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Alfred de Grazia, Statement

U.S., Congress, Subcommittee on Separation of Powers, Committee on the Judiciary, Hearings, 90th Cong., 1st Sess. (July, August, September, 1967), pp. 163-78.

Senate Bill 1384, 90th Congress, 1st Session, introduced by Senator Hartke of Indiana, is one of a genus of legislative proposals which have been made with increasing regularity in recent years. They appear to be inspired by and take the form of variations upon the Ombudsman, a position familiar to Scandinavian countries, and recently adapted to the common law jurisdictions of New Zealand and Great Britain.[14]

It is my strong belief that the congressional oversight function must be strengthened and institutionalized. This should be done in such a manner as to avoid weakening the constituent-legislator relationship which presently exists. In this regard I would call your attention to the recommendations which I present in the "Oversight," chapter in *Congress: The First Branch*, especially pages 80–81.

Senator ERVIN. Senator Hruska, do you have any statement that you would like to make before the first witness is called?

Senator HRUSKA. No, Mr. Chairman, except to say that I subscribe wholeheartedly to the sentiments which you have already expressed.

Senator ERVIN. The first witness is Dr. Alfred de Grazia. Dr. de Grazia is professor of social theory in government at New York University and director of that institution's research program in representative government.

He received his A.B. and Ph. D. degrees from the University of Chicago, and has taught at the University of Minnesota, Brown University, and Stanford University.

He has served as consultant to numerous organizations and agencies, including the Commission on Organization of the Executive Branch of

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[11] *The New York Times*, July 14, 1955, pp. 1, 8.

[12] Statement of Phillip S. Hughes, Deputy Director of the Bureau of the Budget before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary on Committee Veto Provisions, August 2, 1967.

[13] Hughes, *op. cit.*

[14] See, e.g., Donald C. Rowat (editor), *The Ombudsman*, Toronto, University of Toronto Press, 1965; Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries*, Cambridge, Mass., Harvard University Press, 1966.

Government in 1948, the Operations Research Office, the Department of State, and the U.S. Information Agency.

Recently, he served as editor and coordinator for a book examining the operations of Congress to which 11 other experts contributed, entitled "Congress: The First Branch of Government," sponsored by the American Enterprise Institute and published by Doubleday Co.

Among his many other works are "Republic in Crisis: Congress Against the Executive Force"; "Public and Republic; The American Way of Government"; and "Apportionment and Representative Government."

Dr. de Grazia, I would like to welcome you to the subcommittee and to express to you our deep gratitude for your willingness to appear and to give us the benefit of your knowledge and observations on the subject which is before us today.

We will be glad to hear from you now.

STATEMENT OF PROF. ALFRED DE GRAZIA, PROFESSOR OF SOCIAL THEORY IN GOVERNMENT, NEW YORK UNIVERSITY, NEW YORK, N.Y.

Professor DE GRAZIA. Thank you, Senator Ervin.

I am pleased to have the privilege of appearing before the subcommittee. I have prepared a statement of some four pages which you may wish me to read or which may be entered into the record—as you please.

Senator ERVIN. We will leave that up to you. It might be well to read it.

Professor DE GRAZIA. Owing to its brevity, I think it might be well to do so, and I can take off from that.

Senator ERVIN. You may proceed in any way that you see fit.

Professor DE GRAZIA. I can take off from the prepared statement later, and may I say that if any member of the subcommittee wishes to interrupt me at any point I would hope that they would do so.

To my mind, the Subcommittee on the Separation of Powers may play an important part in the determination of the future of republican government in America. The very fact that its theoretical deliberations are conducted amidst the overpowering commotion of domestic strife and international warfare emphasizes, rather than detracts from, its significance, for it is precisely under the conditions of such crises that the principles of constituitonalism and the separation of powers are menaced.

The committee requires an axiom to sum up and guide its further progress toward reconstituting the posture of Congress in relation to the separation of powers. Such an axiom can be stated as follows:

Congress can redefine or recapture any legislative power authorized to it under the Constitution whenever it can devise an efficient means.

Implied in this axiom are several propositions:

(1) Congress does not lose authority. It postpones its use until it has an appropriate occasion and means to employ it. For example, if Congress finds a way of controlling the power to go to war which is efficient, it can use such means of control.

(2) The invention of means of using its powers automatically entitles Congress to employ the invention. If Congress has learned that a committee is an excellent means for defining a legislative delegation, it may use the committee for that purpose.

(3) A new means of using established powers is commanding over precedents that are conflicting or substituting.

For example, a bill has been put forward to create a general legal counsel for Congress to replace the dependence of Congress upon the attorneys of the executive branch for advancing its legal position on a number of issues. The new institution receives its justification from the old power of the Congress to rule itself.

Much of the discussion of the right of Congress to invent more effective means of establishing its authority centers around a narrow range of precedents, such as the administrative reorganization acts giving the whole Congress the power to approve or reject presidential plans and several other laws involving generally the expenditure of funds on discrete projects. Other important developments out of the same device may be foreseen.

