CONGRESS, THE CONSTITUTION AND CROSSKEY

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INTRODUCTION

By this time the publication of William Winslow Crosskey's controversial treatise on *Politics and the Constitution in the History of the United States*[1] has been noted with much heat and light in many newspapers and periodicals[2] as well as in learned journals throughout the country.[3] Among the reviewers have been Senator Paul H. Douglas of Illinois, Judge Charles E. Clark of the Second Circuit Court of Appeals, and the distinguished commentator for the *New York Times,* Arthur Krock, who writes: "And there is evidence that among his [Crosskey's] earnest students are members of the Supreme Court."[4]

The views of this writer with respect to the significance of the Crosskey work have been set forth at length in another forum.[5] The purpose of this article is to examine the influence the present volumes could have, if any, upon the relative power positions of Congress and the President. This examination becomes pertinent because it has been implied that Crosskey's thesis places the Legislature in a dangerously supreme position over the other branches of government, particularly the Executive. Of course, for present purposes, it is necessary to assume that Crosskey will gain considerable acceptance—at least in the Congress.

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1. Chicago: Univ. of Chicago Press, 1953. Pp. ix, 1410. $20.00.

2. See Swisher, Saturday Review, April 4, 1953, pp. 33-34; Mettels, Chicago Tribune, April 19, 1953, § 4, p. 9; Braden, Louisville Courier-Journal, May 17, 1953, § 3, p. 13; Nevins, New York Times Book Review, May 31, 1953, p. 7; Clark, The Nation, June 13, 1953, p. 505; Douglas, New York Herald-Tribune Book Review, October 4, 1953, p. 12; Boorstin, Commentary Magazine, December 1953, p. 603; Krock, New York Times, Feb. 16, 1954, p. 24, col. 5.

3. See Braden, 2 KANS. L. REV. 638 (1953); Corbin, Braden, 62 YALE L.J. 1137, 1145 (1953); Durham, 41 CALIF. L. REV. 209 (1953); Field, 28 N.Y.U.L.Q. REV. 1197 (1953); Gooch, 8 READING GUIDE, UNIV. OF VA. LAW LIBRARY 66 (Nov.-Dec. 1953); Heimann, Kelso, 39 IOWA L. REV. 138, 149 (1953); Jeffrey, 13 LA. L. REV. 638 (1953); Krash, Clark, Hamilton, Fairman, 21 U. OF CHI. L. REV. 1 (1953); Lasswell, 22 GEO. WASH. L. REV. 383 (1954); McCloskey, 47 AM. POL. SCI. REV. 1152 (1953); Patterson, 32 TEXAS L. REV. 251 (1953); Peters, 28 NOTRE DAME LAW. 307 (1953); Ribble, 39 VA. L. REV. 863 (1953); Sutherland, 39 CORNELL L. Q. 160 (1954).

4. New York Times, Feb. 16, 1954, p. 24, col. 1.

5. 41 CALIF. L. REV. 209 (1953).

To summarize the relevant portion of the Crosskey argument: The Constitution established a national government of comprehensive powers, with directive power in the Congress. The duty and function of faithfully executing the laws, reposed in the President, was designed to fix responsibility only for the *administration* of laws passed by the Congress. It is true that the Constitution confers upon the President other powers: participation in the legislative process through recommendation of legislation, the veto, and the calling of special sessions; granting of reprieves and pardons; command of the armed services; and a real law-making power in the area of foreign relations, subject only to a kind of Congressional veto by way of the ratification process and appropriations.

But by virtue of this enumeration, and the emphasis upon faithful execution of the laws, Crosskey argues that the Constitution also effectively erased the notion that any American Executive could ever legitimately assert that he possessed the powers which Blackstone assigned to the Stuarts. Therefore, in Crosskey's view there are to be found no executive powers other than those enumerated or, to use terminology in current use, any "inherent executive powers."

