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Sarah Scott

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# LOUISIANA LAW REVIEW

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## Reviews

PRESIDENTIAL GOVERNMENT IN THE UNITED STATES: THE UNWRITTEN CONSTITUTION, by C. Perry Patterson. Chapel Hill: University of North Carolina Press, 1947. Pp. ix, 301. \$3.75.

Although Dr. Patterson cited Laski extensively and reverently he strayed from the fold, for Dr. Patterson believes that the relations between the executive and legislature need to be substantially changed—not merely readjusted. He states that we are destroying

our democratic way of governing ourselves by making the irresponsible president and through him the bureaucracy the sole possessors of power.

Dr. Patterson deals with the effects of the party system upon the functioning of our government. The evolution of party government, he says, was an essential prerequisite to the successful operation of constitutional government, and the political head of the government has naturally become the real ruler. Since the president holds the position of political head and legal head (head of administration) he has to delegate his legal powers to administrative subordinates to give his attention to politics. The president has converted legislative supremacy into presidential supremacy and judicial review into an instrument of policing the federal system.

Since the party system has secured control of the Constitution, Dr. Patterson states, it should be made responsible to the people through their representatives. We have accepted the principles of unlimited democracy of the British system. To secure responsible government we should accept its principles of cabinet government. At present we have unlimited and irresponsible government by the executive control of the national government.

This is Dr. Patterson's basic thesis. The Supreme Court has abdicated its function of saying what the Constitution means because of presidential appointments, and has thrown the duty upon Congress, which has also abdicated. Dr. Patterson devotes only a few pages to explain why Congress has been so weak. Mainly, I gather, because we have shifted from a *laissez faire* economy to a planned economy, making law become "the ordered product of a bureaucratic hierarchy headed and controlled by the President."

Under government control of business, Dr. Patterson says, parliaments cannot be anything else than assemblies of yes men. This charge is of serious moment if it can be supported by fact or reason. Dr. Patterson does not bother to produce evidence necessary to establish a presumption in favor of his statements. The positive state, he says, has been brought about by science and politics. Science has "created an executive type of society which can be governed only by an executive." Politics, too, has forced the president "to become governor of this society." "The American people demanded that he be given control."

It is all quite confusing. The president, from George Washington on down, has overstepped his power, and become irresponsible. By heading his party, he has forced Congress to pass unconstitutional acts. By appointing those who he believed would best fit the place on the Supreme Court, the president got his unconstitutional acts sustained. But it was the irresponsible people who demanded he be given control!

Dr. Patterson rather skirts the question of how the bureaucracy endangers democracy. His discussion of bureaucratic inefficiency is not convincing, little constructive, or explanatory. He seems to have stuck to the distortions typified by Sullivan whom he quotes. According to Dr. Patterson, administrators are primarily interested in acquiring power and cannot and must not be trusted with such things as rule-making. Further, the bureaucrats, frequently without adequate knowledge or appreciation of the frightful responsibility which they are exercising, have a strong tendency toward arbitrariness. It seems to me that our system of democracy would be a dismal failure if it produced administrative personnel which could be suspected of conscious intention of destroying the liberties of the people. Ordinarily, of course, the bureaucracy is doing just what we expect it to.

While going to lengths to show that the president is the political leader, Dr. Patterson constantly overlooks the fact that the president is also elected to help make public policy. If he does not conform to policies made by the elected authority, true, dictatorship is incipient. But Dr. Patterson gives no examples of this type of action by the president. He ignores the fact that the chief executive is himself the acknowledged leader of the policy makers and has the greatest prestige of all of them.

There are, generally, three schools of thought concerning the solution of the dilemma of how free the president is to insist in getting established his pledged policies and how it can be made impossible for him to command his power in defiance of the will of the people. One group says that there is need for vigorous and persistent leadership by the president and for ways of restraining him from using the power he possesses contrary to the wishes of the people. Dr. Patterson repudiates this school, by saying simply "irresponsible dictatorship" is "generally and soothingly called presidential leadership by modern so-called liberals who are either attempting to abolish constitutional government in this country or

ignorantly are unable to see that the logic of this advocacy ends in an autocracy."<sup>1</sup>

The second school—the power and faith school—would give the president plenty of power and have faith that he would not abuse it. The third school would make the president, as a sort of prime minister, responsible to Congress, giving up the office when Congress no longer has confidence in him or is no longer willing to follow his leadership.

It is impossible to say to which school Dr. Patterson belongs, or if his theories would constitute an additional school. He proposes a congressional cabinet responsible to Congress through party organization. The president could act only through these cabinet officers chosen from Congress. The prime minister would be chosen by the party caucus composed of members of Congress of the majority party. He, in turn, would select the other cabinet officers with approval of the caucus. Since both houses would be under the cabinet, when they were of different parties, a coalition cabinet would be necessary. The leaders of the party in power and opposition would have to agree on a cabinet and present it for approval of the caucus of each party. When accepted it would require the support of the entire Congress.