There is a general frustration nowadays among Congressmen and the public concerning the right to carry the country into war or other heavy foreign involvements. The authority to engage in war is theoretically that of Congress. The authors of the Americans Constitution hated the power of kings to carry a people into war and destroy their liberties in the process. Yet Congressmen and scholars have not yet discovered a way of countering the slippage of this war power back into the hands of the Executive.

This committee, and by extension Congress itself, may have in its hands the means to reestablish, in a fair and efficient way, congressional control over the de facto declaration of war. It can do so by employing the very means of controlling executive use of legislative power that are employed in several laws presently under discussion wherein the approval of a congressional committee is required for certain executive actions.

Congress can, first of all, enact legislation defining the conditions under which the country will employ force in international affairs without a formal declaration of war. It can delegate the right to act under such conditions to the President and a specially constituted committee of Congress. That committee will have by implication authority to participate in the making of the decision and explicitly must approve the action. If the committee decides that the matter is one for action by the whole of Congress, it so recommends, and to Congress the decision will go.

Congress, at the beginning of each session and as part of its procedure in electing committees, may select the Force Committee members, as I call them. It can be taken for granted that the gravity of the choice will be reflected in the caliber of the members.

In respect to the combat in Vietnam, for example, where at no point was there a critical moment requiring an immediate determination, it is doubtful whether the United States would have been committed to force without a declaration of war or something close to it.

In the event that an immediate decision on the use of force had to be taken, the Force Committee would be of great service to the Nation.

Its advice would be useful because it would be both representative and informed. But, over and beyond the advice is power to back up the advice, and this the proposed committee would have.

I would further counsel this committee to take up at some point the power of such a Force Committee in respect to the President's "finger on the button" of the nuclear armament. I have suggested in several places that a second publicly responsible finger be "on the button" in the form of respected and responsible Congressmen, of the same kind as are contemplated for the proposed Force Committee.

Indeed, there are good reasons for removing from the President's control the immediate action of ordering the delivery of nuclear weapons against real targets. Basically, the logic here is that, despite all the perceived and largely fictional value derived from this presidential power, a number of counterproductive disadvantages accrue by reason of it in the general exercise of the presidential office itself as well as in respect to the congressional authority in war decisions and the separation of powers.

For the reasons given above, and by the examples presented, I hope to have underlined the importance of this committee's work and stressed my support of the general directions of the committee's philosophy of action.

In reading the several documents that have been printed by the subcommittee of the witnesses appearing before it, certain observations have occurred to me which I should like to make now. They begin, I should say, almost as a kind of catechism and include a series of proposals additional to those that have already been presented.

The consequences of the separation of powers in the establishment of government are generally of the greatest advantage to society. They produce a rule of law. Ultimately, they produce efficiency in government as that term "efficiency" should be defined when its meaning is not a prisoner of a certain group of scholars or Congressmen of a special ideology. The separation of powers is important in producing what I have described elsewhere as republican government ("republican" with a small "r," of course).

The separation of powers, as has well been said by many others before me, is threatened principally by the growth in powers of the executive branch and its agencies. Part of this is owing to the development of the Office of the President as a kind of lightning rod for the attraction of all kinds of activities and interventions of Government. But, more than that, the threat extends beyond the President as a person and political figure; it is a product of the development of a vast activity of Government and the dissemination of such activities among hosts of Government officials not directly responsible to Congress or, for that matter, to the President himself.

We have had a continuous expansion and little or no contraction of Government powers, and we have had, as a result of it, the delegation of all sorts of semilegislative, quasilegislative authority, to public officials, and a narrowing of the interest base of the Government—that is, to say, a full range of public opinions on many important issues is now denied, because the Congress does not itself participate in the decisions involving such issues.

Congress can use several means of enforcing and enlarging the base for supporting the separation of powers. It can engage in constructive

legislative activity so as to deny, by possession of the field, the field to the opposition. It can see to it that the executive branch of Government is checked from arrogating excessive legislative power, granting that it has in the past and will always have a certain amount of such power. And it can defend itself against restrictions upon its legislative authority, an issue which is of pressing importance before this subcommittee presently.

Now, the legislative power in America is not something that may be defined other than pragmatically. It is not defined in the skies; it is not defined in Webster's Dictionary; nor is it even to be defined theoretically. The legislative power is, essentially, defined as whatever the legislature wishes to engage in. The power to order the behavior of the people, subject to constitutional and natural limitations, constitutes the legislative power of the Congress.

What is then the executive power? The executive power is that power to order the behavior of people under law, including, especially, the acts of Congress. The President is given certain powers of a legislative type, however. We recognize that and have recognized that from the beginning of the republic. So, legislative power is not exclusively that of the Congress. Furthermore, both the President and the courts have acquired more extansive legislative power over the years, and so have the administrators of the executive branch. Legislation over every class of citizen and every subject is impossible for Congress; therefore, Congress must deal with legislative matters and leave other agencies to make so-called administrative decisions. Also, there is a wide area of legislative action that is not covered by congressional activity, which is, theoretically, a free area for citizens to enjoy.