The "Messenger Boy" Concept of the Presidency

It will be observed that this emphasis appears to clash with the conception of a "balanced constitution" which Professor Corwin has urged.[6] This is the view that the Constitution provided a divided legislative initiative between Congress and the Executive and, in addition, some area for the exercise of executive prerogative. Whether there is really any substantial *de facto* conflict between Crosskey and Corwin may not be clear, but it is certain that the theory of inherent executive power, which Judge Pine accused the Truman Administration of claiming in the *Steel Case*,[7] has no place in the Crosskey scheme of things.[8]

Although the thrust of these volumes is to establish Congress over and above the remainder of the government, Crosskey cannot legitimately be read as proposing to make the President a "messenger boy" of Congress. Judging by the final reaction on Capitol Hill to Congressman Velde's attempted subpoena of former President Truman, there is little enthusiasm even in Congress for a return to the ways of the Johnson administration. In view of his position that the Judiciary

6. Corwin, The President: Office and Powers 15-16 (1948).

7. The Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

8. Of course, the old notion of "judicial supremacy" has no place at all in this setting because Crosskey's Supreme Court would be without power to tamper with legislation unless it invaded the "judicial prerogative."

and the Executive possess the *legitimate* power to protect their own prerogatives, presumably Crosskey would have agreed with Truman. The "messenger boy" argument, so deftly atttempted by Chief Justice Vinson to justify Mr. Truman's seizure of the steel mills,[9] apparently is something of a straw man.

Passing from argument to realities, the enumerated powers of the President are enormous, and Crosskey recognizes these in full force and effect. But in addition, by sheer force of "faithful execution of the laws," that is, by administration, there arises political authority in the Executive that defies enumeration. The opportunity of setting over-all governmental objectives, the making of appointments, preparation of the budget, reports to the people, issuance of press releases, dispensation of patronage and government contracts, and financial and other support which can be given or withheld in local elections through the party committee controlled by the Executive as well as through the Presidential office itself are all important assets which a resourceful President can employ in a long run contest with Congress. A vigilant administration not only creates real political power in the Executive but also diminishes that of the Congress. The farm, labor, or public power policy pursued by a vigorous Administration actually tends to limit the legislative decision to one of ratification or rejection.

Some of the criticisms of Crosskey's work are that he does not recognize the accretion of power that has come to the Executive through this process of administration. Presumably, this criticism is based upon a theory that the Constitution has been changed by the trauma of historical events. Of course, Crosskey does not recognize the concept of a "growing Constitution" and in fact expressly rejects it.[10] But even if he did, it is not clear that the Executive *as an institution* has acquired powers arising from vigorous administration. In this century only Wilson and the two Roosevelts have developed political power based upon full use of the Constitutional powers of the Executive,[11] and this alone is certainly an insufficient basis from which to argue that the basic relationship between Congress and the President has been changed in any permanent or constitutional sense. The ebb and flow which attaches to this phenomenon suggests that it is personal rather than institutional.

9. Dissenting in The Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952).

10. A brilliant argument favoring the "growing Constitution" is contained in the review by Heimann, 39 IOWA L. REV. 138 (1953).

11. See Roche, *Executive Power and Domestic Emergency: The Quest for Prerogative*, 5 WEST. POL. Q. 592 (1952).

CONGRESSIONAL POWER AND THE NATIONAL INTEREST

There also is some feeling that Crosskey's product is objectionable on the ground that permanently increased Executive power and permanently diminished Legislative power are in the national interest. Often value judgments of this character, if repeated frequently enough, become accepted; the revelation that this has happened so often in the literature of our constitutional law is one of the great contributions of Crosskey's volumes. No doubt some of those who are interested in enhanced Executive authority feel strongly that the resurgence of Congressional power—particularly by committees—during the Truman and Eisenhower Administrations has been an unfortunate development. This perhaps is contrasted with the long Roosevelt administration when a strong President was able to keep the initiative in Congressional affairs during the greater part of his tenure. History, too, is an ally to this type of thinking, for Lincoln, Jackson, Theodore Roosevelt, and Wilson, all believers in what is sometimes called the "stewardship" theory of the Presidency, are the Executives who have taken the grand places in the affections of the people.

