero is zero still."¹⁰ Of Theodore Roosevelt the author writes: "No more convinced preacher of the Eternal Verities, none more adept at translating his preferences into moralistic axioms and attitudes, ever attained the presidency."¹¹ Whereas he observes of Woodrow Wilson that while he had similar pretensions, they "were divested of their accidental association with . . . [Roosevelt's] picturesque traits of personality and endowed with the authority of constitutional principle."¹² And speaking of the President's inaction at the time that the Hawley-Smoot Tariff was enacted, he writes that Hoover "had in retrospect the doubtful satisfaction of being responsible for that egregious exemplification of the gospel of hands-off."¹³ In commenting on the fact that a President is apt to stray pretty far and wide in getting advice, he remarks that "it is because the Cabinet seraglio has been recruited from an early date on principles that make it fairly certain that an active presidential imagination will frequently stray beyond its decorous precincts."¹⁴ Finally, in discussing the presidency of Dwight Eisenhower he says: "And not even the spectacle of an actor coaching the President on his TV lines and mannerisms has dissuaded the people from looking upon the Chief Executive as the author of peace, prosperity, and good crops, or, in the alternative, of war, depression, and famine."¹⁵

In conclusion, I should stress two principal points regarding the book under discussion. The first is that it is primarily a study in constitutional law, though it is worth repeating that Corwin takes a generous and not a cramped view of what the province of constitutional law is. Certainly this is still the best book we have on the constitutional law of the American presidency, although we now have many able studies of various other aspects of this exalted office. Secondly, while Corwin is

9. P. 191.

10. P. 243.

11. P. 266.

12. P. 268.

13. P. 272.

14. P. 296.

15. P. 305.

a constitutional lawyer, he is also a constitutionalist. And I should suppose that the very heart of the concept of constitutionalism is that all those in the government who exercise power are subject to law, no one being above or beyond the law. This goes for the President also and while the power of the chief executive is vagrant, ill-defined, and illusive by its very nature, the central purpose of constitutional government is to keep the stream of executive authority within the banks of legality. This, I suggest, is a noble theme, to which Corwin has made a distinguished contribution.

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TAX MANAGEMENT OF ESTATES AND TRUSTS. New York. By Practising Law Institute, 1957. Pp. 57. \$3.50.

This paper-bound volume is a compilation of extracts from a carefully planned Practising Law Institute Forum attended by a large audience of practicing lawyers. Members of the panel discuss tax problems arising from the management of a small estate, a medium-sized estate, and a large estate. The book is conveniently printed so as to leave a blank page opposite each printed page for notes.

Of greatest importance to the busy lawyer is that the book is composed entirely of discussion of practical questions and suggested answers without an erudite description of background and theory. Consequently one may read through the forty-five pages and be confronted in a short period of time with the principal tax questions that are bothering lawyers most active in the administration of estates and trusts. As an example of the earthy discussion reported, here are some of this reviewer's notes which were written in pencil on the blank page afforded for that purpose opposite the discussion of the subject matter:

(1) Estates in the lower brackets may well elect the higher valuation date even though it might involve some estate tax, in order to get a higher tax basis for the property in event of later sale.

(2) Some difficulties inherent in the estate of the standard marital deduction formula are:

(a) The share of the surviving spouse can be directly affected by the choice of optional valuation dates.

(b) The share of the surviving spouse will be affected by the decision to charge attorney's fees as an estate tax deduction or as an income tax deduction.

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