The courts and the Congress have to be constantly alert, not only to guarantee that the agencies confine themselves to administrative determinations as defined by the Congress but that the agencies do, in fact, make such determinations, that is, do not sit on their hands but really do enforce the laws. Furthermore, Congress and the courts must see to it that the agencies stay out of areas of freedom, which is very often a difficult matter to oversee and which presently is not subjected to the ordinary scrutiny of the Congress.

The legislative postaction review is a developing means of supervising the agencies. Involved here are both the legislative postaction review conducted by the whole of the Congress, and that which involves the committees of Congress.

The power at issue is legislative, because it is defined as such by Congress. It is legislative because it is of a satisfactory level of generality. It is not a bill of attainder. It is legislative, because Congress makes the relevant determinations by itself. It does through its committees what it has often in the past chosen to delegate to the executive branch as executor of the legislative will. It is legislative because where committees are given the postlegislation review, the committee represents the Congress as a whole. It is legislative because the committees must be presumed to be, and probably in fact are, more representative than their opposite numbers in the executive branch—those who would otherwise make the determinations at issue, those who are seeking to deprive Congress of its power, and those who would exercise such powers if Congress had to give them up.

We have depended a great deal upon the wisdom of Congress as a group. If Congress, as a group, were not to undertake these responsibilities, we would have a great deal of concern about the wisdom of the executive officers involved.

Another means for preserving separation of powers is involved in the proposals which I have advanced in a work called "Republic in Crisis--Congress Against the Executive Force," for a General Counsel or an Attorney General for Congress. Senator Hartke has taken the leadership with respect to the proposed institutions, and I can only add my support to that notion.

There are many significant constitutional controversies arising in which the total role of the Congress and the republican form of government itself are at stake. To delegate the advocacy of that role and its subsequent definition to officers of the executive branch of Government seems to be foolhardy. I cannot, therefore, believe that Congress can go far on the road to recapturing its constitutional position and fortifying it, without establishing such an officer.

But I would like to mention a number of other means of exercising and controlling the legislative authority that have been suggested by myself and others.

In one work it has been suggested that the Congress should issue a charter of legislative authority which would declare the principle of the legislative supremacy of the Congress and define the position of the Congress with respect to the executive branch, and this charter would be disseminated widely within and outside of the Government.

It has also been suggested that exemplary legislation should be made a regular job of Congress. This legislation would consist of laws having minimum scope and substance; that is, dealing with, perhaps, minor matters, but exercising vital principles and asserting such vital principles continuously and seeking to demonstrate congressional rights to act through a large range of devices, such as the legislative veto, in the full exercise of its powers to control aggressiveness in the executive branch.

It has been recommended that all bodies formed by the executive agencies that are representative in character should require direct authorization by Congress, and that all members of the hundreds of such agencies in the executive branch should be considered subrogated to the Congress and should pass tests to assure their comprehension of the principles of government by legislature.

Professor Dexter has recommended that Congressmen appreciate that one of their paramount tasks is to harass the specialists. Check-and-balance operations, he says, must be performed by standing committees since they are better equipped than others to perform that function. Congressmen should make themselves specialists on the kinds of mistakes that bureaucratic specialists make, the kinds of questions that bureaucrats ought to be asked, and the kind of explanations that the bureaucrats are likely to put forward in reply. They should acquire an expertness in challenging the specialists, and, indeed, should line up their own specialists as counterspecialists to the executive.

A joint committee on check-and-balance principles should be established, says Professor Dexter, to serve as a central voice for ideas as to how Congress should more effectively carry out its work and to be a spokesman for the Congressmen in any difficulties that may arise with

the executive branch as a result of carrying out their harassing operations.

I have again suggested that the Congress should present a nonpartisan message, corresponding in time and scope to the President's state of the Union message, and that Congress should employ special messages from time to time.

Professor Cotter has recommended that Congress should have the power to revise Supreme Court decisions that declare statutes to be unconstitutional, perhaps through reenactment by two-thirds vote in two consecutive sessions of the legislature.

I have myself, along with others, recommended that the Congress establish a much more elaborate central office, facilitating the work of the Members in investigating the performance of the executive branch of the Government.

I have further recommended that all officers to whom have been delegated considerable legislative power should be constituted in a Sub-legislative Corps, certified by Congress as to their qualifications for such office and their awareness that their legislative capacity has been granted them by the Congress.

And I have suggested the acceptance of the doctrine that the Congress as a whole may structure and restructure all agencies down to the last unit and recapture all initiatives that it believes important to have.

Professor Cotter, in another place, has recommended that Congress might be assured a more effective oversight in emergency executive action and that the President be assured more flexibility in response to emergencies if a general statute applicable to all types of emergencies were adopted. One provision of the statute might require a proclamation as to the coming into being of an emergency, with the stipulation that rules and regulations promulgated under each such proclamation be subject to congressional veto by concurrent resolution.

I have made the radical proposal in another place that legislation be passed or perhaps a constitutional amendment adopted requiring the canceling of an old activity whenever a new activity is begun. And I have enunciated something that I call the "zero sum basis" for the balancing of governmental activities; that is, one minus one equals zero.