It is an anomalous historical occurrence that the Presidents who have come to realize added power through vigorous and imaginative administration of the laws are the same Executives whose concept of the national interest, by and large, has been most favorably received by the American people—not only by their respective generations but by their descendants as well. In this setting it is easy to absorb the subconscious, but dangerous, notion that a "strong" President will also be a "good" President. Very little reflection should suggest that if this formula should ever fail to carry through, the existence of a Congress of considerable powers around which men of good will can rally with hope of success would be a condition precedent to the maintenance of our democratic institutions. This is the other side of the value judgment as to the desirability of permanently and constitutionally increasing the power of the Executive. This was the value judgment accepted in 1776 and 1788, which by itself should carry weight with lawyers.

THE ROTTEN BOROUGH PROBLEM

It has been suggested that the Crosskey thesis is undemocratic because it may result in the further entrenchment of rural economic interests to the detriment of urban interests. The argument is that Congress is a rural institution, whereas the Presidency and the Judiciary

are not; therefore, any increase in Congressional power at the expense of other branches of the government (particularly if the President is to be a "messenger boy") is bound to result in favorable class legislation for farmers and laws unfavorable to whatever classes (such as labor, middlemen, and stock brokers) who may be the current antagonists of the agricultural group.[12]

The logical implication of this position is that the urban-rural balance of political power is so out of harmony with what justice requires in 1954 that urban interests should be given a greater voice by increasing the power of the President. Perhaps the *Steel Case* will one day be cited for the proposition that the imbalance of urban-rural political power cannot be redressed legitimately by an ascendance of the Executive at the expense of Congress. In any event, such an oblique approach to the representation issue could lead to much more serious problems than having to live with a "rotten borough" Congress.

The fact is that we do have this kind of a Congress, and it fails to fully reflect the attitudes of the urban society of today. With respect to the Senate, where equality of geographical representation was written into the Constitution, the present variations in populations between states was never anticipated. Today's population difference between New York and Nevada, for example, is many times greater than the population difference between the largest and the smallest of the original states. And, in addition, the number of relatively small populated states is larger in number today than in 1787. Had the present population disparities between states prevailed during the ratification campaign, it is almost inconceivable that the large states would have accepted the Constitution. Curiously enough, however, over the long run the Senate has been able to command greater respect from the new urban areas than the House, to a great extent because the districting system developed by the Jefferson Party has provincialized the House along rural lines and has made it less responsive to public opinion.

Considering that this nation is now 64 percent urban,[13] the rural character of the House is somewhat astounding.[14] And there is no end

12. The assumption that the interests of particular nonfarm groups are bound to clash (and never to coincide) with that of the farm group seems unwarranted, but a discussion of that interesting subject must be by-passed here.

13. UNITED STATES CENSUS OF POPULATION: 1950 NUMBER OF INHABITANTS, U.S. SUMMARY xiv (U.S. Dep't of Commerce, Bureau of the Census, 1952). "An urbanized area is an area that includes at least one city with 50,000 inhabitants or more in 1940 or later according to a special census taken prior to 1950 and also the surrounding closely settled incorporated places and unincorporated areas that meet the criteria listed below. . . ." *Id.* at xxiv.

14. Since there is no really accurate way to match metropolitan areas as defined by the Census Bureau with the actual Congressional districts established by state legisla-

to the disparity of representation in sight. By hardened custom (some say by constitutional right) state legislatures determine the size and boundaries of each Congressional district; and since these legislative bodies are in turn dominated by rural interests, there is little chance of urban succor from this source.[15] As industrial development and urbanization have come to state after state, only slight change at the most, and usually none at all, has been made in the nonrepresentative character of the legislatures.[16] Even if Congress were willing to do its own redistricting, as Crosskey would have it do, there is no incentive for rural interests there to surrender voluntarily their power.

This, of course, is the main reason why the Supreme Court has in recent years been asked to break up this system by requiring some sort of population equality in the districts of a particular state. However, as is well known, the Court has repeatedly found this subject to be a "political" one to be thrashed out in Congress and the state legislatures,[17] although somehow it was able to find no such "political" obstacle in ordering the Southern states to return suffrage to the Negro.[18] If equal protection of the laws is an applicable principle in this latter situation, it would appear that the same argument is equally available in the former. The result is indeed anomalous that the Supreme Court, which concededly can strike down a state statute for contravening the Federal Constitution, is forced by its own decisions to make an exception for state laws establishing unfair representation in Congress.