The cabinet would not be affected by presidential veto or the failure of Congress to override the veto, although it should be easier to override, and the president would hardly veto a measure of his own party, thereby giving the opposition an advantage. The president and prime minister would reach an agreement, because each is in a position to give the other trouble—an ideal basis of partnership, says Dr. Patterson.

The cabinet would have twice as many members as executive departments so that each department would be represented by a minister in each house. The minister of each department would be assisted by another minister from the other house so that the cabinet might be able to present its measures in each house, to participate in debate, and to be subjected to questions.

The cabinet would exercise supervision over the bureaucracy. The cabinet ministers, with their assistants, would be the political heads of the departments. In their administrative capacity, they would exercise only advisory powers to the president and to Con-

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gress. Dr. Patterson says the cabinet would "offer advice which they can enforce." The cabinet would fall if its advice were not approved. The president's appointees would be the legal heads of the departments. The cabinet would advise the president as to whether the policy of the government was being properly executed and might demand the resignation of such administrative officers as were refusing to cooperate with the cabinet. The president, with his administrative appointees, might be given the power to make orders-in-council, subject to the approval of the cabinet, with right of final approval or rejection by Congress.

Under this proposed arrangement, it seems to me, the president and his principal officers, who at present are leaders of political groups since they got into power by winning elections, would become a part of the bureaucracy, once their political power is removed, provided of course, you could remove that power by a change in legislative procedure. The president, now as party head, will not permit himself and his party to be subjected to party control under the leadership of a cabinet which he did not select and cannot reorganize. Dr. Patterson says that if the president refuses to obey and to dismiss his appointees at the request of the cabinet, Congress can abolish the agency. But this certainly Congress cannot do, since, after all, it is the public which is hurt, and election time comes around too soon for that.

It is a relief to know that the author is under no delusions as to the defects of his proposal, as he states in his final conclusion, although he does not bother to explain the deficiencies. All he says is that there is "no halfway and piecemeal readjustment this side" of his plan. Furthermore, even if the president were responsible, he could not control the bureaucracy. This statement Dr. Patterson does not attempt to prove. The President's Committee on Administrative Management in its report in 1937 did not attempt to prove its contention that the president can exercise conclusive control if the administrative branch is organized and if the president is given proper staff assistance. Dr. Patterson evidently did not think enough of this document to refute it, mention it, or for that matter include it in his twelve pages of bibliography. He does not say where integration and coordination actually comes from. He offers little or no evidence as to how the president moves toward his objectives of maneuvering the power of the bureaucracy. Even Congress, he

says, "can exercise very little if any control over national administration."<sup>2</sup>

I think Dr. Patterson has given a rather superficial account of Congress' control over administration. To believe as I do that the time-honored and experience-tested way of keeping the bureaucracy in hand is to set up a representative body to control it, and then to read Dr. Patterson's account, is pretty disappointing.

In spite of his exclamations that the president has forced Congress to pass unconstitutional acts, no president has ever succeeded in lining up all congressmen even in time of war, and rarely, if ever, does he have a firm hold on the loyalty of all members of his own party. Congressmen are chosen by separate and scattered constituencies. They can and do defy the president when conscience or local interest dictates. An assembly like this is a fatal obstruction to a would-be dictator. Concepts of the public interest, loyalty to established institutions and practices, considerations of local, special or personal advantage all combine to block the autocrat's path to power.

In addition to the anti-democratic sanction of abolishing an agency, Congress, regardless of Dr. Patterson's belief, has substantial methods by which it can hold the bureaucracy in check. The act of legislation that creates an agency determines much of its internal organization and fixes many of its procedures. In appropriating funds for an agency's use, Congress ordinarily hedges its grants with precautions. Furthermore, Congress constantly questions, criticizes, and sometimes carries out thorough investigations. Congress may change the civil service system in any way it chooses. That the Senate should go further in confirmation of appointments has even been seriously considered. Still another method of controlling administrative law-making is through the use of the legislative veto. An extensive use of this device would place more responsibility upon Congress for administrative policy. It would show Congress the difficulties of filling in the details of legislative acts which were a result of compromise.

As Congress finds ways of freeing itself for a full exercise of its powers, already started in 1945, it ought, of course, to make up its mind on how its powers are to be used. As for Dr. Patterson's solution, I remember that institutions have a way of not working out quite as imagined in theory. If we try to graft a part of the

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cabinet system on ours, we may get the type of institutions we don't want. Even though, as Dr. Patterson says, his plan requires no statute, no amendment, it would eat into our political ways and we might have to start all over again bringing the people up to the point where they understand their system of government and have confidence in their ability to control it.

I do not find this book illuminating, profound or original. It fails completely to present a sober survey or analysis of the factors to be reckoned with. The mixing of facts with interpretations of facts, plus the mixing of both with a proposed plan, has made for much confusion.

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