Senator ERVIN. If I may interject: I believe that the Government Operations Committee would be interested in cataloging Government activities. And I presume the number of such would be almost unbelievable.

Professor DE GRAZIA. Well, sir, I think that we may have a little more information on that. There has been some interest in making such an accounting of governmental activities, something that really has never been done on any detailed and valid basis. We all know the general shape of the events, but not enough of the hard facts.

And I have undertaken just recently, under the auspices of a grant from the American Enterprise Institute for Public Policy Research, to examine some 1,300 program activities of the Federal Government and to code all such activities according to the formula: "Who is authorized to use what means to do what to whom, and how much money are they using for the purpose?" This is quite a job, but when

I get it done I hope we may be able to put it on computer tape in such fashion that we may receive as output a large number of tables of different types that will present to us the kind of things and the relations among things that the Government is engaged in at any given moment. Once this prototype model that inventories Government activities is set up, the Congress may, or some committee of the Congress may, wish to use that model and to perfect it and to keep it up on a continuous basis as a way of controlling the level of the activities of the Federal Government.

By this point, I think I have mentioned some of the more important proposals that have been broached in recent years for the more efficient organization of Congress to perform its task as a separate branch of the Government. I would hope, however, that these are but the beginning, and that as time goes on more and more scholars and social scientists as well as Congressmen will get into the game, because upon the practicality and the imagination of such inventions depends the ultimate supremacy of the first branch of Government.

Senator ERVIN. Senator Dirksen has come in. Would you like to ask any questions, Senator Hruska?

Senator HRUSKA. I should like to inquire of the witness, with your permission, as to a few matters, to get his thoughts in these areas.

One has to do with the general proposition which the chairman stated in his opening statement, as to the determination of Government policies and programs. Professor, what I would like to ask you is this: Let us suppose a situation where the Congress approves and authorizes an appropriation for the building of 100 B–70 planes which are strategic in nature, and the Appropriations Committee, following the approval of the authorization bill into law, appropriates that money and says that this money is available for the building of 100 B–70 planes. The bill is signed by the President, and it becomes law. Then, the President totally disregards it, and by that total disregard he engages in a pocket veto.

What becomes of the legislative power of the Congress to establish the general policy which is in the language of the bill? The Congress directs the Executive to undertake the construction and equipping of the 100 B–70 planes and there is simultaneously appropriated the funds for that purpose. How can we reconcile the proposition that the Congress has the policymaking power with the ability of the President to render such a determination of general policy in that particular field totally blank?

Professor DE GRAZIA. Senator Hruska, I believe that in such a situation legally the President is the responsible officer, and he would appear to be or would be acting in contravention of the Constitution. There is no method of enjoining him to behave as he is instructed to behave. It is left to the Congress to seek means of retaliation; that is, sanctioning this misconduct or finding other ways for accomplishing the purpose intended. The means of sanctioning such behavior that have occurred to most of us have to do with manipulating appropriations in the affected sphere or in related spheres.

Action may also be taken by the Congress, if it has set up the machinery for doing so, by a committee appointed to act promptly, or in some general policy later on, such as in future authorizations and appropriations, and whatnot.

I have not, frankly, considered explicitly the preferable means of achieving the will of the legislative body; that is, I have not intensively sought other ways of accomplishing the same purpose. This requires a good deal of checking with a staff of constitutional lawyers. I do not know, for example, whether some means of carrying out an authorization and an appropriation might be employed without direct employment of sanctions against the executive branch. Such means are ostensibly inconceivable, but then it is inconceivable that the President and the officials of the executive branch would not carry out an explicit legislative enactment of the Congress.

Senator HRUSKA. Sometimes, in discussion of the subject, it is said that once the Congress passes the bill and declares the policy, then the program becomes a matter totally administrative and executive in character and the Congress loses its jurisdiction over it. The point is that here is a policy, and if it becomes a matter of executing that policy and complying with that policy, that is one thing, but can the executive totally ignore it and completely cancel it for all practical purposes? That amounts to a veto.

Professor DE GRAZIA. It certainly does that.

Senator HRUSKA. And a very final veto, without any opportunity for the Congress, in the normal manner of handling vetoes, to override it.

Professor DE GRAZIA. It is a type of veto. So, also, it would be difficult to perceive the power of a court to accomplish anything, and it is thus in the way of becoming a constitutional precedent, an actual nonlegal mode of doing legislative business without the abolition of the legislative branch. And I suppose that those who do this kind of thing you are referring to may console themselves and ease their consciences and at the same time try to appease us by saying, "Yes; we did this only in the most extraordinary exceptional case; and, therefore, let us not worry about it. It will not happen again; it will not happen again very soon"—a kind of pragmatic justification, such as "I only get drunk rarely, so let us try not to get too exercised about my drunkeness."

Senator HRUSKA. Another point is the matter of a Legislative Attorney General or a Congressional Counsel General. There is one thing that bothers me about the bill, and that is the fact that the Congress very seldom has a unanimous voice. It is not a monolithic body. How can we pick one man who will have the power to represent the Congress in the Supreme Court or any place else in the rendering of decisions and expect him to have opinions or take actions or to make interpretations of congressional intent in such a way as to enable the placing of two or three major approaches to any very fundamental constitutional question? Is that conceivable, that we could find such a paragon of legal wisdom and the like?