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tion, comparison is difficult. Reference to Figure 13 and Table 18 of the document cited in note 13 *supra,* and to the maps of Congressional districts appearing in 100 CONG. REC. 633-685 (1954) is suggestive of the disparity.

15. The best record is that of New York, which has made slight changes in both Congressional and Assembly districts in the last few years. In contrast to this, a recent study of the problem in Missouri, Iowa, and Kansas showed that ". . . the rural blocs have stubbornly withstood the force of this post-war expansion [in urban population] and all attempts to shift the representation have been beaten down." New York Times, January 31, 1954, § 1, p. 63.

16. A recent manifestation of the urban suspicion of rural-dominated state governments is the opposition expressed by the United States Conference of Mayors to the tentative proposal of the Council of Governors that the federal government withdraw from the gasoline taxing field and leave this subject of taxation entirely to the states. However, since many of the large cities depend upon direct federal grants for highway construction, it is not surprising that they should be opposed to a tax change which would force them to look for greater assistance from rural-dominated state legislatures. New York Times, Feb. 14, 1954, § 1, p. 51.

17. Colegrove v. Green, 328 U.S. 549 (1946); *cf.* South v. Peters, 339 U.S. 276 (1950); see *Symposium on Legislative Reapportionment,* 17 LAW & CONTEMP. PROB. 253-269 (1952), *passim.*

18. Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

In this country we have never seriously approached the "rotten borough" problem which reared its head in England after the industrial revolution resulted in substantial shifts in population. There are several obvious reasons for this. When the industrial revolution came to these shores, the United States was still emerging as a nation, and the vested interests responsible for continuation of the English rotten boroughs had not yet arisen in this country. There was no reason why they should, for this was still a rural economy into the 20th Century; and as long as the cheap land of the frontier beckoned, the dominance of rural attitudes in Congress was assured. Fortunately, the size of the American Legislature was small, and it was easy to enlarge both of its Houses as states were added without reducing the representation of the existing states.

While representation in the Senate was a point of major tension for many years prior to the Civil War—usually compromised by the admission of a slave state along with a free state—it was not until after the conflict between the states that the first significant development occurred bearing upon the basis of representation in the House of Representatives. Thus, the effect of Section 2 of the Fourteenth Amendment was to increase the size of Southern representation by counting the Negro as a full person instead of three-fifths of a person as provided in Section 2, Article I of the original Constitution. This Amendment was sponsored by the Reconstruction Republicans on the assumption that Negro suffrage would be guaranteed by troops if necessary. But one of the consequences of the Hayes-Tilden election dispute was to effectively disenfranchise the Southern Negro for many years to come, creating anomalous kinds of racial "rotten boroughs" all over the South. By the time this disenfranchisement occurred, however, population growth in the North and West had more than offset the increased power of the South in the House of Representatives, and, consequently, this potential crisis was passed.

Rural Congress and Urban Executive

But these difficulties had little to do with the political power of urban and rural interests. It is true that if the rural South had been denied part of its representation in the House because of the disenfranchisement of the Negro, as contemplated by the Fourteenth Amendment,[19] the power of the other states (only a few of which could then

19. Section 2 of the 14th Amendment is an almost forgotten provision: ". . . [B]ut when the right to vote . . . is denied . . . or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citi-

be classified as urban) would have been slightly increased. What difference, if any, this would have made in the Congressional history of the late 19th and early 20th Century is problematical since the big issues which carried the day, such as railroad regulation and antitrust laws, were supported by great majorities in city and on farm alike.