Professor DE GRAZIA. No, sir. I think the Senator puts it very well. It is unlikely that the Attorney General of the Congress will always advocate a consensus of the Congress, to use those words which seem appropriate here. However, I wonder whether we would be, speaking as Congressmen, asking too much of ourselves in respect to the others; for frequently the Attorney General, the Department of Justice, takes a position which is contrary to the position of many of the officials of

the executive branch of the Government. That is to say, unanimity is not always present on the other side either.

Senator HRUSKA. In the case of the Attorney General we have a man who pretty well speaks the policy of the head man, the Chief Executive, and if he does not he does not remain in office very long. Now, that is one thing.

Is there some way that we could have some representation of a possible deviation from what one man considers to be the legislative intent. You can take almost any of the bills that are very bitterly contested in Congress. We have the minority and majority view on those. Are we to say in this business of constitutional law, which has a sweep that covers past history and which will have a thrust that will go far into the future, that this minority opinion shall be totally ignored and not presented to the Supreme Court for its consideration?

In that connection some suggestion has been made for a Deputy Counsel General, to be selected by the minority party, as the Counsel General could be selected by the majority party, with the hope that they would then find themselves, where there is an honest difference of opinion, as advocates for their respective bodies, presenting their particular points of view, respectively.

Has that suggestion any merit in your judgment?

Professor DE GRAZIA. I believe it does, Senator Hruska. I do not know whether the ordinary means of presenting a brief before the Court would satisfy the minority without having a Deputy Attorney General of the Congress to represent them directly.

I think that the main thrust, Senator Hruska, of Senator Hartke's proposal should be to have some central voice of the Congress presenting what is, essentially, the rights of the legislature, rather than depending upon the executive branch to do that. Rarely will it represent a unanimity of opinion in the Congress; but I think that the Congress should proceed nevertheless with the creation of such an officer. I realize that there is a certain unresolvable difficulty here, but I still feel that if the officer is properly selected by the Congress—and I have also suggested a plenary council of the Congress, which would conceivably contribute to the more generous and overall selection of such an official—it might solve that problem.

Senator HRUSKA. That is expecting an awful lot of human nature. I have been a lawyer for a long time. We can become advocates, but if we want to be good advocates, we had better take a good line and pursue it and be as hard and resourceful as we can as advocates, and not at the same time be like a judge who will say: "Here there are certain arguments for and against, and I present both to you."

That becomes a pointless exercise. I do not think that there would be a central force created by the Congress.

We have within our own congressional organization in the Senate a majority leader, and he is highly respected and is laudable and we revere him very much, but we also have a minority leader for whom we have such respect and whom we love and revere more than we do a particular issue when it comes to the majority leader. And I am just wondering as we proceed with this, Mr. Chairman, if we could not give some consideration to a refinement of Senator Hartke's bill in such a fashion that we can accommodate that concept and allow for the presentation of the issues involved in a hard-hitting and thorough

way for one side's idea and for the other side's idea if there are two major possible interpretations?

I have no more questions. Thank you, Professor de Grazia, for your response to my questions.

Senator ERVIN. Senator Dirksen?

Senator DIRKSEN. I would like to revert to the question that Senator Hruska raised a moment ago, where the Congress has mandated something, and the Executive refuses to comply. That is, where the Executive has not seen fit to act on the measure, how do you get at that? How do you get to the end result? You can set up all of the general counsels from now until doomsday, but that does not get to the question. The question then is: Do you go into a court and use the power of mandamus, or do you stand there? That is the situation.

Professor DE GRAZIA. We have several general ways of attempting to get the President and other executive officials to act in accord with the clearly expressed will of Congress. No one to date has discovered a perfect way. It is impossible, in many instances. The solving of the difficulty that you suggest is presently impossible, except as to the various indirect devices, such as harassment, a flank attack, interfering with the other business of the Government in order to get action in another sphere. We all know that these are part of politics, and we have to use such means. It would be much preferable for us if some regularized, justifiable, constitutional means were discovered to get the executive branch to act on the will of Congress.

Unlike some persons in this day and age, I have little doubt that the Congress is as good a judge on these matters as the President and his advisers. So, I would not concede to the President or his advisers the right to say either that they are above the Constitution or that they may, except in the most dire crisis, substitute their will for that of the duly enacted law of the Congress.

Senator DIRKSEN. The matter of nonfeasance in office is one method of dealing with it, perhaps.

Professor DE GRAZIA. That is, of course, an ultimate weapon that the Congress possesses.

Senator DIRKSEN. The enactment of laws by the Congress is a part of their duty under the Constitution. But here we have a situation of how we get action where it is the will of the Legislature as expressed in statute form that there be such action taken.

Professor DE GRAZIA. I think that we should go more into the history of the autocratic control that the President is supposed to exercise over the executive branch. We ought, perhaps, to go back and ask ourselves a fundamental question: Is it true that absolute control must exist in order for an administration to function? Did this theory exist originally in the minds of the writers of the Constitution? Or was it a later graft onto the Constitution by academic idealists?