It was when the House achieved substantial size that the spectre of "rotten boroughs" based upon population differences arose. In the twenties, the debate acquired a state versus state flavor, as it does to some extent yet, with the East and Midwest reluctant to yield to the burgeoning West. *To the older areas of the country, the issue presented was whether they should use their political power in Congress to deprive themselves of representation!* This power was used to maintain the status quo in 1920 when Congress refused to recognize Western population growth. It was in this context that the late Senator Vandenberg had the foresight to sponsor the Reapportionment Act of 1929,[20] under which the 435 seats in the House are distributed among the states automatically on the basis of the decennial census. In hindsight it must be conceded that this statute averted serious difficulties which would have arisen had Congress been forced to deal in 1950 with the representation problem posed by the population increase in California.[21]

In contrast to Congress the Presidency has become, essentially, an urban institution. While the state legislatures have defied population shifts, they have almost automatically been recognized in the contest for control of the national Executive. This is quite understandable. First of all, the geographical factor is a minor one in the Electoral College; thus, Nevada's two geographical votes in the Senate of 96 members are vitally important to the passage of a bill, but its two geographical votes among the 531 electoral votes which are counted in choosing a President are relatively insignificant. Moreover, the absence of any district system for choosing electors results in a city vote being equal to a country vote, and, of course, in an urban state there are more votes in the cities. In addition to this, the candidate

zens shall bear to the whole number of male citizens twenty-one years of age in such State." In 1950, Congressman Case of New Jersey offered an amendment to the Lodge-Gossett Resolution which would have accomplished this result in the election of the President. 96 CONG. REC. A891 (1950).

20. 46 STAT. 26 (1929), 2 U.S.C. § 2a (1946).

21. Fortunately, Senator Vandenberg was from Michigan, which as a growing industrial area stood to gain under the new formula. The Act was passed at a time when the Republicans had a commanding Congressional majority following the Hoover landslide, and in view of the suspicion among Democratic leaders (such as Senator Black) that the Vandenberg Act was favorable to the Republicans, its passage by the next Congress (with a Democratic House) would have been improbable.

(or electors) receiving the most popular votes wins all the electoral votes of a particular state. Since with few exceptions the heavily populated states are urban in character, the *city dweller in the large states must necessarily become the object of the affections of any candidate (and his party) competing for the Presidency.*

This system, which places so much power in the great cities in the heavily populated states, has been the subject of increasing criticism. The basic argument is simply that this arrangement is unfair to the rest of the country, including the city dwellers in the small states. If for no other reason, this criticism is understandable because of the tendency to assume that rural-dominated political institutions reflect a just "norm." Of course, the growing influence of the cities in President-making is unfair; but unless the nation is willing to elect a President by popular vote, there seems no way out of the dilemma without creating greater inequities.

Recent Reform Proposals

The most recent and most serious attempt at reform was the Lodge-Gossett Resolution, which passed the Senate in 1950 but failed to clear the House. This proposed constitutional amendment would have abolished the system under which the Presidential candidate with the popular plurality in a state receives all the electoral votes thereof. In place of this so-called "general ticket" system, the electoral vote of each state would be apportioned among the candidates in exact ratio to the popular vote.[22] Obviously, this would have destroyed the "pivotal" character of the heavily populated states and cities since the electoral vote of New York and California would be split along fairly even lines. In the future, a Presidential campaign would have to be conducted in every nook and cranny of the countryside, and the Executive would be without special obligation to, and pressure from, the heavily populated urban areas.

There is much to be said for this objective (which would also be the effect of a popular election of the President), but the Lodge-Gossett Amendment would have done two other things: First of all, it would have made almost impossible the election of a Republican President. The technical reasons why this would be the likely result of the Amend-

22. The proposal also would have abolished the Electoral College itself and would require a 40 percent plurality of the electoral vote for election. Under this latter provision which was sponsored by Senator Lucas, if no candidate received 40 percent, then the House and the Senate, voting as individuals and not by state delegations, would choose the President from among the two candidates having the most electoral votes.

ment have been spelled out in detail in a brilliant essay.[23] Obviously such a consequence would have damaged the present two-party system beyond repair (to the extent that this system has vitality), for it is doubtful that a national party which has no chance to capture the Presidency can survive today. It is to the everlasting credit of Senator Taft that he understood this (and persuaded his following in the House to vote against the Gossett Resolution) when most of the members of his party in the Senate did not. Rather they adhered to the very tenuous and speculative argument of Senator Lodge that his Amendment would create a two-party system in the South. The willingness of the Southern Democrats in both Houses to embrace the Lodge-Gossett proposal should have alerted the Republicans to the dangers ahead. Instead, it remained for the House Democrats from the industrial areas to enter into "a strange coalition"[24] with the Taft group to block the proposal in the House. This group feared that the Amendment would help the South (particularly Texas) to take over the Democratic Party and change its position on labor and racial issues.

The second consequence of the Lodge-Gossett Amendment would have been the conversion of the Presidency from an essentially urban to a rural institution. The rural South would have regained its supremacy in the Democratic Party; the Republicans would have been unable to bid for the Presidency except on the basis of Senator Lodge's long-shot possibility of turning the South into a two-party area; and to make this kind of a bid the Republicans would have found it necessary to appeal to Southern rural economic interests and attitudes.

One Congressman who fully understood the consequences of the Lodge-Gossett Resolution was Frederic R. Coudert, Jr. of New York. But, instead of meeting the issue head-on, he offered an amendment which would have made election of a Republican President almost a certainty in any closely contested contest. Thus, he sought to replace the vote-splitting formula of the Gossett Resolution with a system of choosing electors by Congressional districts plus two electors chosen by state-wide vote. Since the majority of Congressional districts in the heavily populated Northern states usually go Republican (even when the other party carries the same states), this would mean that the

23. Silva, *The Lodge-Gossett Resolution: A Critical Analysis,* 44 AM. POL. SCI. REV. 86 (1950).

24. This was the phrase used by Robert L. Riggs, one of the few newspapermen who was aware of the larger consequences of the Resolution, in the Louisville Courier-Journal Sunday, March 5, 1950, § 3, p. 3, cols. 1-3.

Republicans would start with a lead in electoral votes very difficult to overcome.[25]

The Coudert proposal also is relevant to the urban-rural political power balance. Again, in the heavily populated Northern states the most important voters would be those in the rural and small town areas, for they elect most of the Congressmen. And if experience showed that rural interests needed more votes in these states, there would be nothing to prevent the rural-dominated state legislatures from gerrymandering a few more districts. Presumably the Supreme Court would not interfere, under its present decisions, with those "political" decisions of the states.

Therefore, neither the Lodge-Gossett nor the Coudert formula would have made any contribution to redressing the imbalance of political power between urban and rural areas. Even the direct election of the President will not make our democracy more representative because the basis of representation in Congress is still the real problem. And so long as the Supreme Court sides with rural interests in this matter, as it does by its jurisdictional decisions, the only hope is that over a period of years attitudes of the South and the West will change as industrial development occurs in those areas. The rate at which this process is going on, as a result of production, marketing, and defense factors, has been particularly marked on the Pacific Coast and in the TVA Region.

CONCLUSION

Contrary to statements from some quarters, Crosskey does not argue for cutting down the power of the Executive to that of a "messenger boy." While he rejects the theory that the Executive has acquired (and Congress has lost) new powers through constitutional growth, his position does not deny the kind of authority which flows from vigorous administration. This kind of personal Presidential authority is consistent with the words and structure of the Constitutional document.

Nor can an increase in the powers of the Executive, such as could have followed a victory for the government in the *Steel Case,* be

25. This plan was endorsed with great enthusiasm in a series of three articles by Walter Lippman. Chicago Sun-Times, Mar. 6, 1950, § 1, p. 26, col. 1; Mar. 8, 1950, § 1, p. 30, col. 1; Mar. 10, 1950, § 1, p. 34, col. 1. His basic argument was that the Lodge-Gossett Resolution adopted the principle of "proportional representation" and, therefore, was a dangerous precedent. Unquestionably, the Coudert proposal would not encourage splinter parties.

justified on the ground that Congress is a rural institution which cannot accurately reflect the public opinion of our urban society. The real necessity is to rid Congress of its "rotten borough" complex. In this connection, Crosskey need not be feared as a source of intellectual strength for those who would increase the political power of rural interests. The real danger is from those who would make the Executive the representative of the same rural interest groups who elect the most Congressmen. If the Presidency can remain an urban instition until such time as the South and the West "catch up" in industrial development, and this is reflected in the Congress, then we can afford to place more emphasis upon the *method* of choosing the Executive.