I have mentioned here a suggestion that there be constituted a sub-legislative corps of all of the officers of the executive branch who engage in quasi-legislative action, that they be compelled to regard themselves as officers of the Congress as well as executive officers; for if you are giving them admittedly legislative functions, delegating legislative functions to them, you are, in a sense, making them your officers as well as officers of the President. I think we might explore

thoroughly this problem. What are the implications of the Congressional control over such sublegislative officers?

Senator DIRKSEN. Some agency officers have legislative powers and are also members of the executive staff. And I am sure that he would not like congressional efforts to control them and would say, "I am sorry, boys, you are out of line. They work for me." What are you going to do, then? What happens to the legislative authority, then?

Professor DE GRAZIA. I doubt that anyone would go so far as to suggest—that is, I am not suggesting at this moment that the President would have to share that power to hire and fire, although there are various implications to the issue.

Senator DIRKSEN. I think I share the reservations of the very distinguished chairman of this subcommittee, because I do not know on how many occasions these matters have come up where it has been testified that the Congress could not get a document, that they could not get this or they could not get that, on the ground that it was within the province of the executive branch. We have had the precedent set where the Attorney General's office has refused to turn over certain documents, and we still have that; there has been this action over a long period of time, and it continues to be. And we have not been able to do anything about it. That is the thrust of the experience we have had.

You mention somewhere in your statement, for example, the suggestion that we create the Office of General Legal Counsel for Congress; but the harmful precedent has been established and we are the victims of that precedent today. How do we get beyond that?

Professor DE GRAZIA. Precedents are available for many points. I think that opinion is turning in the direction of justifying the members of Congress to elicit information from the executive branch. This situation has come up abruptly in the last few years. Learned opinion is not at all what it was at the time during which the junior Senator from Wisconsin was jousting with the executive branch. Scholars, political scientists, and probably editors, are now much more aware of the need of the Congress to inquire deeply into the doings of the executive branch. You can make yourself quite popular at academic cocktail parties by sounding loudly your notions on this subject. This is a favorable indication, which the Congress might well consider, along with other favorable evidence, that the times have changed, and that the time may be ripe for new decisive measures.

Senator HRUSKA. Will you yield?

Senator DIRKSEN. Yes.

Senator HRUSKA. A little bit ago, the witness observed that it would be a happy circumstance if the people in the executive department could consider themselves in part as agents of the Congress, inasmuch as certain legislative duties are delegated to them. Was not that the original concept of the Interstate Commerce Commission, the Civil Aeronautics Board, the Securities and Exchange Commission, the Federal Communications Commission, and all of the rest of the regulatory agencies, including AID in the field of foreign aid—that they would be arms of the Congress inasmuch as they were vested with so much statute-making power, really, in the form of the power to promulgate regulations which have the effect of law? Yet, they have strayed, because they are afraid of what Senator Dirksen has referred

to as being confronted with a proposition which is declared by the President, and thereby those people and those bodies have become isolated from the Congress. They simply take what they have gotten from the Congress and then exploit it in order to implement the executive policy. Is not that the source of a lot of this trouble, aggravated by the fact that the President appoints them?

Professor DE GRAZIA. Yes. Again, here, in recent years, in the last generation, let us say, the bulk of academic thought and scholarly writing on this subject has defended the President in his absolute powers and has sought to extend that power into those bodies which, as you correctly state, were designated specifically by Congress as quasi-legislative arms not only of the executive branch but of the Congress.

Senator HRUSKA. Thank you, Senator Dirksen.

Professor DE GRAZIA. Again, now, if I may add one more comment. Again, reading between the lines, I would say that public opinion would look more favorably now upon going back to the original intention of the Congress to put itself more in a commanding position with respect to the sublegislative officers.

Senator DIRKSEN. Mr. Chairman, I have an appointment that I have to keep. I shall have to leave.

Senator ERVIN. We have certainly been glad to have you here and have enjoyed your comments.

Senator DIRKSEN. My colleague from the House of Representatives, Mr. Paul Findley, is here to testify later this morning. I would like to present him to you. I commend him to you. He is a very distinguished Member of the House.

Senator ERVIN. He made a very fine statement the other day before the Senate Committee on Foreign Relations. I am sure that he will make an equally fine statement here today.

Professor de Grazia, the Constitution attempts to exercise control over rash Government action by creating what we call checks and balances to keep men from doing unwise things in certain situations. The Constitution also reflects a contradictory attitude by imposing great confidence in officers of the Government. It imposes upon the President the duty of seeing that the laws are properly executed; and it assumes that he will perform that duty and that the other Executive officers will perform their duties. It trusts him to the extent of not setting out any specific ways whereby the Congress can do very much about it, except by the power of the purse. The present state of the law is such that a failure on the part of the Executive to carry out the law is not in line with the Constitution.

Professor DE GRAZIA. I should say not.

Senator ERVIN. Since the laws are the acts of Congress and all of the policymaking powers are vested in the Congress, when the President fails to carry out the specific acts of Congress, the President is not performing his constitutional duty as the law states. But the Congress has no direct means of forcing the President to act.

Professor DE GRAZIA. That is right.

Senator ERVIN. But over the course of the history of the Nation, as you have indicated, certain informal methods have been devised to bring the President in line, including such inducements as you have suggested. I take it that you endorse very strongly the idea of a com-

mittee veto as a means of securing adherence to congressional intent and also as a means of overseeing the execution of the laws by the executive branch of the Government?

Professor DE GRAZIA. I would say that I regard this process as a continuation of the legislative process and not really as an oversight function in that sense, inasmuch as the job of the Congress is not finished until this committee has acted as it was designated to act, in approval of the proposals or actions of the executive agencies involved, so that, really, it is a fulfillment of the legislative process and not an exception to it.

Senator ERVIN. Is it not an application of the doctrine that the Congress, in passing a law, may establish conditions precedent to the effectiveness of the law and may delegate the authority to determine the existence of those conditions to a committee rather than to an executive official as is so often done.

Professor DE GRAZIA. That would seem to me to be the proposition. The only principle that the Congress might carefully observe is to reserve this means of oversight for the more important delegations of authority to administrators. There are literally thousands of cases in which an administrator is empowered by the Congress to take action or not to take action in a given situation at a given time. The Congress does not want to take over all of those actions, but I should say that in a good number of those cases, those which the Congress regards as important, where its judgment is likely to be better than the executive judgment, where the policy itself has great generality, and in other similar cases, the Congress should employ this technique, and may employ it very effectively for the benefit of the country.

Senator ERVIN. As a matter of fact, many of the Members who serve on these congressional committees have been in Congress for a long time and have specialized in those committees and have acquired a very high degree of competency in determining whether or not certain actions conform to the intent of Congress.

Professor DE GRAZIA. That is a very well-known fact.

Senator ERVIN. Mr. Woodard?

Mr. WOODARD. One of the early methods devised by the Congress to control certain executive actions was to provide that those actions could not be taken until the executive official had come into agreement with designated committees. This was highly criticized, even in Congress.

Then, more recently, the Congress devised the method mentioned in Senator Ervin's letter to you—a committee approval requirement tied to the appropriations process. Do you have any doubt that the Congress has the authority to do that through the appropriations process?

Professor DE GRAZIA. I do not, just as it has through the structure of the Federal Government. If the Congress wishes to set up some unit to take care of tiny functions, some tiny function that has to do with, for example, forestry in America, it may do so. It may not be wise to do so. It might be wiser to put such a tiny program, an insignificant program, under an existing program than to give it over to the executive to carry out. But Congress may do so. Similarly, it may be unwise in certain instances for the Congress to use the committee agreement method as a way of expressing its legislative will. But it would be authorized constitutionally, I would think, to do so.

Mr. WOODARD. In the case of the committee veto formula under which the appropriation may not be made unless the proposed projects have been approved by the designated committees, would it make any difference, so far as the constitutionality of the program is concerned, apart from its wisdom, whether the projects are actually approved before the appropriation is made or after?

Sometimes the appropriation is passed in advance of the submission to the Congress of the projects, and, necessarily, in advance of their approval by the designated committees. In these situations, the Executive takes the position that the Agriculture Department has the authority under the Watershed Act to build these projects, and has a lump-sum appropriation for that purpose; but is still required to come down to have each project approved before construction. They claim that this procedure is in effect the same as the old procedure to which they objected.

Professor DE GRAZIA. I really would like to know more than I do about the provisions of the Watershed Act before suggesting anything about the desirability or the undesirability of this appropriations process.

Senator ERVIN. If I may interject, I should point out that when it considers the appropriation, Congress does not know anything about all of the watershed projects. It does not have that information in advance because it depends upon people making applications for a grant to establish a watershed project. Nobody is going to make an application to build a project unless they know that money is available for that purpose and the money has to be appropriated. The Congress makes the appropriation. The Department of Agriculture then receives the applications for the projects and submits these projects to the committees. The committees then have to decide whether or not they come within the purview of the act. As a matter of fact, I do not think any proposed projects have been rejected absolutely. Where there has been disagreement, the project has been withdrawn and modified to conform to the committee's wishes.

It seems to me that this is a very reasonable and practical way of handling the program.

Professor DE GRAZIA. It seems to me, Senator Ervin, that it is a very clever system, an eminently wise one. You know that there is a need for a watershed program. You do not have the means for going around the country and specifying the locale where the need is precisely felt. So you provide the way by which the need may be expressed by giving a framework of legislation to support such need, and then you stand back and you wait for the project to come in and then get a final determination at that point.

Senator ERVIN. Most of them are very local in nature. They are usually at the headwaters of small rivers and streams or the like. They are small projects. They are not like the great rivers and harbors projects, not like that at all; they are small.

Professor DE GRAZIA. In view of all the work the full Congress has to do, and the many important things that occupy it, I would not think it unwise to delegate responsibility for approval of watershed projects to committees. If I were a Congressman, I might not be wanting to spend my time on that problem in preference to other more important problems. That is, again, for the Congress to decide.

Mr. WOODARD. Perhaps the appropriation process needs to be reviewed and changed in some respects. One suggested change was that the legislative committees play a more active part. That might be helpful in the watershed program. Do you agree with that?

Professor DE GRAZIA. Well, that is perhaps in order. It is not my proposal, however. I think it was a proposal of one of the other gentlemen who contributed to "Congress, the First Branch."

Mr. WOODARD. I think it was Professor Cotter who made that proposal. One difficulty with the watershed program is that when the appropriation request from the Department of Agriculture for the watershed program is being considered, the information available to the Appropriations Committees has very little to do with the specific projects that might afterward be proposed.

Professor DE GRAZIA. I see what you are after.

Mr. WOODARD. It has to do with how many new starts there should be in the watershed program in the coming year and how many projects have been started but not completed. They authorize hundreds of new starts, and they might be carrying on maybe 500 or 600 other projects in various stages of completion. They do not have any specific information, as I understand it, as to any individual projects that might be begun during the year and financed out of the lump-sum appropriation.

Professor DE GRAZIA. You would certainly be considering a set of approvals where the appropriations had to be sought from the approving legislative committees. But I would be concerned. Perhaps time and more study and more experience would determine whether there are other ways of coping with this problem without destroying or damaging the parallel structure of the appropriations and the committee work. That is, there may be ways of tying the committees together on legislation of this type where finances and subject matter have to be jointly raised without revamping the whole congressional committee system.

Mr. WOODARD. One suggestion for improving the oversight function has been made by a number of people. That is that both Houses establish oversight calendars. In other words, on certain days both Houses of Congress would do nothing except review existing programs and decide what changes are necessary or what programs might be limited or expanded. Would you like to comment on that?

Professor DE GRAZIA. I might go about it in another way, although I see no objection to what has been suggested. Perhaps I would support it; but I feel it would not get to the root of the problem of oversight. There are many avenues of access for the oversight function. This is one of them, but the calendar being as difficult to manage as it is, and so often confused, I wonder whether imposing new formalities, in view of all of the other formal problems of managing the calendar, would be helpful.

Mr. WOODARD. This proposal was made by Congressman Laird. He thought that the oversight function was not well enough understood by many Members of the Congress and that something like this might have the beneficial effect of underlining its importance.

The other suggestion was that Congress create oversight committees or possibly oversight subcommittees of each major committee.

Professor DE GRAZIA. My feeling tends to be that since every Congressman has so many things coming before him, he should not be

allowed to overspecialize. This is especially true of some universal functions. Everyone has an interest in such subjects. Oversight is one of them. If you set up a specialized oversight function conducted by a few men, there would be a tendency for the others not to engage themselves in control of the executive.

Mr. WOODARD. Thank you. That is all.

Senator ERVIN. There has been a suggestion that the officers of Government other than those appointed by the President by and with the consent of the Senate, should serve only during the administration of the President who appoints them. Is there any constitutional impediment to the Congress taking care of this situation in such fashion? That is, with every change of office of the president, the employees of the executive branch of Government would be changed.

Professor DE GARZIA. I think that a certain amount of that would be helpful for the executive branch. Exclusive executive prerogative over quasi-legislative personnel is an interjection of a movement which is distinct from the Constitution or the practical conduct of the Government. It has come from the outside. You might call it the "scientific management principle"; the idea of a man spending his life in the civil service and thereby rendering more efficient help to the Government. This principle has come to take precedence over all other requirements of the Government's employment policy. Perhaps it is time to reconsider the notion in certain regards. With provision for a limited tenure, for transfer, for special compensation in case of removal, and so on, somewhat more control and more liveliness could be injected into the administrative situation.

Senator ERVIN. One final question on Senator Hartke's bill, S. 1384. Apart from the serious problem mentioned by Senator Hruska about disagreements and conflicts which might complicate the position of the Congressional Counsel General, do you not think it would be well for the Congress to have some source of representation independent of the Justice Department?

Professor DE GRAZIA. I do, sir; I do emphatically maintain that position, even while respecting Senator Hruska's view. I know that he is a first-class constitutional writer and attorney. Even knowing that many Congressmen will not always feel represented by the views advocated by a general counsel of Congress, in the main Congressmen will feel better being specifically represented as a corporate group than they would if they had to entrust their advocacy to an appointee of the executive branch of the Government.

Senator ERVIN. It has been very good to have you before the committee, Dr. de Grazia. Your testimony has been most refreshing to me and also most illuminating. It is very encouraging to have the opinion expressed that the Congress has the means to recapture the powers that the Constitution gave it.

Professor DE GRAZIA. Thank you, sir. It has been a pleasure to appear before you.

Mr. WOODARD. Mr. Chairman, the next witness is Hon. Paul Findley, a Representative in Congress from the 20th Congressional District of Illinois and a member of the Foreign Affairs Committee of the House of Representatives.

Senator ERVIN. We are delighted to have you, Congressman Findley, and we are sorry to have detained you as long as we have.